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No. 839

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12073

LIBRARY
SUPREME COURT, U. S.

AL BIERMAN and WILLIAM MILLER,
Plaintiffs-Appellees,

vs.

SAMUEL MARCUS,
Defendant-Appellant and Cross Claimant-Appellant,

and

MILMAR ESTATE, INC., a corporation organized under the rules of the State of New Jersey,
Defendant-Appellee.

AL KEVELSON,
Defendant on Cross Claim-Appellee.

Civil Action (No. 1025-50)

On Appeal from Final Judgment of the United States District Court for the District of New Jersey

Sat Below:
Modarelli, U.S.D.J.

APPENDIX TO APPELLANT'S BRIEF

[Volume I—Pages 1a to 416a]

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APPENDIX

Relevant Docket Entries

TITLE OF CASE

AL BIERMAN and WILLIAM MILLER,

Plaintiffs,

vs.

SAMUEL MARCUS AND MILMAR ESTATE, INC., a corporation organized under the laws of the State of New Jersey,

Defendants.

CIVIL 1026-50—Docket

JUDGE MODARELLI

ATTORNEYS

For Plaintiffs:

Chazin & Chazin, Esqs., 30 Journal Sq., Jersey City.

For Defendants:

Robert D. Grosman, Esq., 24 Commerce St., Newark 2.

Maurice C. Brigadier (for M. E. Inc.), 26 Journal Sq., Jersey City.

Maurice Schapira, Esq. (for SM), 17 Academy St., Newark 2.

• • •

Relevant Docket Entries

DATE	FILINGS—PROCEEDINGS
12-28-50	Complaint, filed.
12-28-50	Summons issued.
	• • •
12-28-50	Order to show cause re discharging plaintiffs from liability, and temporary restraining order, filed (Meaney) (ret. 1-15-51).
12-28-50	$1,700. deposited in Registry.
1- 5-51	Summons returned served together with copy of order to show cause on 1-2-51, on Samuel Marcus, filed.
1- 8-51	Summons returned served on Milmar Estate, Inc. together with copy of order to show cause on 1-3-51, filed.
	• • •
1-31-51	$1,700.00 deposited in Registry.
	• • •
2-26-51	$1700.00 deposited in Registry.
	• • •
3-27-51	$1700 deposited in Registry.
	• • •
4-26-51	$3200. deposited in Registry.—
	• • •
6-29-51	$3200.00 deposited in Registry.
7-30-51	$3200.00 deposited in Registry.
9- 4-51	$3200.00 deposited in Registry.
9-27-51	$3200.00 deposited in Registry.
	• • •
6- 1-51	$3200. deposited in Registry
2- 1-52	$3590. deposited in Registry

Relevant Docket Entries

DATE	FILINGS—PROCEEDINGS
10-30-51	$1700.00 deposited in Registry.
	• • •
11-27-51	$1700.00 deposited in Registry.
	• • •
12-26-51	$3200. deposited in Registry.
	• • •
4-30-52	Ordered hearing on order to show cause to discharge plaintiffs from liability adjourned without date. (Modarelli) (4-28-52).
5-14-52	Transcript of hearings held April 28, 1952, filed 5-13-52.
	• • •
11- 2-53	Petition for temporary restraining order and the appointment of a Receiver, filed 10-30-53.
11- 2-53	Order to show cause why preliminary restraint should not issue, and Receiver Pendente Lite appointed, filed 10-30-53 (Meaney) (ret. 11-9-53).
11-10-53	Affidavit of William Miller filed 11-9-53.
11-10-53	Affidavits of Abraham Lieberman, Al Bierman and Jacob Hoffman filed 11-9-53.
11-10-53	Affidavit of William Miller filed 11-9-53.
11-10-53	Affidavit of Al Kevelson filed 11-9-53.
11-10-53	Affidavit of service for a petition for temporary restraining order etc. filed 11-9-53.
	• • •
12-28-53	Affidavit of Samuel Marcus, filed.
12-28-53	Affidavit of service of copy of affidavit of Samuel Marcus, filed.
	• • •

Relevant Docket Entries

DATE	FILINGS—PROCEEDINGS
1-26-54	Hearing on application for temporary restraint and appointment of receiver pendente lite. Decision Reserved. Order to be submitted. (Modarelli) (1-25-54).
	• • •
1-27-54	Notice of motion to restrain plaintiffs and defendant Milmar Estates, Inc. from receiving condemnation award filed 1-25-54.
2-23-54	Order appointing master to take into his possession funds, etc. filed 2-18-54 (Modarelli) Notice mailed.
	• • •
10-15-54	Consent order extending time to answer and to file crossclaims or counterclaims to 10-22-54, filed 10-14-54 (Modarelli) Notice mailed.
10-25-54	Notice of motion re discharging plaintiffs from liability and temporary restraining order, and acknowledgments of service, filed 10-22-54 (ret. 11-8-54) (No brief submitted).
	• • •
10-25-54	Affidavit of service of copy of notice of motion, filed 10-22-54.
10-25-54	*Answer and cross-claim of defendant, Milmar Estate, Inc.*, filed 10-22-54.
10-25-54	*Answer and counter-claim of defendant, Samuel Marcus*, filed.
10-25-54	Defendant Samuel Marcus notice of intention to make tender, filed.

Relevant Docket Entries

DATE	FILINGS—PROCEEDINGS
10-25-54	Notice of motion to join third persons to counterclaim, acknowledgments and affidavits of service, filed (ret. 11-8-54) (No brief submitted).
	• • •
11-12-54	*Reply to Counterclaim of Samuel Marcus; and counterclaim of Al Bierman and William Miller,* filed 11-10-54.
11-12-54	*Answer of Milmar Estate, Inc., to the cross-claim of Samuel Marcus,* filed 11-10-54.
11-16-54	*Reply* of Samuel Marcus to the *answer* and *answer to cross-claim* of deft. Milmar Estate, Inc., filed 11-15-54.
	• • •
11-29-54	Transcript of hearing held on July 7, 1954, filed 11-26-54.
12- 1-54	*Reply* of Samuel Marcus to plaintiff's answer to Counterclaim of Samuel Marcus; and answer to Counterclaim of plaintiff's Al Bierman and William Miller, filed 11-30-54.
12- 1-54	*Reply* of Cross-Claimant, Samuel Marcus to the Answer of Milmar Estate, Inc. to the cross-claim filed by Samuel Marcus against his co-defendant Milmar Estate, Inc., filed 11-30-54.
	• • •
12-22-54	*Pre-Trial Conference.* (Modarelli) (12-21-54).
12-22-54	*Answer* of Al Kevelson deft. on counterclaim *to Counterclaim* of Samuel Marcus and *cross-claim,* filed 12-21-54.
1- 7-55	*Answer* of Samuel Marcus to the cross-claim of defendant, Al Kevelson, filed.
	• • •

Relevant Docket Entries

DATE	FILINGS—PROCEEDINGS
1-10-55	Deposition of Samuel Marcus taken 12-19-51, filed 1-7-55.
1-10-55	Deposition of Samuel Marcus taken 12-26-51, filed 1-7-55.
1-10-55	Deposition of Samuel Marcus taken 2-13-52, filed 1-7-55.
1-10-55	Deposition of Samuel Marcus taken 2-25-52, filed 1-7-55.
1-10-55	Deposition of Samuel Marcus taken 2-26-52, filed 1-7-55.
1-10-55	Deposition of Samuel Marcus taken 3-18-52, filed 1-7-55.
1-10-55	Deposition of Samuel Marcus taken 3-26-52, filed 1-7-55.
1-12-55	Deposition of Al Bierman, filed 1-11-55.
1-12-55	Deposition of Al Kevelson, filed 1-11-55.
1-12-55	Deposition of Abraham Lieberman, filed 1-11-55.
1-12-55	Deposition of William Miller, filed 1-11-55.
1-12-55	Deposition of Robert J. Schwartz, filed 1-11-55.
1-14 55	Deposition of Robert J. Schwartz taken 3-17-54, filed 1-13-55.
1-14-55	Deposition of Robert J. Schwartz taken 5-11-54, filed 1-13-55.
1-17-55	Transcript of hearing on motion of 12-13-54, filed.
1-17-55	Transcript of Pre-Trial Conference, filed 1-14-55.

Relevant Docket Entries

DATE	FILINGS—PROCEEDINGS
1-17-55	Order granting motion to join Al Kevelson to counterclaim of Samuel Marcus, * * *
1-21-55	Trial without Jury before Hon. A. E. Modarelli: (1-20-55) Trial adjourned to 1-26-55.
1-27-55	Trial continued: (1-26-55) Trial adjourned to 1-27-55.
1-28-55	Trial continued. (1-27-55) Trial adjourned to 1-28-55.
1-31-55	Trial continued. (1-28-55) * * * Trial adjourned to 1-31-55.
2- 1-55	Trial continued: (1-31-55) * * * Trial adjourned to 2-1-55.
2- 2-55	Trial continued: (2-1-55) Trial continued to 2-2-55.
2- 3-55	Trial continued: (2-2-55) Ordered application to amend pleadings on the record Granted. Trial adjourned to 2-3-55.
2- 4-55	Trial continued: (2-3-55) Trial adjourned to 2-7-55.
2- 8-55	Trial continued: (2-7-55) Trial adjourned to 2-8-55.
2- 9-55	Trial continued: (2-8-55) Trial adjourned to 2-9-55.
2-10-55	Trial continued: (2-9-55) Trial adjourned to 2-15-55.
2-16-55	Trial continued: (2-15-55) Trial adjourned to 2-16-55.

Relevant Docket Entries

DATE	FILINGS—PROCEEDINGS
2-17-55	Trial continued: (2-16-55) Trial adjourned to 2-17-55.
2-18-55	Trial continued. (2-17-55) Trial adjourned to 2-24-55
2-25-55	Trial continued. (2-24-55) Trial adjourned to 2-26-55.
2-28-55	Trial continued. (2-25-55) Trial adjourned to 4-12-55.
4-13-55	Trial continued: (4-12-55) Trial adjourned to 4-14-55.
4-15-55	Trial continued. (4-14-55) Trial adjourned to 4-26-55.
4-27-55	Trial continued. (4-26-55) Decision Reserved.
3-13-56	Opinion, filed 3-12-56 (Modarelli).
3-13-56	Transcript of Testimony, filed (6 Vols.).
4-10-56	Notice of motion for entry of final judgment with affidavit of service filed 4-6-56. (ret. 4-16-56).
4-20-56	Notice of motion to dismiss part of cross claim of Milmar Estates against Samuel Marcus, filed (ret. 4-23-56).
4-24-56	Hearing on motion for entry of final judgment. Ordered hearing continued to April 24, 1956. (Modarelli) (4-23-56).
4-25-56	Continued hearing on motion for entry of judgment. Decision reserved. (Modarelli) (4-24-56).

Relevant Docket Entries

DATE	FILINGS—PROCEEDINGS
4-25-56	Hearing on motion to dismiss part of cross-claim of Milmar Estates against Samuel Marcus. Ordered motion denied. (Modarelli) (4-24-56).
	• • •
4-30-56	Notice of motion to fix trial date on Counts 4, 5, 6 & 7 of cross-claim of the Milmar Estate, Inc., with acknowledgment of service filed. (ret. 5-14-56).
	• • •
8- 6-56	Copy of complaint and order to show cause (Lieberman -vs- Milmar Estate, Inc.) of action pending in Superior Court of N. J., Chancery Div—Essex County, filed 8-3-56.
	• • •
10-22-56	Judgment on certain counts of complaint, answer, cross claim, counterclaim or third-party claim, establishing rights and liabilities of the parties; for payments out of the registry; for allowance of counsel fee and Master's fee and payment over of balance in hands of Master; for judgment in the sum of $5,800.00 in favor of Samuel Marcus, defendant, and against William Miller, plaintiff; with costs, including $659.52 reporter's fees, in favor of Al Bierman and William Miller, plaintiffs, Milmar Estate, Inc., defendant, Al Kevelson, third-party defendant, and against Samuel Marcus, defendant, filed 10-19-56. (Modarelli) Notice mailed.
10-25-56	Notice of Appeal, filed 10-24-56.
	• • •
11- 8-56	Amended Notice of Appeal, and affidavit of mailing copies to Maurice C. Brigadier, Esq., Chazin & Chazin, Esqs. and George Kesselhaut, Esq., filed 11-7-56. Copy forwarded to Clerk, U. S. C. A.
	• • •

Complaint

(Filed—December 28, 1950)

Plaintiff, Al Bierman, residing at Charlotte, North Carolina, and plaintiff, William Miller, residing in Englewood, Bergen County, New Jersey, say that:

1. The plaintiff, Al Bierman is a citizen and resident of the State of North Carolina, and the plaintiff, William Miller is a citizen and resident of the State of New Jersey.

2. The defendant, Samuel Marcus is a citizen and resident of the State of New York and the defendant, Milmar Estate, Inc., is a corporation organized and existing under the laws of the State of New Jersey and is a citizen and resident of the State and District of New Jersey.

3. This action arises under Title 28, U. S. Code, Section 1335.

4. The amount of the obligation involved in this case exceeds Five Hundred ($500.00) Dollars.

5. On or about September 14th, 1948, the defendant, Milmar Estate, Inc., as Seller, and the plaintiffs, Al Bierman and William Miller, as Buyers, executed a paper-writing dated September 14th, 1948, which provides that the defendant, Milmar Estate, Inc., sells to the plaintiffs, Al Bierman and William Miller, all of the authorized and issued stock of defendant, Milmar Estate, Inc., consisting of 1250 shares of common stock, for the price of One Hundred Twenty Five Thousand ($125,000.00) Dollars, payable as follows: $30,000.00, in cash on the execution of the agreement; $95,000.00 in deferred payments of $3,000.00 each month on the first day of each and every month that certain premises located at Fort Lee, New Jersey, are open for business, and $1,500.00 each month on the first day of each and every month that the said premises are closed.

6. Said paper-writing provided as follows:

(a) (In paragraph 2 thereof) "Time is the essence of this contract."

(b) (In paragraph 6 thereof) "In the event of the Buyer failing to pay the amount due hereunder, or in the event that the Buyer shall default in making any one of the payments due thereunder, then the balance remaining unpaid shall immediately become due and payable, and in such event the shares of stock remaining in escrow shall be returned by the said ABE LIEBERMAN to the Seller."

7. The unpaid balance of the purchase price provided for in said paper-writing is now $35,000.00.

8. An installment payment in the amount of $1,500.00, on account of said balance, together with interest from December 1st, 1950, at the rate of 4% annum, will become due and payable on account of said balance of purchase price on January 1st, 1951. Additional payments in the amount of $1,500.00 per month or $3,000.00 per month, together with interest, will become due and payable on the first day of each and every month as above specified.

9. Defendant, Samuel Marcus, claims that he is entitled to the said $1,500.00 installment and interest, and to all the installments constituting the balance of the purchase price, to wit: $35,000.00, and interest, and demands payment of same. Defendant, Milmar Estate, Inc., may claim that it is entitled to the said $1,500.00 installment and interest, and to all the installments constituting the balance of the purchase price, to wit: $35,000.00 and interest.

10. In the event that plaintiffs pay the next installment, or any in subsequent installment, to the defendant not entitled to same, the other defendant may declare an acceleration of the entire balance of the purchase price and may demand that the stock held in escrow by Abraham Lieberman, Esq., Escrow Agent, be returned to the Seller.

11. The plaintiffs, Al Bierman and William Miller, require the protection of this Honorable Court in order that they may not be compelled to pay the balance of the purchase price twice; to restrain the defendants from requiring said Abraham Lieberman, Esq., to return to the Seller the said shares of stock deposited in escrow with him.

12. The plaintiffs, Al Bierman and William Miller, have deposited the said installment of $1,500.00 and the interest, which will become due thereon into the Registry of this Court, there to abide the judgment of the Court. The plaintiffs are willing and offer to deposit the amount of each installment with interest thereon as it becomes due into the Registry of this Court, there to abide the judgment of the Court.

WHEREFOR, plaintiffs pray:

1. That this Honorable Court may issue its process for all the defendants and enter its Order restraining and enjoining them and each of them from instituting or prosecuting any proceeding in any State or United States Court affecting the obligation involved in this interpleader action until further order of the Court.

2. That the defendants interplead and determine their rights to collect the obligation described in this complaint and the installments thereof.

3. That the plaintiffs, upon payment into the Registry of this Court of the sum of Fifteen Hundred ($1,500.00) Dollars and interest thereon, may be adjudged to be discharged from all liabilities to said defendants, or any of them, as regards the said installment payment of $1,500.00 and interest thereon which shall be paid by the plaintiffs into the Registry of this Court, they may be adjudged to be discharged from all liability to the defendants, or any

of them upon such payment or payments being made into the Registry of this Court.

4. That upon payment by plaintiffs into the Registry of this Court of the installment of $1,500.00 and interest thereon which shall become due on January 1st, 1951, and upon payment by plaintiffs into the Registry of this Court of subsequent installments as they become due and payable, the defendants, and each of them, be restrained and enjoined from declaring an acceleration default of the balance of the purchase price, and that the defendants further be restrained and enjoined from demanding the return of the said stock by Abraham Lieberman, Esq., the Escrow Agent, to the Seller.

5. That the plaintiffs be paid out of the sum deposited with this Court, all costs, including a counsel fee.

s/ CHAZIN & CHAZIN
Attorneys for Plaintiffs,
30 Journal Square, Jersey City, N. J.
By: s/ ABRAHAM CHAZIN
A Member of the Firm.

[Verified by William Miller, December 28, 1950]

Answer and Cross-Claim of Defendant, Milmar Estate, Inc.

(Filed—October 25, 1954)

The defendant, Milmar Estate, Inc., a corporation organized and existing under the laws of the State of New Jersey, having its principal office at Hudson Terrace, Borough of Fort Lee and County of Bergen, by way of answer to the complaint of Al Bierman and William Miller says:

Answer and Cross-Claim of Defendant, Milmar Estate, Inc.

1. It admits the allegations contained in paragraph 1 of the complaint.

2. It admits the allegations contained in paragraph 2 of the complaint.

3. It admits the allegations contained in paragraph 3 of the complaint.

4. It admits the allegations contained in paragraph 4 of the complaint.

5. It admits the allegations contained in paragraph 5 of the complaint.

6. It admits the allegations contained in paragraph 6 of the complaint.

7. It admits the allegations contained in paragraph 7 of the complaint as of the time of the filing of the complaint. The amount of $35,500. has been paid into court.

8. It admits the allegations contained in paragraph 8 of the complaint as of the time of the filing of the complaint. The said payments have been paid into court.

9. It admits the allegations contained in paragraph 9 of the complaint. The defendant, Milmar Estate, Inc., consents that pursuant to the said contract of sale the monies deposited by the plaintiffs with the register of this court are payable to Samuel Marcus.

10. It admits the allegations contained in paragraph 10 of the complaint as of the date of the filing of the complaint.

11. It admits the allegations contained in paragraph 11 of the complaint.

12. It admits the allegations contained in paragraph 12 of the complaint.

Answer and Cross-Claim of Defendant, Milmar Estate, Inc.

13. The defendant, Milmar Estate, Inc., is the seller named in the contract dated September 14, 1948 between Milmar Estate, Inc., as seller and William Miller and Al Bierman as purchasers, referred to in paragraphs 5 and 6 of the complaint. The defendant asserts that the true intent of the parties as manifested by the said contract was that by the execution thereof, defendant Samuel Marcus was getting out of Milmar Estates, Inc. completely, surrendering and releasing all right, title and interest which he had to any stock in Milmar Estates, Inc. or Bill Miller's Riviera, Inc., resigning from all offices and positions which he had held and severing all relations with Milmar Estates, Inc. and releasing all claims, rights and causes of actions which he had or may have had against Milmar Estates, Inc., Bill Miller's Riviera, Inc., William Miller or Al Bierman. The essence of the transaction was that Samuel Marcus was selling out and getting out completely from Milmar Estates, Inc., that William Miller and Al Bierman were, upon completion of the transaction, to own all of the stock of Milmar Estates, Inc., consisting of 1250 shares.

CROSS-CLAIM

FIRST COUNT

The defendant, Milmar Estates, Inc., by way of cross-claim, says:

1. This defendant herein repeats the allegations contained in paragraph 1 and paragraph 2 of the complaint to the same extent as if repeated at length herein. The jurisdiction of this court arises out of the fact that the parties are citizens of different states, and that the amount in controversy is in excess of $3,000, exclusive of interest and costs.

Answer and Cross-Claim of Defendant, Milmar Estate, Inc.

2. This action is brought under the applicable provisions of the Judicial Code, 28 U. S. C. §2201 because there is an actual controversy now existing between the parties in respect of which this defendant is in need of a declaration of rights by this court.

3. This defendant incorporates herein paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 of the complaint to the same extent as if set forth at length herein.

4. On or about September 14, 1948, the transaction involving the sale of the stock of the defendant, Milmar Estates, Inc., was concluded. The essence of the transaction was that Samuel Marcus was selling out and getting out completely from Milmar Estates, Inc., surrendering and releasing all right, title and interest which he had to any stock in Milmar Estates, Inc. or Bill Miller's Riviera, Inc., resigning from all offices and positions which he had held and severing all relations with Milmar Estates, Inc. and releasing all claims, rights and causes of actions which he had or may have had against Milmar Estate, Inc., Bill Miller's Riviera, Inc., William Miller or Al Bierman. The essence of the transaction was that Samuel Marcus was selling out and getting out completely from Milmar Estate, Inc., that William Miller and Al Bierman were, upon completion of the transaction, to own all of the stock of Milmar Estate, Inc. consisting of 1250 shares. The purchase price was $125,000.00 payable $30,000 on execution of the agreement and the balance of $95,000 in monthly payments of $3,000 per month when Bill Miller's Riviera, Inc. was open for business and $1500 per month when it was closed. Previously issued Milmar Estate, Inc. stock certificates were not at the closing. All of the previously issued stock were marked cancelled on the stub of the stock book of

Milmar Estate, Inc. and new certificates were issued which were to constitute the total outstanding authorized stock of Milmar Estate, Inc. Samuel Marcus had no right, title, interest or ownership in the newly issued stock certificates and upon the completion of this transaction, he had no right, title or interest in any of the previously issued Milmar Estate, Inc. stock certificates.

5. Samuel Marcus has asserted and does assert a right, title and interest in certain stock certificates of Milmar Estate, Inc. issued prior to September 14, 1948 which now are or may be in his possession. This defendant asserts that by reason of the transaction of September 14, 1948 aforementioned, any stock certificates of Milmar Estate, Inc. issued prior to September 14, 1948 are cancelled, invalid, null and void and should be delivered up to Milmar Estate, Inc.

6. There is between the parties hereto an actual controversy as hereinbefore set forth.

WHEREFORE, defendant, Milmar Estate, Inc., demands:

(1) Judgment declaring that any stock certificates of Milmar Estate, Inc., in the possession of Samuel Marcus are cancelled, null and void; and

(2) Judgment declaring that the defendant, Samuel Marcus, has no right, title or interest in and to any stock certificates of Milmar Estate, Inc., issued prior to September 14, 1948; and

(3) Judgment declaring that any and all stock certificates of Milmar Estate, Inc., in the possession of Samuel Marcus be delivered to Milmar Estate, Inc., to be physically cancelled; and

(4) Judgment granting such other further and general relief as may be proper.

SECOND COUNT

The defendant, Milmar Estate, Inc., by way of cross-claim, says:

1. This defendant herein repeats the allegations contained in paragraph 1 and paragraph 2 of the complaint to the same extent as if repeated at length herein. The jurisdiction of this court arises out of the fact that the parties are citizens of different states, and that the amount in controversy is in excess of $3,000, exclusive of interest and costs.

2. This action is brought under the applicable provisions of the Judicial Code, 28 U. S. C. §2201 because there is an actual controversy now existing between the parties in respect of which this defendant is in need of a declaration of rights by this court.

3. This defendant incorporates herein paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 of the complaint to the same extent as if set forth at length herein.

4. On or about September 14, 1948 the transaction involving the sale of the stock of the defendant, Milmar Estate, Inc. was concluded. The essence of the transaction was that Samuel Marcus was selling out and getting out completely from Milmar Estate, Inc., surrendering and releasing all right, title and interest which he had to any stock in Milmar Estate, Inc. or Bill Miller's Riviera, Inc., resigning from all offices and positions which he had held and severing all relations with Milmar Estate,

Inc. and releasing all claims, rights and causes of actions which he had or may have had against Milmar Estate, Inc., Bill Miller's Riviera, Inc., William Miller or Al Bierman. The essence of the transaction was that Samuel Marcus was selling out and getting out completely from Milmar Estate, Inc., that William Miller and Al Bierman were, upon completion of the transaction, to own all of the stock of Milmar Estate, Inc. consisting of 1250 shares. The purchase price was $125,000.00 payable $30,000.00 on execution of the agreement and the balance of $95,000.00 in monthly payments of $3,000.00 per month when Bill Miller's Riviera, Inc. was open for business and $1500.00 per month when it was closed. Previously issued Milmar Estate, Inc. stock certificates were not at the closing. All of the previously issued stock were marked cancelled on the stub of the stock book of Milmar Estate, Inc. and new certificates were issued which were to constitute the total oustanding authorized stock of Milmar Estate, Inc. Samuel Marcus had no right, title, interest or ownership in the newly issued stock certificates and upon the completion of this transaction, he had no right, title or interest in any of the previously issued Milmar Estate, Inc. stock certificates. The transaction of September 14, 1948 was intended by the parties thereto as constituting a release of Milmar Estate, Inc., Al Bierman and William Miller from any and all claims of any type or nature whatsoever which Samuel Marcus may have had against the said corporation or persons prior to the date thereof excepting, however, the obligation to make payment to Samuel Marcus of the purchase price pursuant to the said agreement.

5. Samuel Marcus has asserted and does assert a right, title and interest in certain stock certificates of Milmar Estate, Inc. issued prior to September 14, 1948 which now

are or may be in his possession. This defendant asserts that by reason of the transaction of September 14, 1948 aforementioned, any stock certificates of Milmar Estate, Inc. issued prior to September 14, 1948 are cancelled, invalid, null and void and should be delivered up to Milmar Estate, Inc. The defendant, Samuel Marcus, has asserted and does assert other claims against Milmar Estate, Inc. and William Miller and Al Bierman including a claim that he is an officer, director and stockholder of Milmar Estate, Inc. and a creditor thereof, all of which claims are denied by Milmar Estate, Inc.

6. There is between the parties hereto an actual controversy as hereinbefore set forth.

WHEREFORE, defendant, Milmar Estate, Inc. demands:

(1) Judgment declaring that the transaction entered into between the parties on September 14, 1948 constitutes a release, the effect of which is to bar and preclude Samuel Marcus from asserting any claim or causes of action against or right, title or interest in, Milmar Estate, Inc. or any stock certificates of Milmar Estate, Inc., and judgment granting such other further and general relief as may be proper.

THIRD COUNT

The defendant, Milmar Estate, Inc., by way of cross-claim says:

1. This defendant herein repeats the allegations contained in paragraph 1 and paragraph 2 of the complaint to the same extent as if repeated at length herein. The jurisdiction of this court arises out of the fact that the

parties are citizens of different states, and that the amount in controversy is in excess of $3,000, exclusive of interest and costs.

2. This action is brought under the applicable provisions of the Judicial Code, 28 U. S. C. §2201 because there is an actual controversy now existing between the parties in respect of which this defendant is in need of a declaration of rights by this court.

3. On or about February 18, 1954 a certain order was entered in the above captioned matter ordering and adjudging as follows:

> "1. The state Highway Commissioner of the State of New Jersey shall pay over the proceeds of the condemnation award made in favor of Milmar Estates, Inc. by the commissioners in condemnation in the matter of the Petition of the State Highway Commissioners of the lands of Milmar Estates, Inc., a corporation of New Jersey before Honorable J. Wallace Leyden, Superior Court Judge, Bergen County, New Jersey, which premises are situated in Fort Lee, Bergen County, New Jersey, owned by Milmar Estates, Inc., and which premises are commonly known as 'Bill Miller's Riviera' to Peoples Trust Company of Bergen County, 210 Main Street, Hackensack, New Jersey, which said bank shall receive said money and place the same upon deposit in an account designated 'Walter G. Winne, Master of the United States District Court', District of New Jersey; and which said money shall not be disbursed by said banking institution or subject to withdrawal by any person except upon the express order of the United States District

Court, District of New Jersey; no bond shall be required of the bank, Peoples Trust Company and Walter G. Winne, Master.

2. Peoples Trust Company of Bergen County shall pay out of the proceeds of the aforesaid award the sum of $77,500.00 together with interest computed from February 1, 1954 at the rate of 5 per centum per annum to the holder of record of the first mortgage on lands and premises of Milmar Estates, Inc., situated in Fort Lee, New Jersey heretofore condemned by the Highway Commission of the State of New Jersey.

3. Upon the entry of this order, the defendant, Samuel Marcus, or his attorney shall sign the necessary documents to vacate lis pendens filed by him in the County of Bergen, affecting the lands and premises of Milmar Estates, Inc., which are the subject of the aforementioned condemnation proceedings."

4. Subsequently, on August 21, 1954, an order was entered directing that Walter G. Winne, Master of the United States District Court be authorized, permitted and directed to pay from the aforesaid funds certain claims of the United States Government and Public National Bank and Trust Company.

5. The balance remaining in the account of Walter G. Winne, Master of the United States District Court aforementioned, is the sole property of Milmar Estate, Inc.

6. Samuel Marcus has asserted a right, claim and interest to the said fund which claim the defendant, Milmar

Estate, Inc. asserts to be without any foundation in fact or law.

7. There is between the parties hereto an actual controversy as hereinbefore set forth.

WHEREFORE, defendant Milmar Estate, Inc. demands a judgment declaring that the balance of the proceeds of the condemnation award made in favor of Milmar Estate, Inc., by the commissioners in condemnation in the Matter of the Petition of the State Highway Commissioners of the lands of Milmar Estate, Inc., which said monies were ordered deposited in an account designated "Walter G. Winne, Master United States District Court" constitute the sole property of the defendant, Milmar Estate, Inc., and that the balance now on deposit should be forthwith delivered and paid to Milmar Estate, Inc. and that the said account of Walter G. Winne, Master United States District Court, be closed.

* * *

[Fourth, fifth, sixth and seventh counts omitted.]

WHEREFORE defendant, Milmar Estate, Inc. demands judgment against Samuel Marcus in the amount of $100,000.00 together with interest and costs of this action.

/s/ MAURICE C. BRIGADIER
Attorney for Defendant,
Milmar Estate, Inc.

Answer and Counterclaim of Defendant, Samuel Marcus

(Filed—October 25, 1954)

UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY,
EQUITY DIVISION.

(Civil Action No. 1026-50)

AL BIERMAN and WILLIAM MILLER,
Plaintiffs,

vs.

SAMUEL MARCUS and MILMAR ESTATES, INC., a corporation organized under the laws of the State of New Jersey,
Defendants,

by original summons,
and between the said
SAMUEL MARCUS,
Plaintiff,

vs.

AL BIERMAN and WILLIAM MILLER,
Defendants on Counterclaim,

MILMAR ESTATES, INC., a New Jersey Corporation,
Defendant on Cross-claim,

and

AL KEVELSON and ABRAHAM LIEBERMAN, Escrowee,
Additional Defendants on Counterclaim.

Defendant, Samuel Marcus, files his answer to the Complaint in interpleader herein:

1. Paragraphs 1 and 2 are admitted.

2. Paragraph 3 is admitted, except that portion of it which alleges that the action "arises". This defendant ad-

mits that the action is brought under Title 28, United States Code Section 1335, but does not admit that it actually arises thereunder.

3. Paragraph 4 is admitted.

4. Paragraphs 5, 6, 7 and 8 are admitted.

5. As to Paragraph 9, this Defendant admits that up to the time that he learned of the fraud practiced upon him by the Plaintiffs, he claimed to be entitled to the $1,500.00 installments and interests and to all the installments constituting the balance of the purchase price, to wit: $35,000.-00 and interest, and demanded payment of same; but since becoming aware of said fraud he has rescinded all agreements to which he was a party and has elected to be restored to his original status.

6. Presently, he is not prepared to say whether he is in fact entitled to the said $1,500.00 installment and interest and to all the installments constituting the balance of the purchase price, to wit: $35,000.00 and interest and to demand payment of the same for reason of the facts hereinafter set forth in his separate defenses; and his election to rescind said transaction.

7. This Defendant is without sufficient information or knowledge whereon to form a belief as to whether or not the Defendant, Milmar Estates, Inc., may claim that it is entitled to the said $1,500.00 installment and interest, and to all installments constituting the balance of the purchase price, to wit: $45,000.00 and interest; and consequently neither affirms or denies the same but puts the plaintiffs upon their proofs.

Answer and Counterclaim of Defendant, Samuel Marcus

8. As to paragraph 10, this Defendant is without sufficient information or knowledge whereon to form a belief and consequently neither affirms or denies the same but puts the plaintiffs on their proof.

9. As to paragraph 11, the allegations thereof are denied.

10. As to paragraph 12, it is admitted.

As separate and distinct defenses, this Defendant alleges:

FIRST SEPARATE DEFENSE

This action is not brought by the plaintiffs in good faith.

SECOND SEPARATE DEFENSE

The alleged paper writing referred to in Paragraph 5 of the complaint, between the plaintiffs, Al Bierman and William Miller and the Defendant, Milmar Estates, Inc., a New Jersey Corporation, is ultra vires for reason of the fact that the said Milmar Estates, Inc., a New Jersey Corporation, did not own said shares of stock which it supposedly agreed to sell and consequently said contract is null, void and of no effect.

THIRD SEPARATE DEFENSE

On September 14th, 1948, this Defendant was the sole and unconditional owner of 625 shares of the common stock of the Defendant, Milmar Estates, Inc., a New Jersey Corporation, and in addition thereto the equitable owner and in possession of an additional 480 shares of stock of said defendant corporation. Plaintiff, William Miller, individually and as agent, on behalf of and with the cooperation of plaintiff, Al Bierman and counterclaim defendant Al Kevelson, induced this Defendant to enter into an al-

leged contract for the sale of 625 shares of his said stock to the said Al Bierman and William Miller by fraud, trickery and deceit in that the said plaintiffs, jointly and severally, misrepresented the true financial condition of the said defendant, Milmar Estates, Inc., and of Bill Miller's Riviera, Inc. a New Jersey Corporation, the tenant in possession of the lands and premises owned by the defendant, Milmar Estates, Inc., a New Jersey Corporation, falsely stating that the tenant, Bill Miller's Riviera, Inc. was unable to pay its rent to defendant Milmar Estates, Inc.; that in consequence thereof, said defendant Milmar Estates, Inc. would of necessity default on its mortgage obligations causing this defendant Samuel Marcus to lose his entire investment in said corporate defendant, Milmar Estates, Inc.; by reason whereof this defendant agreed to the sale of his 625 shares of common stock of the defendant Milmar Estates, Inc., to the plaintiffs, relying upon the representations made to him by the plaintiffs, or one of them, concerning the financial condition of the defendant, Milmar Estates, Inc., a New Jersey Corporation, and of Bill Millers Riviera, Inc., a New Jersey Corporation, fearing that unless he agreed to the sale of his said stock, he would lose his entire financial investment in said Milmar Estates, Inc.

FOURTH SEPARATE DEFENSE

This Defendant has elected to rescind said alleged contract for the sale of his 625 shares of common stock of Milmar Estates, Inc., and tenders himself willing to return to the payors the sum of $90,000.00 thus far received by him on account of the purchase price of said stock.

FIFTH SEPARATE DEFENSE

The Defendant, Milmar Estates, Inc., a New Jersey Corporation, has at no time threatened to make any claim

in connection with the subject matter of said contract or of this suit and cannot do so without the active cooperation and incitement of the plaintiffs.

WHEREFORE, this Defendant demands that the Complaint be dismissed and that he have Judgment for costs.

By way of counterclaim against the plaintiffs Al Bierman and William Miller, Cross-claim against his co-defendant, Milmar Estates, Inc., and Al Kevelson and Abraham Lieberman, Esq., defendants on counterclaim, Defendant-counterclaimant, Samuel Marcus says that:

FIRST COUNT

1. The Milmar Estates, Inc., a New Jersey corporation, is a co-defendant herein.

2. This Court has jurisdiction over all of the parties to the foregoing action named in the caption hereof.

3. The Defendant, Milmar Estates, Inc., is a New Jersey corporation, and has issued and outstanding a total of 1250 shares of common stock.

4. On the 14th day of September, 1948, counterclaimant was, and claimed to be the owner of approximately 1105 shares of the common stock of said defendant, Milmar Estates, Inc., of the aforementioned 1250 shares of common stock of said corporation issued and outstanding; subsequently he acquired an additional 125 shares of said stock.

5. On the said 14th day of September, 1948 by trickery, deceit, and false representations made to him and specifically hereinafter set forth by the plaintiffs William Miller, Al Bierman and counterclaim defendant, Al Kevelson, counterclaimant was fraudulently induced to agree to the sale of 625 shares of the capital stock of said corporation,

for the sum of $125,000.00 payable in various installments, plus an additional $15,000.00 payable by counterclaim defendant William Miller.

6. The plaintiff, Al Bierman, is the owner of 20 shares of the common capital stock of Milmar Estates, Inc.

7. Counterclaimant is presently owner of 1230 shares of common stock of his co-defendant, Milmar Estates, Inc.

8. The plaintiff, William Miller, never acquired any of the shares of the stock of Milmar Estates, Inc., nor is he legally entitled thereto.

9. In pursuance of said alleged agreement of September 14, 1948, counterclaimant, though not a party to said agreement, deposited with one Abraham Lieberman, of Union City, 625 shares of the capital stock of said Milmar Estates, Inc., owned by him individually, upon condition that the said Abraham Lieberman was to hold the same in escrow, pending the full and complete performance of each and every covenant of said alleged contract, executed the 14th day of September, 1948, between the said Milmar Estates, Inc., and Al Bierman and William Miller.

10. Said alleged agreement, dated the 14th day of September, 1948, between Milmar Estates, Inc., a New Jersey corporation, therein referred to as the "seller", party of the first part, and Al Bierman and William Miller, therein referred to as the "buyer", party of the second part, is so vague, indefinite, unintelligible, as to be null, void, and of no legal effect.

11. The alleged contract of September 14, 1948 referred to herein was never and cannot be performed. Consequently, said 625 shares of stock of the Milmar Estates, Inc., deposited by counterclaimant with the said Abraham Lieberman, in escrow, are, or should still be in his posses-

sion; and counterclaimant is entitled to the immediate and unconditional return of said 625 shares of the common stock of said Milmar Estates, Inc., and other documents deposited in escrow with the said Abraham Lieberman upon the repayment of the money thus far received by him on account thereof.

12. On said 14th day of September, 1948, when counterclaimant was induced to deposit said 625 shares of Milmar Estates, Inc., common capital stock with the said Abraham Lieberman in escrow, as aforesaid, counterclaimant was the president and a director of the said Milmar Estates, Inc., counterclaimant is still the lawful president and a director of said Milmar Estates, Inc.

13. Said understanding between the plaintiffs and counterclaimant was never reduced to writing, but in place thereof, a vague, indefinite and wholly ineffective paper writing dated the 14th day of September, 1948, was prepared between Milmar Estates, Inc., a New Jersey corporation, as seller, party of the first part, and Al Bierman and William Miller, buyers, parties of the second part, which is hereto annexed and marked Exhibit "A".

14. Said paper writing of September 14, 1948 (Exhibit "a" hereof), is wholly void, null and of no effect, because it not only failed to carry out the intent and agreement of the parties, but also because it was a product of trickery, deceit, fraud and misrepresentation practiced upon the counterclaimant by the plaintiffs William Miller and Al Bierman, and counterclaim defendant Al Kevelson.

15. The trickery, deceit, fraud and misrepresentation, which counterclaimant alleges the plaintiffs, William Miller individually and as agent for Al Bierman and Al Kevelson practiced upon him, in order to induce him to enter into

said abortive agreement of September 14, 1948, whereby he allegedly undertook to sell 625 shares of the capital stock of Milmar Estates, Inc., is inter alia, as follows:

(a) At all the times herein mentioned, the lands and premises of the defendant, Milmar Estates, Inc., a New Jersey corporation, were encumbered by a mortgage in the original sum of $300,000.00 held by the Michael Realty Co., a New Jersey corporation, and assigned by it to Tessie Schlesinger and Julia Steinberger, payable in monthly installments of $5,000 each, together with interest at 4% on the unpaid balance to the date of payment.

(b) Said lands and premises were occupied by Bill Miller's Riviera, a New Jersey corporation, as tenant.

(c) The affairs of said tenant corporation were and still are controlled by the plaintiff, William Miller. The monthly payments of $5,000.00 each required to be made on account of said $300,000 mortgage, given to the Michael Realty Co., a New Jersey corporation and land taxes were to be paid from the rents payable by Bill Miller's Riviera, Inc., to Milmar Estates, Inc.

(d) William Miller represented to counterclaimant that the business of Bill Miller's Riviera, Inc., was continuously falling off, and it could not continue to make its monthly rental payments to Milmar Estates, Inc. Because of these representations, counterclaimant obtained permission from said mortgagees to pay $2,500, instead of $5,000 per month on account of the principal of said mortgage.

(e) William Miller continued to represent to counterclaimant, not only that the business of Bill Miller's Riviera, Inc., a New Jersey corporation tenant of said premises, was so poor that it would have to default on the payment of its rent entirely, but that the mortgage insisted on the

restoration of the original installments of $5,000 per month, in which event, the Milmar Estates, Inc., would be unable to pay even the reduced monthly installments on account of the mortgage; would of necessity default entirely thereon, in consequence whereof said mortgage would be foreclosed, and said Milmar Estates, Inc., would suffer a total and complete loss of its assets by reason of said foreclosure, and counterclaimant would suffer a total loss of his investment.

(f) Plaintiffs William Miller and Al Bierman, further represented to counterclaimant that he had interested one Al Kevelson in purchasing 625 shares of the capital stock of Milmar Estates, Inc., owned by counterclaimant for the sum of $125,000.

16. The statements and representations made to counterclaimant by William Miller and Al Bierman with respect to the inability of the tenant Bill Miller's Riviera, Inc., to pay its rent to Milmar Estates, Inc., and that the mortgagee demanded a restoration of the monthly payments of $5,000 were false, in fact, to the knowledge of the said William Miller and Al Bierman; and made solely for the purpose of inducing counterclaimant to agree to sell the aforementioned 625 shares of stock for a fraction of the value of said stock.

17. Counterclaimant relied upon the aforementioned representations made by William Miller, individually and as agent for Al Bierman and Al Kevelson to him, and agreed to sell the aforementioned 625 shares of stock, which he would not otherwise have agreed to do.

18. William Miller has never invested a dollar of his own money in the Milmar Estates, Inc., although upon the organization of said corporation, he agreed to equal the in-

vestment of counterclaimant by contributing $100,000 which likewise he failed to do, and later by agreeing to contribute $50,000, which likewise he failed to do.

19. Thereafter, on or about the 28th day of December, 1950, William Miller and Al Bierman, filed a complaint of interpleader against counterclaimant and Milmar Estates, Inc., a New Jersey corporation, and obtained from this Honorable Court a restraint against counterclaimant, and the defendant, Milmar Estates, Inc., a New Jersey corporation from instituting or prosecuting any proceedings in any State or United States Court affecting the obligation involved in this interpleader action.

20. Subsequent to said 14th day of September, 1948, when said alleged agreement was entered into between the defendant, Milmar Estates, Inc., and the plaintiffs, and counterclaimant deposited in escrow with the said Abraham Lieberman, his said 625 shares of common capital stock of Milmar Estates, Inc., the plaintiffs, William Miller and Al Bierman and Al Kevelson, defendants on counterclaim, wrongfully and unjustly, and without legal warrant or authority whatsoever, undertook to act, and are still acting as officers and directors of the said Milmar Estates, Inc., a New Jersey corporation.

21. Counterclaimant charges that the said plaintiffs, William Miller and Al Bierman and the said Al Kevelson, defendants on counterclaim, were without power and authority to act as officers and directors of said defendant, Milmar Estates, Inc., a New Jersey corporation, and still are without such power and authority.

22. Notwithstanding their lack of authority so to do, the said plaintiffs, William Miller and Al Bierman and Al Kevelson, defendants on counterclaim, have proceeded to

illegally manage the affairs of the said corporation, Milmar Estates, Inc., to make contracts, and to do all and singular the several acts and things and perform the duties appertaining to the office of officers and directors of the said Milmar Estates, Inc., a New Jersey corporation.

23. Counterclaimant is informed, believes it to be true, and therefore charges the fact to be, that William Miller and Al Bierman are agents in this matter for Al Kevelson, who is a true party in interest herein.

24. Al Kevelson is made a defendant on this counterclaim because he is an undisclosed principal and a true party in interest in the purchase of counterclaimant's 625 shares of stock.

25. A copy of the alleged agreement of September 14, 1948 between Milmar Estates, Inc. a New Jersey corporation and Al Bierman and William Miller, is hereto annexed marked Exhibit "A" and made a part hereof.

26. Abraham Lieberman is made a party defendant on this counterclaim because he holds counterclaimant's stock certificates and other documents entrusted to him under said alleged contract of September 14th, 1948, all of which counterclaimant is entitled to have returned to him forthwith.

27. Counterclaimant Samuel Marcus hereby tenders to those persons who may be legally entitled to receive the same, all money paid to or received by him on account of the alleged purchase of his 625 shares of the common capital stock of his co-defendant Milmar Estates, Inc. under the said paper writing dated September 14th, 1948 marked Exhibit "A" and annexed hereto.

Wherefore, counterclaimant demands judgment on this Count as follows:

Answer and Counterclaim of Defendant, Samuel Marcus

A. That the alleged contract of September 14, 1948 annexed hereto, marked Schedule A, be declared null and void.

B. That the additional defendant on Counterclaim, Abraham Lieberman, be ordered to forthwith deliver to counterclaimant all and singular the stock and all other documents and securities of whatever nature, deposited by counterclaimant with him in pursuance of said alleged contract of September 14, 1948 marked Exhibit "A".

C. That it be declared that he is the owner and presently entitled to the immediate possession of 1230 shares of stock of Milmar Estates, Inc.

D. That it be declared that plaintiffs Al Bierman, William Miller and counterclaim defendant Al Kevelson are not the duly elected officers and directors of Milmar Estates, Inc., have no right to act as such and that they be restrained from so doing.

E. That it be declared that no contract of any nature exists between plaintiffs Al Bierman, William Miller, counterclaim defendant Al Kevelson and counterclaimant with respect to the sale of counterclaimant's stock in Milmar Estates, Inc., his co-defendant.

In the alternative and by way of counterclaim against the plaintiffs William Miller and Al Bierman cross-claim against his co-defendant, Milmar Estates, Inc., Al Kevelson and Abraham Lieberman, defendants on counterclaim, defendant-counterclaimant, Samuel Marcus says that:

SECOND COUNT

28. All and singular the allegations of the First Count are made a part of this Count precisely as if herein repeated in words at length.

Answer and Counterclaim of Defendant, Samuel Marcus

29. If perchance this Court should find that the alleged agreement of September 14th, 1948 (Exhibit "A" hereof) is binding upon this counterclaimant, then and in that event counterclaimant, Samuel Marcus, demands that he be paid the balance due him upon the said alleged contract, to wit, the sum of $35,000.00 together with interest thereon, still due and owing to him from the plaintiffs and his counterclaim and cross-claim defendants on account of the alleged sale of his aforementioned 625 shares of the common capital stock of Milmar Estates, Inc., his co-defendant, and the further sum of $15,000.00 together with interest and costs thereon from the 14th day of September, 1948 to the date of payment due him from the counterclaim defendant, William Miller.

WHEREFORE counterclaimant demands judgment on this Count in the alternative.

A. The sum of $35,000.00 together with interest and costs thereon against the counterclaim defendants.

B. The sum of $15,000.00 together with interest and costs against the counterclaim defendant, William Miller, and said interest to run from the 14th day of September, 1948, to date.

THIRD COUNT

30. All and singular the allegations of the First Count are made a part of this Count precisely as if herein repeated in words at length.

31. The alleged agreement of September 14th, 1948 was intended to effect the sale of 625 shares of the common capital stock of the Milmar Estates, Inc., owned by counterclaimant.

Answer and Counterclaim of Defendant, Samuel Marcus

32. Counterclaimant was then the owner of an additional 480 shares of the common capital stock of Milmar Estates, Inc. held by him as security for the payment to him by counterclaim defendant William Miller in the sum of $50,000 which moneys the said counterclaim defendant, William Miller never paid.

33. Subsequent thereto this counterclaimant acquired by purchasing from Robert Schwartz an additional 125 shares of the common capital stock of counterclaim defendant Milmar Estates, Inc.

34. Counterclaimant has assigned to plaintiff Al Bierman 20 shares of the stock of counterclaim defendant Milmar Estates, Inc., upon the request of counterclaim defendant, William Miller.

35. Counterclaimant is presently the owner of 630 shares of counterclaim defendant Milmar Estates, Inc.

WHEREFORE in the alternative, counterclaimant demands judgment on this Count as follows:

C. Declaring that he is the owner and immediately entitled to possession of 630 shares of the common capital stock of counterclaim defendant Milmar Estates, Inc.

FOURTH COUNT

36. All and singular the allegations of the First Count are made a part of this Count precisely as if herein repeated in words at length.

37. By the terms and conditions of said alleged agreement of September 14th, 1948 it was provided among other things as follows:

In the event of the Buyer failing to pay the amount due hereunder, or in the event that the Buyer shall

default in making any one of the payments due hereunder, then the balance remaining unpaid shall immediately become due and payable, and in such event the shares of stock remaining in escrow shall be returned by the said Abe Lieberman to the Seller.

38. The counterclaim defendants Milmar Estates, Inc., a New Jersey corporation, William Miller, Al Bierman and the undisclosed principal Al Kevelson have defaulted in making the several payments, totaling $35,000.00 due to counterclaimant under the terms of the alleged agreement.

39. The default in the making of said payments by counterclaim defendants to counterclaimant consisted in that, instead of making the said payments to him as theretofore, the said counterclaim defendants instituted the present interpleader action and paid said several installments into the registry of this Court.

40. Said interpleader action was not brought in good faith but was merely a scheme or device concocted by the counterclaim defendants for the purpose of circumventing the provisions of the said alleged agreement of September 14th, 1948 with respect to the making of said payments to counterclaimant regularly, as therein provided.

41. Counterclaimant has elected to declare a default and does hereby declare a default under the terms of said alleged agreement (Exhibit "A" hereof) and is therefore entitled to have the counterclaim defendant Abraham Lieberman, escrowee, immediately deliver over to counterclaimant the shares of stock of counterclaim defendant Milmar Estates, Inc., a New Jersey corporation, entrusted to his keeping.

Answer and Counterclaim of Defendant, Samuel Marcus

WHEREFORE counterclaimant, in the alternative, demands judgment on this Count as follows:

D. That the counterclaim defendants have defaulted in making the payments due counterclaimant under said alleged agreement of September 14th, 1948 (Exhibit "A") and that counterclaimant is entitled to the immediate possession of the stock of the counterclaim defendant Milmar Estates, Inc. in the possession of counterclaim defendant Abraham Lieberman, as escrowee.

E. That counterclaim defendant Abraham Lieberman, escrowee, as aforesaid be ordered to immediately deliver over to counterclaimant the stock of counterclaim defendant Milmar Estates, Inc., a New Jersey corporation, entrusted to his possession, and all other documents delivered to him in connection with the alleged contract of September 14th, 1948.

FIFTH COUNT

By way of cross-complaint against his co-defendant, Milmar Estates, Inc., a New Jersey corporation, cross-claimant, Samuel Marcus says that:

42. Defendant on this cross-claim, Milmar Estates, Inc., a New Jersey corporation, owes and is indebted to the cross-claimant in the sum of $46,801.23.

43. Said indebtedness results from loans made to said Milmar Estates, Inc. by this cross-claimant.

44. Annexed hereto and made a part hereof, marked Schedule "B" is an itemized list of said loans made by cross-claimant to the said Milmar Estates, Inc., a cross-claim defendant, and the payments made by the cross-claim defendant to cross-claimant on account.

Exhibit "A"

45. Moneys due from the cross-claim defendant, Milmar Estates, Inc. to cross-claimant, became due and payable five years from the 23rd day of July, 1947 and are now due and owing.

WHEREFORE, cross-claimant demands judgment against the cross-claim defendant, Milmar Estates, Inc. for the sum of $46,801.23 together with interest from the several dates stated in Schedule "B" hereto annexed.

/s/ ROBERT D. GROSMAN,
Attorney for Cross-claimant,
Samuel Marcus.

/s/ JULES E. TEPPER,
Of counsel with Cross-claimant,
Samuel Marcus.

Exhibit "A"

Exhibit "A", the alleged agreement of September 14, 1948 (Exhibit D-ME 5) appears as an exhibit to the opinion of the District Court, infra, p. 139a.

Schedule "B"

Loans Advanced:

July 16, 1946	$2,000.00	a
September 30	3,500.00	a
October 30	3,500.00	x
November 13	700.00	a
November 27	3,500.00	a
December 4	3,500.00	x
December 28	5,100.00	x
January 2, 1947	3,500.00	x
February 6	700.00	x

Schedule "B"

Loans Advanced:

February 24	1,727.23	x
February 27	3,000.00	x
March 5	1,100.00	x
April 11	500.00	x
April 9	1,000.00	x
June 20	2,000.00	To Modern Industrial Bank
July 7	3,000.00	
August 15	3,500.00	
September 2	1,000.00	x
September 5	3,000.00	x
September 8	100.00	x
September 30	1,500.00	x
November 5	5,820.00	x
December 16	1,500.00	x
December 2	6,000.00	x
January 3, 1948	808.33	x
February 3	600.00	
February 5	2,500.00	x
March 5	2,500.00	x
March 8	781.00	
September 15	50.00	
Total	$67,997.23	

Repayments:

January 1947	$3,500.00
March 12	1,500.00
July 21	3,000.00
August 12	3,500.00
September 30	3,000.00
July 6, 1948	5,000.00
July 12	1,696.00
Total	$21,196.00

Reply of Plaintiffs, Al Bierman and William Miller to the Counterclaim of Samuel Marcus; and Counterclaim of Al Bierman and William Miller

(Filed—March 10, 1954)

UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY
Docket No. 1026-50

AL BIERMAN and WILLIAM MILLER,
Plaintiffs,

vs.

SAMUEL MARCUS and MILMAR ESTATES, INC., a corporation organized under the laws of the State of New Jersey,
Defendants.

By way of reply to the Counterclaim of Samuel Marcus, the plaintiffs, Al Bierman and William Miller, say that:

REPLY TO THE FIRST COUNT

1. Paragraph 1 is admitted.

2. Paragraph 2 is admitted.

3. Paragraph 3 is admitted.

4. Paragraph 4 is denied.

5. Paragraph 5 is denied.

6. Paragraph 6 is denied to the extent that it states that plaintiff, Al Bierman, is the owner of only twenty shares of the common capital stock of Milmar Estates, Inc. Plaintiffs state that Al Bierman is the owner of 250 shares of the said capital stock.

7. Paragraph 7 is denied.

Reply of Plaintiffs, Al Bierman and William Miller to the Counterclaim of Samuel Marcus; and Counterclaim of Al Bierman and William Miller

8. Paragraph 8 is denied.

9. Paragraph 9 is denied. However, plaintiffs state that pursuant to the agreement of September 14, 1948, counterclaimant Samuel Marcus and the plaintiffs caused to be cancelled all of the issued and outstanding stock of Milmar Estates, Inc.; 1250 new shares of stock were issued by Milmar Estates, Inc. in the name of Samuel Marcus, which shares Samuel Marcus signed as president, and thereupon all of said shares were endorsed in blank by Samuel Marcus and delivered to the plaintiffs and Abraham Lieberman, pursuant to the agreement.

10. Paragraph 10 is denied.

11. Paragraph 11 is denied.

12. Paragraph 12 is denied except that it is admitted that on September 14, 1948, prior to the execution of the contract, counterclaimant Samuel Marcus was president and a director of Milmar Estates, Inc., but as part of the transaction of said date he resigned as an officer and director of Milmar Estates, Inc., and since that date has not held office either as president or director of Milmar Estates, Inc.

13. Paragraph 13 is denied except that plaintiffs admit the execution of a valid and effective agreement in the form set forth in Exhibit A annexed to the answer of Samuel Marcus; except however that the signature of Samuel Marcus and his designation as president appear on the agreement but are omitted from Exhibit A.

14. Paragraph 14 is denied.

15. Paragraph 15 is denied except that it is admitted that the premises were occupied by Bill Miller's Riviera, Inc. as tenant, and were subject to a mortgage.

Reply of Plaintiffs, Al Bierman and William Miller to the Counterclaim of Samuel Marcus; and Counterclaim of Al Bierman and William Miller

16. Paragraph 16 is denied.

17. Paragraph 17 is denied.

18. Paragraph 18 is denied.

19. Paragraph 19 is admitted and reference is made to the said Order for the contents thereof.

20. Paragraph 20 is denied.

21. Paragraph 21 is denied.

22. Paragraph 22 is denied.

23. Paragraph 23 is denied except that plaintiffs state that upon the completion of the transaction of September 14, 1948, Al Kevelson was the owner of 40% of the stock of Milmar Estates, Inc., Willam Miller was the owner of 40% of the stock of Milmar Estates, Inc., and Al Bierman was the owner of 20% of the stock of Milmar Estates, Inc.

24. Paragraph 24 is denied except that plaintiffs state that upon the completion of the transaction of September 14, 1948, Al Kevelson was the owner of 40% of the stock of Milmar Estates, Inc., William Miller was the owner of 40% of the stock of Milmar Estates, Inc., and Al Bierman was the owner of 20% of the stock of Milmar Estates, Inc.

25. Paragraph 25 is admitted except that the plaintiffs state that the said agreement of September 14, 1948, is a valid and effective agreement in the form set forth in Exhibit A annexed to the Answer of Samuel Marcus, except however that the signature of Samuel Marcus and his designation as president appear on the agreement but are omitted from Exhibit A.

26. Paragraph 26 is denied except that it is admitted that certain stock certificates and papers were left with

Reply of Plaintiffs, Al Bierman and William Miller to the Counterclaim of Samuel Marcus; and Counterclaim of Al Bierman and William Miller

Abraham Lieberman pursuant to the agreement of September 14, 1948. Plaintiffs assert that defendant, Samuel Marcus, has no right, title, claim or interest in any of the said stock certificates or papers and said Samuel Marcus is not entitled to have any of said stock certificates or papers returned to him.

27. Paragraph 27 is denied. Plaintiffs deny that the statements contained in paragraph 27 constitute a valid tender or have any legal effect as a tender.

AFFIRMATIVE DEFENSES TO THE FIRST COUNT OF THE COUNTERCLAIM OF SAMUEL MARCUS

FIRST AFFIRMATIVE DEFENSE

The counterclaim fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Defendant, Samuel Marcus, has failed to rescind the contract of September 14, 1948.

THIRD AFFIRMATIVE DEFENSE

Defendant, Samuel Marcus, cannot rescind the contract of September 14, 1948.

FOURTH AFFIRMATIVE DEFENSE

Defendant, Samuel Marcus, has failed to make a valid tender of the moneys received by him pursuant to the agreement of September 14, 1948.

Reply of Plaintiffs, Al Bierman and William Miller to the Counterclaim of Samuel Marcus; and Counterclaim of Al Bierman and William Miller

FIFTH AFFIRMATIVE DEFENSE

Defendant, Samuel Marcus, cannot make a valid tender of the moneys received by him pursuant to the agreement of September 14, 1948.

SIXTH AFFIRMATIVE DEFENSE

Defendant, Samuel Marcus, is barred by laches. Among other things, defendant, Samuel Marcus, did not participate in the affairs of Milmar Estate, Inc. since 1948; knowingly permitted William Miller and Al Kevelson to sign the checks of Milmar Estate, Inc., a number of which were made to the order of Samuel Marcus, accepted and deposited or cashed by him and the benefit of same retained by him; pern tted Al Kevelson, William Miller and Al Bierman as the officers of Milmar Estates, Inc. to participate through counsel of their chosing in the condemnation proceedings against the property of Milmar Estate, Inc.; permitted Milmar Estates, Inc. to enter into obligations and to conduct its business generally without participation by Samuel Marcus; stood by and permitted the conduct of a suit in the Superior Court of New Jersey, Chancery Division, entitled Milmar Estates, Inc. v. Sarah Marcus, involving alleged dower of Sarah Marcus, the wife of Samuel Marcus, in the property of Milmar Estates, Inc. and made no effort to assist Milmar Estates, Inc. in said proceeding; and otherwise acted like a person who was completely out of and had no interest whatsoever in Milmar Estates, Inc.

SEVENTH AFFIRMATIVE DEFENSE

Defendant, Samuel Marcus, is estopped by his conduct as set forth in the Sixth Affirmative Defense and otherwise.

Reply of Plaintiffs, Al Bierman and William Miller to the Counterclaim of Samuel Marcus; and Counterclaim of Al Bierman and William Miller

EIGHTH AFFIRMATIVE DEFENSE

Defendant, Samuel Marcus, waived any and all alleged rights set forth in the counterclaim.

NINTH AFFIRMATIVE DEFENSE

Defendant, Samuel Marcus, affirmed the transaction and therefore cannot rescind same.

TENTH AFFIRMATIVE DEFENSE

Defendant, Samuel Marcus, failed to rescind for the alleged fraud immediately upon ascertaining the alleged facts which he claims constituted fraud.

ELEVENTH AFFIRMATIVE DEFENSE

Defendant, Samuel Marcus, elected not to rescind.

TWELFTH AFFIRMATIVE DEFENSE

On September 14, 1948, defendant, Samuel Marcus, resigned as officer and director of Milmar Estates, Inc. and executed a written resignation.

THIRTEENTH AFFIRMATIVE DEFENSE

The agreement of September 14, 1948, is valid and binding.

FOURTEENTH AFFIRMATIVE DEFENSE

The agreement of September 14, 1948, and its performance were affirmed by Samuel Marcus.

FIFTEENTH AFFIRMATIVE DEFENSE

Samuel Marcus is not the owner of any of the capital stock of Milmar Estates, Inc. and has no rights in any of the said stock.

Reply of Plaintiffs, Al Bierman and William Miller to the Counterclaim of Samuel Marcus: and Counterclaim of Al Bierman and William Miller

SIXTEENTH AFFIRMATIVE DEFENSE

Samuel Marcus is not entitled to the delivery or possession of any of the papers in the possession of Abraham Lieberman.

SEVENTEENTH AFFIRMATIVE DEFENSE

William Miller, Al Kevelson and Al Bierman are the officers and directors of Milmar Estate, Inc.

EIGHTEENTH AFFIRMATIVE DEFENSE

By reason of the Second Count of his counterclaim Samuel Marcus has waived any right to rescission.

REPLY TO SECOND COUNT

1. As to Paragraph 28 plaintiffs repeat paragraphs 1 to and including 27 of the Reply to the First Count of the Counterclaim and make them part hereof.

2. As to Paragraph 29 plaintiffs state that since the allegations of that paragraph do not constitute a statement of claim which the plaintiffs are required to affirm or deny, plaintiffs leave defendant, Samuel Marcus, to his proof thereof. Plaintiffs do not object to the payment of the $35,000.00 deposited in Court, upon the Court ordering the same paid to Samuel Marcus. The $15,000.00 note of William Miller to Samuel Marcus has been partly paid.

AFFIRMATIVE DEFENSES TO THE SECOND COUNT

FIRST AFFIRMATIVE DEFENSE

Plaintiffs repeat and make part hereof all of the Affirmative Defenses to the First Count.

Reply of Plaintiffs, Al Bierman and William Miller to the Counterclaim of Samuel Marcus; and Counterclaim of Al Bierman and William Miller

REPLY TO THE THIRD COUNT

1. As to paragraph 30 plaintiffs repeat paragraphs 1 to and including 27 of the Reply to the First Count of the Counterclaim and make them part hereof.

2. Paragraph 31 is denied.

3. Paragraph 32 is denied, except that it is stated that shares of stocks owned by William Miller had been placed with Samuel Marcus as security for a note of $50,000.00 made by William Miller to Samuel Marcus, which note was cancelled as part of the transaction of September 14, 1948.

4. Paragraph 33 is denied.

5. Paragraph 34 is denied except that it is stated that prior to the transaction of September 14, 1948, twenty shares of stock of Milmar Estates, Inc. had been issued to Al Bierman.

6. Paragraph 35 is denied.

AFFIRMATIVE DEFENSES TO THE THIRD COUNT

FIRST AFFIRMATIVE DEFENSE

Plaintiffs repeat and make part hereof all of the Affirmative Defenses to the First Count.

REPLY TO THE FOURTH COUNT

1. As to paragraph 36 plaintiffs repeat paragraphs 1 to and including 27 of the Reply to the First Count of the Counterclaim.

2. Paragraph 37 is admitted as being part of the transaction of September 14, 1948, and reference is hereby made

Reply of Plaintiffs, Al Bierman and William Miller to the Counterclaim of Samuel Marcus; and Counterclaim of Al Bierman and William Miller

to all of the other parts and instruments of the transaction of September 14, 1948.

3. Paragraph 38 is denied. Payments totalling $35,000.00 have been made into the Registry of the Court.

4. Paragraph 39 is denied. Payments totalling $35,000.00 have been made into the Registry of the Court.

5. Paragraph 40 is denied.

6. Paragraph 41 is denied.

AFFIRMATIVE DEFENSES TO THE FOURTH COUNT

FIRST AFFIRMATIVE DEFENSE

Plaintiffs repeat and make part hereof all of the Affirmative Defenses to the First Count.

SECOND AFFIRMATIVE DEFENSE

Defendant, Samuel Marcus, has not the right to declare a default.

THIRD AFFIRMATIVE DEFENSE

Defendant, Samuel Marcus, has waived the right to declare a default.

FOURTH AFFIRMATIVE DEFENSE

Defendant, Samuel Marcus, is estopped from declaring a default.

FIFTH AFFIRMATIVE DEFENSE

Defendant, Samuel Marcus, has elected to take the fund of $35,000.00 deposited in the Court.

Reply of Plaintiffs, Al Bierman and William Miller to the Counterclaim of Samuel Marcus; and Counterclaim of Al Bierman and William Miller

SIXTH AFFIRMATIVE DEFENSE

Under the allegations of the Fourth Count, defendant, Samuel Marcus, lacks status to demand the relief therein demanded.

COUNTERCLAIM OF PLAINTIFFS, AL BIERMAN AND WILLIAM MILLER AGAINST DEFENDANT, SAMUEL MARCUS

By way of counterclaim against defendant, Samuel Marcus, the plaintiffs, Al Bierman and William Miller, say that:

1. This Court has jurisdiction over all of the parties named in this counterclaim. The jurisdiction of this Court arised out of the fact that the parties are citizens of different states and that the amount in controversy is in excess of $3,000.00 exclusive of interest and costs, and otherwise under the Statutes and Rules of Court appertaining.

2. This action is brought under the applicable provisions of the Judicial Code, 28 U.S.C. Paragraph 2201 and other pertinent statutes and rules of the Court, because there is an actual controversy now existing between the parties in respect of which these plaintiffs are in need of a declaration of rights by this Court.

3. Milmar Estates, Inc. is a corporation of the State of New Jersey having issued and outstanding 1250 shares of capital stock.

4. On September 14, 1948, an agreement was entered into between the plaintiffs, Al Bierman and William Miller, and the defendants, Samuel Marcus and Milmar Estates, Inc., whereby among other things, all of the issued and

Reply of Plaintiffs, Al Bierman and William Miller to the Counterclaim of Samuel Marcus; and Counterclaim of Al Bierman and William Miller

outstanding stock of Milmar Estates, Inc. consisting of 1250 shares was to become the property of Al Bierman and William Miller, and Al Bierman and William Miller were to pay $125,000.00 in the following manner: $30,000.00 upon the execution of the agreement, and the balance in monthly payments of $3,000.00 per month for each month that the night club known as Bill Miller's Riviera, and located on the real estate of Milmar Estates, Inc., was open for business, and $1,500.00 for every month that the said premises are closed.

5. Prior to the execution of the said agreement, the stockholders of Milmar Estates, Inc. were Samuel Marcus, Robert Schwartz, William Miller and Al Bierman. The agreement contemplated, among other things, that Al Bierman and William Miller should become the owners of all of the issued and outstanding capital stock of Milmar Estates, Inc., that all stock of Milmar Estates, Inc. not then owned by them should become their property, that Samuel Marcus should get out completely and sever all relations with Milmar Estates, Inc., that Samuel Marcus and Robert Schwartz should resign as officers and directors of Milmar Estates, Inc., that Samuel Marcus should release William Miller, Al Bierman, Milmar Estates, Inc. and Bill Miller's Riviera, Inc. from all claims except the obligation incurred on September 14, 1948, and that William Miller, Al Bierman, Milmar Estates, Inc. and Bill Miller's Riviera, Inc. should release Samuel Marcus from all claims. A number of papers were executed by the parties to effectuate the said transaction, among which was an agreement of said date between Milmar Estates, Inc., as seller, and William Miller and Al Bierman, as buyer, a copy of which is annexed to the Answer of Samuel Marcus marked Exhibit A, except that the said copy omits the

Reply of Plaintiffs, Al Bierman and William Miller to the Counterclaim of Samuel Marcus; and Counterclaim of Al Bierman and William Miller

signature of Samuel Marcus and his designation as president.

6. As part of said transaction and with the consent of all the parties, all of the issued and outstanding stock of Milmar Estates, Inc. was marked cancelled on the stubs in the stock book, new stock in the amount of 1250 shares was issued in the name of Samuel Marcus, endorsed by him in blank and delivered to the plaintiffs, Al Bierman and William Miller and Abraham Lieberman, Esq., escrow agent, thereby divesting Samuel Marcus of all and any interest in said stock.

7. It was agreed among Al Bierman, William Miller and Al Kevelson that they shall be the owners of all of the issued and outstanding stock of Milmar Estate, Inc. in the following proportions:

Al Bierman—20%—250 shares.
William Miller—40%—500 shares.
Al Kevelson—40%—500 shares.

8. There was paid to Samuel Marcus $30,000.00 upon the execution of the agreement, and thereafter installment payments totalling an additional $60,000.00.

9. The contract dated September 14, 1948, named Milmar Estates, Inc. as the seller of the 1250 shares of stock, and named Al Bierman and William Miller as the buyer.

10. On December 28, 1950, the plaintiffs, Al Bierman and William Miller, filed a complaint in the United States District Court to which reference is made for the full particulars thereof, pursuant to which complaint an Order of the

Reply of Plaintiffs, Al Bierman and William Miller to the Counterclaim of Samuel Marcus; and Counterclaim of Al Bierman and William Miller

United States District Court was entered on the same date, to which reference is made for the full particulars thereof.

11. The plaintiffs have paid into the Registry of the United States District Court the said installments of the purchase price totalling $35,000.00 together with an amount sufficient to cover all interest which became due thereon.

12. Notwithstanding all of the foregoing, Samuel Marcus has asserted a claim to ownership of the stock of Milmar Estates, Inc. in various amounts, has made claim that he is the lawful president and a director of Milmar Estates, Inc., that the agreement of September 14, 1948, is invalid, and that Milmar Estates, Inc., Bill Miller's Riviera, Inc., and William Miller are indebted to said Samuel Marcus.

WHEREFORE the plaintiffs, Al Bierman and William Miller, pray relief as follows, to wit, that this Court adjudicate:

1. That Samuel Marcus has no right, title or interest or ownership of any kind or nature in any of the stock of Milmar Estate, Inc.

2. That the agreement of September 14, 1948, is a valid agreement.

3. That Samuel Marcus is not an officer nor a director of Milmar Estates, Inc.

4. That the note in the amount of $50,000.00 executed by William Miller to Samuel Marcus is cancelled

5. That Al Bierman and William Miller, Milmar Estates, Inc. and Bill Miller's Riviera, Inc. are released from all

liability to Samuel Marcus, except as to the liability of William Miller on the balance of a certain $15,000.00 note executed by William Miller to Samuel Marcus.

6. That Samuel Marcus is not entitled to the return of any stock, papers, agreements or documents deposited with Abraham Lieberman, Esq.

7. That the stock held by Abraham Lieberman, Esq. and all other papers held by him in this transaction be turned over to Al Bierman and William Miller.

8. That all of the stock of Milmar Estates, Inc. issued and outstanding is owned as follows:

William Miller—40%—500 shares.
Al Kevelson—40%—500 shares.
Al Bierman—20%—250 shares.

9. That Samuel Marcus shall deliver up to Milmar Estates, Inc. all certificates of stock of Milmar Estates, Inc. which he may hold.

And Al Bierman and William Miller further pray that they be granted such further relief as the Court may deem just and proper.

CHAZIN & CHAZIN,
Attorneys for
Plaintiffs-Counterclaimants,
Al Bierman and William Miller.
By: ABRAHAM CHAZIN,
A Member of the Firm.

Answer of Milmar Estate, Inc., to the Cross-Claim of Samuel Marcus

(Filed—November 10, 1954)

The defendant, Milmar Estate, Inc., by way of answer to the cross-claim of Samuel Marcus as set forth in the answer and counterclaim of defendant, Samuel Marcus, says:

Answer to First Count

1. This defendant admits the allegations contained in paragraphs 1, 2 and 3 of the first count.

2. This defendant denies the allegations contained in paragraphs 4 and 5.

3. This defendant admits that the plaintiff, Al Bierman, is the owner of 20 shares of the common capital stock of Milmar Estate, Inc. This defendant further states that the plaintiff, Al Bierman, is the owner of 250 shares of the common capital stock of Milmar Estate, Inc. If paragraph 6 of the first count of the cross-claim of Samuel Marcus is intended to plead that the plaintiff, Al Bierman, does not own any shares of the common capital stock of Milmar Estate, Inc., in excess of 20 shares, then the said allegation is denied to the extent that it is inconsistent with his ownership of 250 shares of the common capital stock of Milmar Estate, Inc.

4. This defendant denies the allegations contained in paragraphs 7 and 8.

5. This defendant denies the allegations contained in paragraph 9, except, however, this defendant admits that, in pursuance of the agreement of September 14, 1948, Samuel Marcus deposited with Abraham Lieberman shares of the capital stock of Milmar Estate, Inc. This defendant further states that, pursuant to the agreement of September 14, 1948, all of the theretofore issued and outstanding

stock of Milmar Estate, Inc., consisting of 1250 shares of stock, was cancelled, and 1250 new shares of stock were issued in the name of Samuel Marcus and signed by Samuel Marcus as president, none of which shares of stock was owned by Samuel Marcus, and all of which shares of stock were forthwith endorsed in blank by Samuel Marcus and delivered pursuant to the agreement of September 14, 1948.

6. This defendant denies the allegations contained in paragraphs 10, 11 and 12.

7. This defendant denies the allegations contained in paragraph 13, except, however, this defendant states that the document marked "Exhibit A" annexed to the answer and counterclaim of defendant, Samuel Marcus, is a copy of a definite and effective contract executed on the 14th day of September, 1948, the original of which contract bears the signature of Samuel Marcus, and an abbreviation indicating that he executed the said instrument as president, though the said signature and designation do not appear on Exhibit A.

8. This defendant denies the allegations contained in paragraphs 14, 15, 16, 17 and 18.

9. In answer to paragraph 19, this defendant admits that, on or about the 28th day of December, 1950, William Miller and Al Bierman filed a complaint of interpleader against Samuel Marcus and Milmar Estate, Inc., a New Jersey corporation, and obtained from this honorable Court a restraint against Samuel Marcus and Milmar Estate, Inc., and other relief, as set forth in a certain order of the said Court entered the 28th day of December, 1950, to which said order this defendant respectfully refers for the full contents thereof.

Answer of Milmar Estate, Inc., to the Cross-Claim of Samuel Marcus

10. This defendant denies the allegations contained in paragraphs 20, 21, and 22.

11. This defendant denies the allegations contained in paragraphs 23 and 24, except that it is admitted that the plaintiffs, in part, acted for Al Kevelson in the acquisition of the title to all of the authorized and outstanding stock of Milmar Estate, Inc.

12. In answer to paragraph 25, this defendant states that the document marked "Exhibit A" annexed to the answer and counterclaim of defendant, Samuel Marcus, is a copy of a definite and effective contract executed on the 14th day of September, 1948, the original of which contract bears the signature of Samuel Marcus, and an abbreviation indicating that he executed the said instrument as president, though the said signature and designation do not appear on Exhibit A.

13. In answer to paragraph 26, this defendant admits that Abraham Lieberman holds certain stock certificates and other documents delivered to him pursuant to the transaction of September 14, 1948. However, this defendant specifically denies that Abraham Lieberman holds any stock certificates or other documents for Samuel Marcus, and this defendant specifically denies that Samuel Marcus is entitled to have any stock certificates or other documents delivered to Abraham Lieberman returned to Samuel Marcus, and this defendant specifically denies that Samuel Marcus has any right, title, interest, or claim in or to any stock certificates or other documents delivered to Abraham Lieberman pursuant to the transaction of September 14, 1948.

14. This defendant denies the allegations contained in paragraph 27. The said allegation does not designate the persons to whom reference is made. Samuel Marcus has

not and can not make any valid tender. The statement contained in paragraph 27 does not constitute a valid, lawful, or effective tender, nor is it sufficient in law to accomplish any objective sought thereby to be accomplished by Samuel Marcus.

FIRST AFFIRMATIVE DEFENSE

This count of the cross-claim fails to state a claim against Milmar Estate, Inc., upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The transaction and agreement and contract entered into and executed on the 14th day of September, 1948, is lawful, valid, effective, and enforceable.

THIRD AFFIRMATIVE DEFENSE

Samuel Marcus can not predicate any claim or cause of action or demand for relief or judgment upon any alleged rescission of any agreement or transaction of September 14, 1948, because, among other grounds, he has not lawfully, validly, or effectively rescinded the said agreement, contract, or transaction.

FOURTH AFFIRMATIVE DEFENSE

Samuel Marcus has never tendered to any person or party any sum of money; he has never been ready, willing, or able to make a valid, lawful, or effective tender of any moneys or benefits received by him pursuant to or relating to any agreement, contract, or transaction of September 14, 1948.

FIFTH AFFIRMATIVE DEFENSE

Defendant, Samuel Marcus, has remained silent and inactive with respect to any claims which he may have aris-

ing out of or relating to the contract, agreement or transaction of September 14, 1948, for an extended period of time, without justification therefor, and is thereby barred by reason of his laches.

Sixth Affirmative Defense

The defendant, Samuel Marcus, has gambled and speculated with any claim which he alleges to have, in that he did not participate or engage in any transaction involving or relating to Milmar Estate, Inc., or his alleged ownership in shares of stock thereof or the conduct of his alleged office or position in the said corporation subsequent to September 14, 1948. He assumed no liabilities and ran no risks and asserted no claims until the affairs of the corporation were in such state that he ran no risk of any liability by reason of his allegedly being an officer or stockholder.

Seventh Affirmative Defense

Over an extended period of time, Samuel Marcus did not in any manner engage or participate in any business transactions of Milmar Estate, Inc., nor participate in any affairs relating to Milmar Estate, Inc., and consequently is barred by his laches.

Eighth Affirmative Defense

Samuel Marcus accepted Milmar Estate, Inc., checks drawn by William Miller and Al Kevelson to his own order and retained the benefits thereof, with full knowledge of all facts on which he now predicates his claim for relief.

Ninth Affirmative Defense

Samuel Marcus did not participate in the condemnation proceeding involving the property of Milmar Estate, Inc.,

knowing that Al Kevelson, William Miller, and Al Bierman, as officers of Milmar Estate, Inc., were actively participating in the said condemnation proceeding, and he acquiesced in and permitted Al Kevelson, William Miller, and Al Bierman to act as officers and to participate in the said condemnation proceeding. By reason thereof, Samuel Marcus is estopped by his conduct and barred by his laches.

Tenth Affirmative Defense

Samuel Marcus did not participate in the dower action instituted in the Superior Court of New Jersey by Milmar Estate, Inc., against Sarah Marcus, the wife of Samuel Marcus, knowing that Al Kevelson, William Miller, and Al Bierman, as officers of Milmar Estate, Inc., were actively participating in the said dower action, and he acquiesced in and permitted Al Kevelson, William Miller, and Al Bierman to act as officers and to participate in the said dower action. By reason thereof, Samuel Marcus is estopped by his conduct and is barred by his laches.

Eleventh Affirmative Defense

Defendant, Samuel Marcus, has waived any and all claims or rights by reason of his acts and conduct as hereinabove set forth.

Twelfth Affirmative Defense

Defendant, Samuel Marcus, has elected to affirm the contract, agreement, and transaction of September 14, 1948, with knowledge of all material facts relating thereto and is now barred from rescinding said contract, agreement, or transaction or asserting any claim or complaint relating or respecting thereto.

Answer of Milmar Estate, Inc., to the Cross-Claim of Samuel Marcus

THIRTEENTH AFFIRMATIVE DEFENSE

Samuel Marcus failed, neglected, and refused to assert any claim of rescission for the alleged trickery, deceit, fraud, and misrepresentations within a reasonable time after allegedly ascertaining the basis thereof, and is now barred from rescission by reason of his laches.

FOURTEENTH AFFIRMATIVE DEFENSE

Samuel Marcus entered into the agreement, contract, and transaction of September 14, 1948, with knowledge of all material facts relating thereto and is thereby barred from asserting any rescission thereof or any claim relating thereto.

FIFTEENTH AFFIRMATIVE DEFENSE

The defendant, Samuel Marcus, has executed written documents conveying, surrendering, and releasing any right, title, or interest in or to Milmar Estate, Inc., or any stock certificates in Milmar Estate, Inc., and he has executed written documents resigning as officer and director of Milmar Estate, Inc.

SIXTEENTH AFFIRMATIVE DEFENSE

The agreement, contract, and transaction of September 14, 1948, is valid, effective, lawful, and binding, and the same has been affirmed by Samuel Marcus.

SEVENTEENTH AFFIRMATIVE DEFENSE

Samuel Marcus has asserted repugnant facts and claims in the various counts of his counterclaim and has waived any right to rescission or relief thereby.

EIGHTEENTH AFFIRMATIVE DEFENSE

Samuel Marcus had knowledge of all material facts when he entered into the agreement, contract, and transaction of

September 14, 1948, and if there were any facts which he did not know, the existence of which constitute any part of the alleged trickery, deceit, fraud, or misrepresentations, he had knowledge of such facts as would place him under a duty to further inquire, and by his inquiry and the exercise of prudence, he could have avoided the consequence of the alleged trickery, deceit, fraud, and misrepresentation.

NINETEENTH AFFIRMATIVE DEFENSE

Samuel Marcus, by his act and conduct on September 14, 1948, has waived any claim against this defendant and is estopped from asserting any claim against this defendant.

TWENTIETH AFFIRMATIVE DEFENSE

Samuel Marcus failed to exercise proper care to avoid the consequences of his alleged injury.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Samuel Marcus well knew, before entering into the contract, agreement, and transaction of September 14, 1948, all of the material facts relating to the said transaction, and notwithstanding such knowledge he knowingly and voluntarily entered into the said contract, agreement, and transaction, and is thereby now barred from any recovery or relief arising out of or relating to the said agreement, contract, or transaction.

TWENTY-SECOND AFFIRMATIVE DEFENSE

The second, third, and fourth counts of the cross-claim are factually repugnant with the first count. Samuel Marcus has taken inconsistent and repugnant positions unauthorized by any rule or practice of court, and the same

constitutes an election or waiver of any right of rescission or other relief demanded in the first count of the complaint.

ANSWER TO SECOND COUNT

1. This defendant herein, in answer to paragraph 28, repeats each and every allegation, statement, claim, and paragraph hereinabove set forth in the answer to the first count of the cross-claim, to the same extent as if set forth at length herein, thereby incorporating the same herein.

2. In answer to paragraph 29, this defendant states that the agreement of September 14, 1948, is binding upon Samuel Marcus, and this defendant does not object to a payment to said Samuel Marcus in the sum of $35,000, together with interest thereon, which said sum has been deposited with the Court. This defendant does not object to the payment of any sum due and owing to Samuel Marcus constituting the unpaid part of the obligation which was originally in the amount of $15,000 owed by William Miller.

FIRST AFFIRMATIVE DEFENSE

Milmar Estate, Inc., repeats herein at length each and every affirmative defense hereinbefore set forth as a defense to the first count of the cross-claim to the same extent as if set forth at length herein and directing the same to the second count.

SECOND AFFIRMATIVE DEFENSE

The second count is repugnant to the other counts in the cross-claim. Samuel Marcus has taken factually inconsistent and mutually repugnant positions unauthorized by any rule or practice of court.

ANSWER TO THIRD COUNT

1. This defendant, in answer to paragraph 30, herein repeats each and every allegation, statement, claim, and

paragraph hereinabove set forth in the answer to the first and second counts of the cross-claim, to the same extent as if set forth at length herein, thereby incorporating the same herein.

2. This defendant denies the allegations contained in paragraph 31.

3. This defendant denies the allegations contained in paragraph 32, except, however, this defendant states that certain shares of stock owned by William Miller were for a period of time pledged in a security transaction with Samuel Marcus to secure the payment by William Miller to Samuel Marcus of the sum of $50,000. This defendant further states that Samuel Marcus was never the owner of any stock which he held merely as security, and that the stock pledged as aforementioned was released from the security transaction and the note of $50,000 was cancelled by the September 14, 1948, transaction.

4. This defendant denies the allegations contained in paragraph 33.

5. This defendant denies the allegations contained in paragraph 34, except that prior to September 14, 1948, 20 shares of stock of Milmar Estate, Inc., were issued to and in the name of Al Bierman.

6. This defendant denies the allegations contained in paragraph 35.

FIRST AFFIRMATIVE DEFENSE

Milmar Estate, Inc., repeats herein at length each and every affirmative defense hereinbefore set forth as a defense to the first and second counts of the cross-claim to the same extent as if set forth at length herein and directing the same to the third count.

Answer of Milmar Estate, Inc., to the Cross-Claim of Samuel Marcus

ANSWER TO FOURTH COUNT

1. This defendant, in answer to paragraph 36, herein repeats each and every allegation, statement, claim, and paragraph hereinabove set forth in the answer to the first count, to the same extent as if set forth at length herein, thereby incorporating the same herein.

2. This defendant admits the allegations contained in paragraph 37 and refers to the agreement and documents constituting the transaction of September 14, 1948, for the contents thereof.

3. This defendant denies the allegations contained in paragraphs 38 and 39. This defendant further states that the sum of $35,000 has been paid into court in the interpleader action captioned as above, the same being pursuant to an order of this honorable Court.

4. This defendant denies the allegations contained in paragraphs 40 and 41.

FIRST AFFIRMATIVE DEFENSE

Milmar Estate, Inc., repeats herein each and every affirmative defense hereinbefore set forth as a defense to the first, second, and third counts of the cross-claim to the same extent as if set forth at length herein and directing the same to the fourth count.

SECOND AFFIRMATIVE DEFENSE

On the 28th day of December, 1950, an order was entered in the above captioned matter in this honorable Court providing that the defendants herein and each of them and their respective officers, agents, servants, and attorneys be restrained until further order of this Court from declaring an acceleration default of the balance of

the said purchase price and from demanding the return by Abraham Lieberman, Esq., escrow agent to the seller of the stock deposited with him, and that the restraint against calling an acceleration default and against demanding of said escrow agent the return of the said stock as aforesaid continue so long as the plaintiffs deposit with the Registry of this Court on or before time or times the same shall become due the various installments of principal of the said obligation, together with interest thereon.

THIRD AFFIRMATIVE DEFENSE

Samuel Marcus has asserted in the second count of his cross-claim a demand for judgment in the amount of $35,000, together with interest and costs, and has thereby elected to take the fund deposited in court and has waived any right to claim any default.

FOURTH AFFIRMATIVE DEFENSE

Samuel Marcus is barred and estopped from declaring a default and is in laches with respect to any alleged right thereto.

ANSWER TO FIFTH COUNT:

1. This defendant denies the allegations contained in paragraphs 42, 43, 44, and 45.

FIRST AFFIRMATIVE DEFENSE

The alleged cause of action did not accrue at any time within six years next before the commencement of the within action, by virtue whereof the Statute of Limitations constitutes a bar to the maintenance of the said action by the said Samuel Marcus.

SECOND AFFIRMATIVE DEFENSE

The transactions related to in the within claim are usurious.

Answer of Milmar Estate, Inc., to the Cross-Claim of Samuel Marcus

THIRD AFFIRMATIVE DEFENSE

Samuel Marcus has released Milmar Estate, Inc., from any claim or cause of action.

FOURTH AFFIRMATIVE DEFENSE

Samuel Marcus has waived any right or claim to relief against Milmar Estate, Inc., and is estopped from asserting same.

FIFTH AFFIRMATIVE DEFENSE

Any obligation or obligations which at any time were owed to Samuel Marcus by Milmar Estate, Inc., have been paid in full.

SIXTH AFFIRMATIVE DEFENSE

The said claims of Samuel Marcus are unfounded in fact and false in nature.

SEVENTH AFFIRMATIVE DEFENSE

Milmar Estate, Inc., never authorized, directed, or instructed any agent, officer, or employee to incur the alleged obligations to Samuel Marcus for any loan or advance of Samuel Marcus on which the said fifth count is predicated.

EIGHTH AFFIRMATIVE DEFENSE

This count fails to state a claim upon which relief can be granted.

MAURICE C. BRIGADIER,
Attorney for Defendant,
Milmar Estate, Inc.

Reply of Samuel Marcus to the Answer and Answer to the Cross-Claim of Defendant, Milmar Estate, Inc.

(Filed—November 15, 1954)

SAMUEL MARCUS, one of the defendants above named, by way of Reply to the Answer of his co-defendant, Milmar Estate, Inc., says that the allegations of paragraph thirteen of the Answer are denied.

FIRST SEPARATE DEFENSE TO THE ANSWER OF THE DEFENDANT, MILMAR ESTATE, INC.

1. The defendant Milmar Estate, Inc. comes into Court with unclean hands.

SECOND SEPARATE DEFENSE TO THE ANSWER OF DEFENDANT MILMAR ESTATE, INC.

2. The defendants Milmar Estate, Inc. and Al Kevelson and the plaintiffs have brought the above action by collusion and connivance between them merely for the purpose of giving this Court jurisdiction. There is, in fact no controversy between the defendants Milmar Estate, Inc. and Al Kevelson and the plaintiffs, they having confederated and conspired between them to bring the defendant Samuel Marcus into this Court.

THIRD SEPARATE DEFENSE

3. The answer of the defendant Milmar Estate, Inc. is replete with surmises and inferences unwarranted by the Complaint filed herein and consequently the defendant Samuel Marcus reserves the right prior to or at the time of the Final Hearing of this cause, to move to strike out the thirteenth paragraph of the defendant's, Milmar Estate, Inc. answer.

By way of Answer to the cross claim of the defendant Milmar Estate, Inc., the defendant, Samuel Marcus says that:

Reply of Samuel Marcus to the Answer and Answer to the Cross-Claim of Defendant, Milmar Estate, Inc.

As to the First Count

4. As to the allegations of the first paragraph, this defendant makes the same answer thereto as was made by him to the corresponding paragraphs of the Complaint, to the same extent as if herein repeated in words at length.

5. As to paragraph two, the defendant denies that there is an actual controversy now existing between the defendant Milmar Estate, Inc. and the plaintiffs which is in need of a declaration of rights by this Court. To the contrary this defendant alleges that the so called controversy between the defendant Milmar Estate, Inc. and the plaintiffs is non-existant in fact but was concocted and manufactured by the plaintiffs and the defendant Milmar Estate, Inc. solely for the purpose of bringing this defendant into this Court. The balance of said paragraph is admitted.

6. This defendant answering the allegations of paragraph three, makes the same answers thereto as was made by him to the correspondingly numbered paragraphs of the Complaint.

7. The allegations of paragraph four are denied.

8. As to paragraph five, this defendant admits that he has asserted and does assert a right, title and interest in certain stock certificates of Milmar Estate, Inc. issued prior to September 14th, 1948 which now are or may be in his possession. He denies the balance of said paragraph.

8a. Paragraph six is denied except as between cross-claimant, Milmar Estate, Inc. and this defendant.

As to the Second Count

9. This defendant makes the same answers to the allegations of paragraph one as was made by him to the correspondingly numbered paragraphs of the Complaint.

Reply of Samuel Marcus to the Answer and Answer to the Cross-Claim of Defendant, Milmar Estate, Inc.

10. This defendant denies that there is an actual controversy now existing between the parties with respect to which the defendant Milmar Estate, Inc. is in need of a declaration of rights by this Court. To the contrary, this defendant alleges that the alleged controversy was concocted and manufactured between the defendant Milmar Estate, Inc. and the plaintiffs solely for the purpose of bringing this defendant into this Court. There is a controversy between this defendant and his co-defendant Milmar Estate, Inc. and between this defendant and plaintiffs.

11. This defendant makes the same answer to paragraph 3 as was made by him to the correspondingly numbered paragraphs of the Complaint.

12. Paragraph four is denied.

13. As to paragraph five this defendant admits that he has asserted and does assert a right title and interest in certain stock certificates of Milmar Estates, Inc. issued prior to September 14th, 1948 which now are or may be in his possession. He admits that he has asserted and does assert other claims against Milmar Estate, Inc. and William Miller and Al Bierman including a claim that he is an officer, director, and stock holder of Milmar Estate, Inc. and a creditor thereof. The balance of said paragraph is denied.

14. As to paragraph six, the allegation thereof is admitted to be true as of the present time.

AS TO THE THIRD COUNT

15. This defendant makes the same answer to paragraph one of this Count as was made by him to the correspondingly numbered paragraphs of the Complaint.

Reply of Samuel Marcus to the Answer and Answer to the Cross-Claim of Defendant, Milmar Estate, Inc.

16. As to paragraph two, this defendant admits that presently there is an actual controversy between the parties hereto but denies that originally such was the case. He contends that there never was a bona fide controversy between the plaintiffs and his co-defendant. The Complaint herein was filed by a collusive agreement between the plaintiffs and the defendant Milmar Estate, Inc. for the purpose of bringing this defendant into this Court.

17. Paragraphs three and four are admitted.

18. Paragraph five is denied.

19. Paragraphs six and seven are admitted. Except this defendant denies that his claim is asserted without foundation.

• • •

[Answers to fourth, fifth, sixth and seventh counts omitted.]

• • •

DEFENSES TO ALL COUNTS OF THE CROSS-CLAIM

a. Cross-claimant Milmar Estate, Inc. comes into this Court with unclean hands and is consequently entitled to no relief in this Court.

b. No enforceable contract was ever entered into between this defendant and cross-claimant and consequently, cross-claimant is not entitled to relief in this Court.

c. This Court will not make a contract between cross-claimant and this defendant and/or the plaintiffs and consequently cross-claimant is entitled to no relief in this Court.

d. This defendant has tendered and now tenders himself willing to return to cross-claimant any and all moneys paid by it to this defendant upon condition that cross-

Reply of Samuel Marcus to the Answer and Answer to the Cross-Claim of Defendant, Milmar Estate, Inc.

claimant authorize Mr. Abe Lieberman, the Escrow holder, to return to this defendant the securities and documents deposited by him with the said Abe Lieberman on September 14th, 1948.

e. This defendant was wholly justified in filing lis Pendens against the lands and premises owned by cross-claimant.

f. Plaintiffs and cross-claimant confederated, conspired and connived to and with each other in bringing the action above named and filing the cross-claim against this defendant, merely for the purpose of bringing this defendant into this Court, all of which was done wrongfully and maliciously for the purpose of injuring and harrassing this defendant.

g. Assuming but not admitting that the paper writing of September 14th, 1948 entered into between the plaintiffs and the defendant Milmar Estate, Inc. has any legal efficacy, then and in that event the plaintiffs and cross-claimant committed an intentional and unjustifiable breach of said alleged understanding in that by filing the original Complaint herein, they committed a breach of the terms and conditions of said alleged agreement which immediately entitled this defendant to declare a default in the performance of said written understanding; which default was in fact declared by this defendant and he immediately became entitled and is now entitled to the return of all and singular the securities and documents deposited with Abraham Lieberman, as escrow holder, on September 14th, 1948.

h. The order referred to in the Third Count was improvidently obtained.

Reply of Cross-Claimant, Samuel Marcus to the Answer of Milmar Estate, Inc., to the Cross-Claim Filed by Samuel Marcus Against His Co-Defendant, Milmar Estate, Inc.

For all of which reasons this defendant demands that the cross-claim of defendant Milmar Estate, Inc. be dismissed and that he be allowed costs and counsel fees against it.

s/ ROBERT D. GROSMAN
Attorney for Defendant
Samuel Marcus

JULES E. TEPPER
Of Counsel with Defendant,
Samuel Marcus

Dated: November 9, 1954

Reply of Cross-Claimant, Samuel Marcus to the Answer of Milmar Estate, Inc., to the Cross-Claim Filed by Samuel Marcus Against His Co-Defendant, Milmar Estate, Inc.

(Filed—November 30, 1954)

Cross-claimant, SAMUEL MARCUS, by way of reply to the Answer of Milmar Estate, Inc. to the Cross-claim filed by the said Samuel Marcus against the said Milmar Estate, Inc., says that:

AS TO THE FIRST COUNT

1. By way of reply to paragraph 5, cross-claimant denies that pursuant to the agreement of September 14th, 1948, all of the theretofore issued and outstanding stock of Milmar Estate, Inc. consisting of 1250 shares of stock, was canceled, and 1250 new shares of stock were issued in the name of Samuel Marcus. He denies that he knowingly

Reply of Cross-Claimant, Samuel Marcus to the Answer of Milmar Estate, Inc., to the Cross-Claim Filed by Samuel Marcus Against His Co-Defendant, Milmar Estate, Inc.

signed any certificates for the issuance of new shares of stock; or that he had knowingly endorsed in blank any certificates of stock and delivered the same pursuant to the agreement of September 14th, 1948.

2. Cross-claimant denies that the document marked "Exhibit A" annexed to the Answer and Counterclaim of defendant, Samuel Marcus, is a copy of a definite and effective contract executed on the 14th day of September, 1948. He admits that the original of said alleged contract bears his signature in a representive capacity, as president of Milmar Estate, Inc.; as alleged in paragraph 7.

3. Replying to paragraph 12 Cross-claimant denies that the document marked "Exhibit A" annexed to the Answer and Counterclaim of defendant, Samuel Marcus, is a copy of a definite and effective contract executed on the 14th day of September, 1948.

4. By way of reply to paragraph 14, Cross-claimant denies that he has not and cannot make any valid tender. He denies that the statement contained in paragraph 27 does not constitute a valid, lawful or effective tender, or that it is insufficient in law to accomplish any objective sought to be accomplished by Samuel Marcus.

5. By Way of Reply to The Several Affirmative Defenses, Cross-claimant says that:

First: He denies that the Cross-claim fails to state a claim against Milmar Estate, Inc. upon which relief can be granted.

Second: He denies that the transaction and agreement and contract entered into and executed on the 14th day of September, 1948 is lawful, valid, effective and enforceful.

Reply of Cross-Claimant, Samuel Marcus to the Answer of Milmar Estate, Inc., to the Cross-Claim Filed by Samuel Marcus Against His Co-Defendant, Milmar Estate, Inc.

THIRD: He denies that he cannot predicate any claim or cause of action or demand for relief or judgment upon any alleged rescission of any agreement or transaction of September 14th, 1948, because, among other grounds, he has not lawfully, validly, or effectively rescinded the said agreement, contract or transaction.

FOURTH: He denies that he has never tendered to any person or party any sum of money; he denies that he has never been ready, willing or able to make a valid, lawful or effective tender of any moneys for benefits received by him pursuant to or relating to any agreement, contract or transaction of September 14th, 1948.

FIFTH: He denies that he has remained silent and inactive with respect to any claims which he may have arising out of or relating to the contract, agreement or transaction of September 14th, 1948, for an extended period of time, without justification therefor, and that he is thereby barred by reason of his laches.

SIXTH: He denies that he has gambled and speculated with any claim which he alleges to have, in that he did not participate or engage in any transaction involving or relating to Milmar Estate, Inc., or his alleged ownership in shares of stock thereof or the conduct of his alleged office or position in the said corporation subsequent to September 14, 1948. He denies that he assumed no liabilities and ran no risks and asserted no claims until the affairs of the corporation were in such state that he ran no risk of any liability by reason of his allegedly being an officer or stockholder.

SEVENTH: He denies that over an extended period of time he did not in any manner engage or participate in

Reply of Cross-Claimant, Samuel Marcus to the Answer of Milmar Estate, Inc., to the Cross-Claim Filed by Samuel Marcus Against His Co-Defendant, Milmar Estate, Inc.

any business transactions of Milmar Estate, Inc., or participate in any affairs relating to Milmar Estate, Inc., and that consequently is barred by his laches.

EIGHTH: He denies that he accepted Milmar Estate, Inc., checks drawn by William Miller and Al Kevelson to his own order and retained the benefits thereof, with full knowledge of all facts on which he now predicates his claim for relief.

NINTH: He denies that he did not participate in the condemnation proceeding involving the property of Milmar Estate, Inc., knowing that Al Kevelson, William Miller, and Al Bierman, as officers of Milmar Estate, Inc., were actively participating in the said condemnation proceeding; he denies that he acquiesced in and permitted Al Kevelson, William Miller, and Al Bierman to act as officers and to participate in the said condemnation proceeding. He denies that he is estopped by his conduct and barred by his laches.

TENTH: He denies that he did not participate in the dower action instituted in the Superior Court of New Jersey by Milmar Estate, Inc., against Sarah Marcus, the wife of Samuel Marcus, knowing that Al Kevelson, William Miller, and Al Biermar, as officers of Milmar Estate, Inc., were actively participating in the said dower action, and that he acquiesced in and permitted Al Kevelson, William Miller, and Al Bierman to act as officers and to participate in the said dower action. He denies that he is estopped by his conduct and barred by his laches.

ELEVENTH: Cross-claimant denies that he has waived any and all claims or rights by reason of his acts and conduct as hereinabove set forth.

Reply of Cross-Claimant, Samuel Marcus to the Answer of Milmar Estate, Inc., to the Cross-Claim Filed by Samuel Marcus Against His Co-Defendant, Milmar Estate, Inc.

TWELFTH: Cross-claimant denies that he has elected to affirm the contract, agreement, and transaction of September 14, 1948, with knowledge of all material facts relating thereto; he denies that he is barred from rescinding said contract, agreement, or transaction or asserting any claim or compiaint relating or respecting thereto.

THIRTEENTH: He denies that he failed, neglected, and refused to assert any claim of rescission for the alleged trickery, deceit, fraud, and misrepresentations within a reasonable time after allegedly ascertaining the basis thereof; he denies that he is now barred from rescission by reason of his laches.

FOURTEENTH: He denies that he entered into the agreement, contract and transaction of September 14, 1948 with knowledge of all material facts relating thereto. He denies that he is barred from asserting any rescission thereof or any claim relating thereto.

FIFTEENTH: He denies that he has knowingly executed written documents conveying, surrendering, and releasing any right, title, or interest in or to Milmar Estate, Inc., or any stock certificates in Milmar Estate, Inc.; he denies that he has executed written documents resigning as officer and director of Milmar Estate, Inc.

SIXTEENTH: The Cross-claimant denies that the agreement, contract, and transaction of September 14, 1948 is valid, effective, lawful and binding, and that the same has been affirmed by him.

SEVENTEENTH: He denies that he has asserted repugnant facts and claims in the various counts of his counterclaim and that he has waived any right to rescission or relief thereby.

Reply of Cross-Claimant, Samuel Marcus to the Answer of Milmar Estate, Inc., to the Cross-Claim Filed by Samuel Marcus Against His Co-Defendant, Milmar Estate, Inc.

EIGHTEENTH: He denies that he had knowledge of all material facts when he entered into the agreement, contract, and transaction of September 14, 1948, and if there were any facts which he did not know, the existence of which constitute any part of the alleged trickery, deceit, fraud or misrepresentations, he had knowledge of such facts as would place him under a duty to further inquire, and that by his inquiry and the exercise of prudence, he could have avoided the consequence of the alleged trickery, deceit, fraud, and misrepresentation.

NINETEENTH: The Cross-claimant denies that by his act and conduct on September 14, 1948 he has waived any claim against this defendant and the cross-claimant denies that he is estopped from asserting any claim against the defendant.

TWENTIETH: He denies that he has failed to exercise proper care to avoid the consequences of his alleged injury.

TWENTY-FIRST: He denies that he well knew, before entering into the contract, agreement, and transaction of September 14, 1948, all of the material facts relating to the said transaction; that he knowingly and voluntarily entered into the said contract, agreement, and transaction; that he is now barred from any recovery or relief arising out of or relating to the said agreement, contract, or transaction.

TWENTY-SECOND: Cross-claimant denies that the second, third, and fourth counts of the cross-claim are factually repugnant with the first count. He denies that he has taken inconsistent and repugnant positions unauthorized by any rule or practice of court, and that the same constitutes an

Reply of Cross-Claimant, Samuel Marcus to the Answer of Milmar Estate, Inc., to the Cross-Claim Filed by Samuel Marcus Against His Co-Defendant, Milmar Estate, Inc.

election or waiver of any right of rescission or other relief demanded in the first count of the complaint.

TWENTY-THIRD: Cross-claimant is ready, willing and able to tender to the parties to this suit entitled thereto, the moneys paid to him allegedly on account of the sale of 50% of his stock but he has been prevented from so doing by the refusal of the said parties to designate a time and place at which such tender may be made. The said parties have knowingly, willfully and deliberately absented themselves from the State of New Jersey and the jurisdiction of this Court and concealed their whereabouts from cross-claimant purposely so that he would be unable to make a tender of the actual moneys paid to him, as aforesaid.

REPLY TO SECOND COUNT

5a. With respect to paragraph 1, cross-claimant makes the same reply thereto as was made by him to the corresponding allegations, statement, claim and paragraphs of the first count of the cross-claim, precisely as if herein repeated in words at length.

6. By way of reply to paragraph 2 of this Count, cross-claimant denies that the agreement of September 14th, 1948 is binding upon him.

6a. With respect to the first affirmative defense to this count, cross-claimant by way of reply makes the same reply thereto as was made by him to each and every affirmative defense hereinbefore set forth by this cross-claim defendant to the first count of the cross-claim, to the same extent as if herein set forth in words at length.

7. By way of reply to the second affirmative defense cross-claimant denies that the second count of his cross-

Reply of Cross-Claimant, Samuel Marcus to the Answer of Milmar Estate, Inc., to the Cross-Claim Filed by Samuel Marcus Against His Co-Defendant, Milmar Estate, Inc.

claim is repugnant to the other counts contained in his said Cross-claim; that he has taken factually inconsistent and mutually repugnant positions unauthorized by any rule or practice of Court.

REPLY TO THIRD COUNT

7a. Cross-claimant makes the same reply to the allegations of the first paragraph of this count as was made by him to the corresponding paragraphs set forth in the cross-claim defendant's answer to the first and second count of the cross-claim, precisely as if herein repeated in words at length.

8. By way of reply to the third paragraph of this Count, cross-claimant denies that he was never the owner of any stock allegedly owned by William Miller, but to the contrary charges that he was at all times the owner of said stock for reason of the fact that said William Miller never paid any part of the $50,000.00 which he was obligated to pay therefor. He denies further that said stock was released from the security transaction as mentioned in this paragraph.

9. By way of reply to the first affirmative defense to the Third Count, cross-claimant makes the same reply as was made by him to each and every affirmative defense set forth by cross-claim defendant as a defense to the First and Second Counts of the Cross-claim, to the same extent as if set forth at length herein and directing the same to the Third Count.

BY WAY OF REPLY TO FOURTH COUNT

9a. Cross-claimant by way of reply to paragraph 1 of this Count makes the same reply thereto as was made by

Reply of Cross-Claimant, Samuel Marcus to the Answer of Milmar Estate, Inc., to the Cross-Claim Filed by Samuel Marcus Against His Co-Defendant, Milmar Estate, Inc.

him to the corresponding paragraphs of the Cross-claim defendant's answer to the First Count, precisely as if herein repeated in words at length.

10. By way of reply to the first affirmative defense of this Count, Cross-claimant makes the same reply as was made by him to each and every affirmative defense herein before set forth as a defense to the First, Second and Third Count of the Cross-claim to the same extent as if set forth at length herein and directing the same to the Fourth Count.

11. By way of reply to the third affirmative defense, cross-claimant denies that he has asserted in the Second Count of his Cross-claim a demand for judgment in the amount of $35,000.00, together with interests and costs, and has thereby elected to take the fund deposited in Court and has waived any right to claim any default, but to the contrary he alleges that the allegations of said Count were stated in the alternative as cross-claimant had a right to do under the rules of this Court.

12. By way of reply to the fourth affirmative defense cross-claimant denies that he is barred and estopped from declaring a default and is in laches with respect to any alleged right thereto.

By Way of Reply to the Fifth Count

13. The cross-claimant, by way of reply to the first affirmative defense of this Count, denies that the cause of action did not accrue at any time within six years next before the commencement of the within action, by virtue whereof the Statute of Limitations constitutes a bar to the maintenance of the said action by cross-claimant.

Reply of Cross-Claimant, Samuel Marcus to the Answer of Milmar Estate, Inc., to the Cross-Claim Filed by Samuel Marcus Against His Co-Defendant, Milmar Estate, Inc.

14. He denies that the transactions related to are usurious as alleged in the second affirmative defense of this Count.

15. He denies that he has ever released Milmar Estate, Inc. from any claim or cause of action as alleged in the third affirmative defense.

16. He denies that he has waived any right or claim to relief against Milmar Estate, Inc., and is estopped from asserting same, as alleged in the fourth affirmative defense.

17. He denies that any obligation or obligations which at any time were owed to him by Milmar Estate, Inc., have been paid in full, as alleged in the fifth affirmative defense.

18. He denies that his claims are unfounded in fact and false in nature, as alleged in the sixth affirmative defense.

19. He denies that Milmar Estate, Inc., never authorized directed, or instructed any agent, officer, or employee to incur the alleged obligations to him for any loan or advance made by him on which the said Fifth Count is predicated, as alleged in the seventh affirmative defense.

20. He denies that this count fails to state a claim upon which relief can be granted.

WHEREFORE cross-claimant demands judgment against the cross-claim defendant Milmar Estate, Inc. as prayed for in his Cross-claim against it.

ROBERT D. GROSMAN,
Attorney for Cross-claimant.

JULES E. TEPPER,
Of Counsel with Cross-claimant.

Reply of Defendant Samuel Marcus to the Plaintiff's Answer to Counterclaim of Samuel Marcus; and Answer to Counterclaim of Plaintiffs Al Bierman and William Miller

(Filed—November 30, 1954)

By way of reply to the answer of plaintiffs Al Bierman and William Miller to the counterclaim of defendant Samuel Marcus (which answer is mistakenly designated as a "reply") this defendant, Samuel Marcus says that:

Reply to First Count

1. This defendant denies Al Bierman is the owner of 250 shares of the capital stock of the defendant Milmar Estate, Inc., as alleged in paragraph six.

2. Replying to paragraph nine, this defendant denies that he knowingly caused to be canceled all of the issued and outstanding stock of Milmar Estate, Inc.; that 1250 new shares of stock were issued by Milmar Estate, Inc. in the name of Samuel Marcus, which shares Samuel Marcus signed as President, and that thereupon all of said shares were endorsed in blank by Samuel Marcus and delivered to the plaintiffs and Abraham Lieberman, pursuant to the agreement. If such papers, documents, stock certificates, etc. were in fact signed by this defendant, they were signed inadvertently and are of no legal effect.

3. In reply to paragraph twelve this defendant denies that as part of the transaction of September 14th, 1948 he in fact resigned as an officer and director of Milmar Estate, Inc. and that since that date has not held office either as President or director of Milmar Estate, Inc.

4. In reply to paragraph thirteen this defendant denies execution of a valid and effective agreement in a form set forth in Exhibit A to the answer of Samuel Marcus. Said agreement is of no validity whatsoever.

Reply of Defendant Samuel Marcus to the Plaintiff's Answer to Counterclaim of Samuel Marcus; and Answer to Counterclaim of Plaintiffs Al Bierman and William Miller

5. In reply to paragraph twenty-three this defendant denies that upon the completion of the transaction of September 14th, 1948 or at any other time Al Kevelson was the owner of 40% of the stock of Milmar Estate, Inc.; that William Miller was the owner of 40% of the stock of Milmar Estate, Inc., and that Al Bierman was the owner of 20% of the stock of Milmar Estate, Inc.

6. In reply to paragraph twenty-four this defendant denies that upon the completion of the transaction of September 14th, 1948 Al Kevelson was the owner of 40% of the stock of Milmar Estate, Inc.; that William Miller was the owner of 40% of the stock of Milmar Estate, Inc. and Al Bierman was the owner of 20% of the stock of Milmar Estate, Inc.

7. In reply to paragraph twenty-five this defendant denies that said alleged agreement of September 14th, 1948 is a valid and effective agreement in the form set forth in Exhibit A annexed to the answer of Samuel Marcus.

7a. In reply to paragraph 26 this defendant denies that he has no interest, right, title or claim in the stock certificates or other documents left with Abraham Lieberman.

8. In reply to paragraph twenty-seven this defendant insists that the offer to make a tender is binding upon the plaintiffs for reason of the fact that they purposely refused to designate a time and place where the actual tender may be made and the present whereabouts of the plaintiffs is unknown to this defendant; and the whereabouts of the registered agent of his co-defendant Milmar Estate, Inc. are likewise unknown to this defendant.

Reply of Defendant Samuel Marcus to the Plaintiff's Answer to Counterclaim of Samuel Marcus; and Answer to Counterclaim of Plaintiffs Al Bierman and William Miller

9. This defendant in reply to the several affirmative defenses to the First Count of the plaintiff's answer to his counterclaim says that:

a. He denies that his counterclaim fails to state a claim upon which relief can be granted.

b. He denies that he failed to rescind the contract of September 14th, 1948, in the alternative.

c. He denies that he cannot rescind the contract of September 14th, 1948.

d. He denies that he has failed to make a valid tender of the moneys received by him allegedly in pursuance to the writing of September 14th, 1948. The plaintiffs and his co-defendant Milmar Estate, Inc. are estopped from raising this issue for reason of the fact that they have refused to designate a time and place at which they will all be present, so that an effective tender can be made to them.

e. Defendant Samuel Marcus denies that he cannot make a valid tender of the moneys received by him pursuant to the alleged agreement of September 14th, 1948.

f. Defendant denies that he is barred by laches for the reasons enumerated in the Sixth affirmative defense.

g. Defendant denies that he is estopped by his conduct as set forth in the sixth affirmative defense and otherwise.

h. Defendant denies that he waived any and all alleged rights set forth in the counterclaim.

i. Defendant denies that he affirmed the transaction and therefore cannot rescind same.

Reply of Defendant Samuel Marcus to the Plaintiff's Answer to Counterclaim of Samuel Marcus; and Answer to Counterclaim of Plaintiffs Al Bierman and William Miller

j. Defendant denies that he failed to rescind for the alleged fraud immediately upon ascertaining the alleged facts which he claims constitute fraud.

k. He denies that he elected not to rescind.

l. The resignation signed by this defendant as officer and director of Milmar Estate, Inc. referred to in the twelfth affirmative defense was executed conditionally and deposited in escrow with Hon. Abraham Lieberman. The condition upon which the said resignation was executed was that said resignation was to be held in escrow by the said Hon. Abraham Lieberman until such time as the moneys due to him from the sale of 50% of his stock holdings in the defendant Milmar Estate, Inc. was fully paid and not otherwise.

m. The agreement of September 14th, 1948 is not valid and binding as alleged in the thirteenth affirmative defense.

n. The agreement of September 14th, 1948 and its performance were not affirmed by Samuel Marcus.

o. The allegations of the fifteenth affirmative defense are denied.

p. The allegations of the sixteenth, seventeenth, and eighteenth affirmative defenses are denied.

By Way of Reply to Plaintiffs' Answer to the Second Count of the Counterclaim

This counterclaimant says that:

10. By way of reply to paragraph one counterclaimant makes the same reply as was made by him to the corre-

sponding paragraphs of the answer to the First Count of the counterclaim.

11. By way of reply to paragraph two counterclaimant denies that the allegations of paragraph twenty-nine mentioned therein do not constitute a statement of claim which plaintiffs are required to affirm or deny.

12. By way of reply to the first affirmative defense to the Second Count, counterclaimant makes the same reply as was made by him to corresponding affirmative defenses of the first count.

REPLY TO THIRD COUNT

13. Counterclaimant by way of reply to paragraph one, makes the same reply as was made by him to the corresponding numbered paragraphs of the answer to the First Count of the Counterclaim.

14. By way of reply to the third paragraph, counterclaimant alleges that no part of the original indebtedness of $50,000.00 due to him from the plaintiff William Miller was ever paid.

REPLY TO FIRST AFFIRMATIVE DEFENSE TO THE THIRD COUNT

15. By way of reply counterclaimant makes the same answers as were made by him to the affirmative defenses to the First Count, precisely as if herein repeated in words at length.

REPLY TO FOURTH COUNT

16. By way of reply to paragraph one this counterclaimant makes the same reply to the allegations of this para-

graph as was made by him to the correspondingly numbered paragraphs of the First Count of the answer to the Counterclaim.

REPLY TO THE AFFIRMATIVE DEFENSES TO THE FOURTH COUNT

q. Counterclaimant makes the same reply to the allegations of this paragraph as was made by him to the affirmative defenses of the First Count.

r. He denies that he lacks the right to declare a default.

s. He denies the allegations that he has waived his right to declare a default.

t. He denies that he is estopped from declaring a default.

u. He denies that he has elected to take the fund of $35,000.00 deposited in the Court.

v. He denies that under the allegations of the Fourth Count, he lacks status to demand the relief therein demanded.

BY WAY OF ANSWER TO THE COUNTERCLAIM OF PLAINTIFFS AL BIERMAN AND WILLIAM MILLER AGAINST DEFENDANT, SAMUEL MARCUS

The defendant Samuel Marcus says that:

17. Paragraph one is admitted.

18. Paragraph two is admitted except that there is a true and actual controversy now existing between the plaintiffs and his co-defendants Milmar Estate, Inc. and Al Kevelson. The action instituted by the plaintiffs who are the counterclaimants herein against the defendant Milmar

Reply of Defendant Samuel Marcus to the Plaintiff's Answer to Counterclaim of Samuel Marcus; and Answer to Counterclaim of Plaintiffs Al Bierman and William Miller

Estate, Inc. and Al Kevelson, co-defendants, resulted from an agreement and conspiracy entered into between them to bring this defendant into this Court. The only true controversy existing in this case is between the plaintiffs, Milmar Estate. Inc., Al Kevelson, co-defendants and this defendant.

19. Paragraph three is admitted.

20. Paragraph four is denied.

21. Paragraph five is denied.

22. Paragraph six is denied.

23. As to paragraph seven, this defendant is without sufficient information or knowledge to form a belief and consequently neither affirms or denies the same but puts the counterclaimants upon their proof.

24. As to paragraph eight, this defendant neither affirms nor denies the allegations thereof, but places the counterclaimants upon their proof.

25. Paragraph nine is denied.

26. Paragraph ten is admitted.

27. As to the allegation of paragraph eleven, this defendant neither affirms or denies the same, but places the counterclaimants upon their proof.

28. The allegations of paragraph twelve are admitted.

FIRST SEPARATE DEFENSE TO COUNTERCLAIM OF AL BIERMAN AND WILLIAM MILLER AGAINST THIS DEFENDANT

29. All and singular the several separate defenses contained in the answer of this defendant to the complaint filed

herein by Al Bierman and William Miller, plaintiffs, are made a part of this answer precisely as if herein repeated in words at length.

SECOND SEPARATE DEFENSE

30. There is no contract of any kind for the sale of this defendant's stock holdings in Milmar Estate, Inc., between this defendant and counterclaimants.

THIRD SEPARATE DEFENSE

31. The alleged agreement of September 14th, 1948 is of no effect not only because it is ultra vires but also because this defendant is not a party thereto, personally.

FOURTH SEPARATE DEFENSE

32. This defendant as no time released counterclaimant William Miller from his obligation to pay the aforementioned sum of $50.000 due to him from the said William Miller.

FIFTH SEPARATE DEFENSE

33. This defendant is the true owner of 1230 shares of the capital stock of Milmar Estate, Inc.

SIXTH SEPARATE DEFENSE

34. This defendant is still an officer and director of Milmar Estate, Inc.

SEVENTH SEPARATE DEFENSE

35. Counterclaimants Al Bierman and William Miller, Milmar Estate, Inc. and Bill Miller's Riviera, Inc. are not released from their liability to Samuel Marcus.

Reply of Defendant Samuel Marcus to the Plaintiff's Answer to Counterclaim of Samuel Marcus; and Answer to Counterclaim of Plaintiffs Al Bierman and William Miller

EIGHTH SEPARATE DEFENSE

36. This defendant is presently and immediately entitled to the return of all stock, papers, agreements and documents of whatever nature or description the same may be, deposited with Abraham Lieberman, Esq.

NINTH SEPARATE DEFENSE

37. Al Bierman and William Miller are not entitled to receive from Abraham Lieberman, Esq. any papers, stock certificates, agreements or documents deposited with him in escrow in pursuance of the alleged contract of September 14th, 1948.

TENTH SEPARATE DEFENSE

38. Neither William Miller or Al Kevelson are stockholders of Milmar Estate, Inc. Counterclaimant Al Bierman is a stockholder of Milmar Estate, Inc. to the extent of 20 shares.

WHEREFORE, this defendant demands judgment dismissing the counterclaim of Al Bierman and William Miller.

ROBERT D. GROSMAN,
Attorney for defendant,
Samuel Marcus.

JULES E. TEPPER, ESQ.,
Of counsel with defendant,
Samuel Marcus.

Answer of Al Kevelson, Defendant on Counterclaim to Counterclaim of Defendant, Samuel Marcus, and Cross-Claim

(Filed—December 21, 1954)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
EQUITY DIVISION

Civil Action No. 1026-50

AL BIERMAN and WILLIAM MILLER,
Plaintiffs,

vs.

SAMUEL MARCUS and MILMAR ESTATES, INC., a corporation organized under the laws of the State of New Jersey,
Defendants,

by original summons,
and between the said
SAMUEL MARCUS,
Plaintiff,

vs.

AL BIERMAN and WILLIAM MILLER,
Defendants on Counterclaim,

MILMAR ESTATES, INC., a New Jersey Corporation,
Defendant on Cross-claim,

and

AL KEVELSON and ABRAHAM LIEBERMAN, Escrowee,
Additional Defendants on Counterclaim.

Defendant on counterclaim, Al Kevelson, in answer to counterclaim of defendant, Samuel Marcus, says:

Answer of Al Kevelson, Defendant on Counterclaim to Counterclaim of Defendant, Samuel Marcus, and Cross-Claim

ANSWER TO FIRST COUNT

1. Paragraphs 1, 2 and 3 are admitted.

2. Paragraphs 4 and 5 are denied.

3. In answer to Paragraph 6 the defendant on counterclaim says that the plaintiff, Al Bierman, is the owner of 250 shares of the common capital stock of Milmar Estate, Inc. and hence, is the owner of more than merely the 20 shares referred to by Samuel Marcus.

4. Paragraphs 7 and 8 are denied.

5. Paragraph 9 is denied except that it is admitted that pursuant to the Sept. 14, 1948 agreement Samuel Marcus deposited with Abraham Lieberman certain shares of the capital stock of Milmar Estate, Inc.; pursuant to the agreement of Sept. 14, 1948 all the issued and outstanding stock of Milmar Estate, Inc., which consisted of 1250 shares, was cancelled and 1250 new shares of stock were issued in the name of Samuel Marcus and signed by Samuel Marcus as president, although none of those shares were owned by Samuel Marcus and although he had no interest therein, and all of those shares were forthwith endorsed in blank by Samuel Marcus and delivered pursuant to the agreement of Sept. 14, 1948.

6. Paragraphs 10, 11 and 12 are denied.

7. Paragraph 13 is denied except that it is stated that the document marked Exhibit A annexed to the answer and counterclaim of Samuel Marcus is a copy of a definite and effective contract executed on Sept. 14, 1948, the original of which contract bears the signature of Samuel Marcus and an abbreviation indicating that he executed the said instrument as president.

Answer of Al Kevelson, Defendant on Counterclaim to Counterclaim of Defendant, Samuel Marcus, and Cross-Claim

8. Paragraphs 14, 15, 16, 17 and 18 are denied.

9. In answer to paragraph 13 this defendant on counterclaim admits that on or about Dec. 28, 1950 William Miller and Al Bierman filed a complaint of interpleader against Samuel Marcus and Milmar Estate, Inc., a New Jersey corporation, and obtained from this honorable court a restraint against Samuel Marcus and Milmar Estate, Inc. and other relief, all as set forth in a certain order of this honorable court entered December 28, 1950, and this defendant on counterclaim respectfully refers to the said order for the full contents thereof.

10. Paragraphs 20, 21 and 22 are denied.

11. Paragraphs 23 and 24 are denied except that this defendant on counterclaim admits that William Miller and Al Bierman in part acted for this defendant on counterclaim in the acquisition of the title to all of the authorized and outstanding stock of Milmar Estate, Inc. It is specifically denied that this defendant on counterclaim was an undisclosed principal.

12. This defendant on counterclaim, in answer to paragraph 25, states that the document marked Exhibit A annexed to the answer and counterclaim of defendant, Samuel Marcus, is a copy of a definite and effective contract executed on Sept. 14, 1945, the original of which contract contains the signature of Samuel Marcus and an abbreviation indicating that he executed the said instrument as president.

13. In answer to paragraph 26, this defendant on counterclaim admits that Abraham Lieberman holds certain stock certificates and other documents delivered to him pursuant to the transaction of Sept. 14, 1948. However, this

Answer of Al Kevelson, Defendant on Counterclaim to Counterclaim of Defendant, Samuel Marcus, and Cross-Claim

defendant on counterclaim specifically denies that the said Abraham Lieberman holds any stock certificates or other documents for Samuel Marcus, and this defendant on counterclaim specifically denies that Samuel Marcus is entitled to have any stock certificates or other documents delivered to Abraham Lieberman returned to Samuel Marcus, and this defendant on counterclaim specifically denies that Samuel Marcus has any right, title, interest or claim in or to any stock certificates or other documents delivered to Abraham Lieberman pursuant to the transaction of Sept. 14, 1948.

14. Paragraph 27 is denied. The said allegations do not indicate the person or persons to whom the purported tender is intended. Samuel Marcus has not and cannot make any valid tender and his statement does not constitute a valid, lawful or effective tender, nor is it sufficient in law to accomplish any objective sought thereby to be accomplished by Samuel Marcus.

FIRST AFFIRMATIVE DEFENSE

This count of the counterclaim fails to state a claim against Milmar Estate, Inc., upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The transaction and agreement and contract entered into and executed on the 14th day of September, 1948 is lawful, valid, effective and enforceable.

THIRD AFFIRMATIVE DEFENSE

Samuel Marcus cannot predicate any claim or cause of action or demand for relief or judgment upon any alleged

rescission of any agreement or transaction of Sept. 14, 1948 because, among other grounds, he has not lawfully, validly, or effectively rescinded the said agreement, contract or transaction.

Fourth Affirmative Defense

Samuel Marcus has never tendered to any person or party any sum of money; he has never been ready, willing or able to make a valid, lawful or effective tender of any moneys or benefits received by him pursuant to or relating to any agreement, contract or transaction of Sept. 14, 1948.

Fifth Affirmative Defense

Defendant, Samuel Marcus has remained silent and inactive with respect to any claims which he may have arising out of or relating to the contract, agreement or transaction of Sept. 14, 1948, for an extended period of time, without justification therefor, and is thereby barred by reason of his laches.

Sixth Affirmative Defense

The defendant, Samuel Marcus, has gambled and speculated with any claim which he alleges to have, in that he did not participate or engage in any transaction involving or relating to Milmar Estate, Inc., or his alleged ownership in shares of stock thereof or the conduct of his alleged office or position in the said corporation subsequent to Sept. 14, 1948. He assumed no liabilities and ran no risks and asserted no claims until the affairs of the corporation were in such state that he ran no risk of any liability by reason of his allegedly being an officer or stockholder.

Answer of Al Kevelson, Defendant on Counterclaim to Counterclaim of Defendant, Samuel Marcus, and Cross-Claim

SEVENTH AFFIRMATIVE DEFENSE

Over an extended period of time, Samuel Marcus did not in any manner engage or participate in any business transaction of Milmar Estate, Inc., nor participate in any affairs relating to Milmar Estate, Inc., and consequently is barred by his laches.

EIGHTH AFFIRMATIVE DEFENSE

Samuel Marcus accepted Milmar Estate, Inc., checks drawn by William Miller and Al Kevelson to his own order and returned the benefits thereof, with full knowledge of all facts on which he now predicates his claim for relief.

NINTH AFFIRMATIVE DEFENSE

Samuel Marcus did not participate in the condemnation proceeding involving the property of Milmar Estate, Inc., knowing that Al Kevelson, William Miller and Al Bierman, as officers of Milmar Estate, Inc., were actively participating in the said condemnation proceeding, and he acquiesced in and permitted Al Kevelson, William Miller and Al Bierman to act as officers and to participate in the said condemnation proceeding. By reason thereof, Samuel Marcus is estopped by his conduct and barred by his laches.

TENTH AFFIRMATIVE DEFENSE

Samuel Marcus did not participate in the dower action instituted in the Superior Court of New Jersey by Milmar Estate, Inc., against Sarah Marcus, the wife of Samuel Marcus, knowing that Al Kevelson, William Miller and Al Bierman, as officers of Milmar Estate, Inc. were actively participating in the said dower action, and he acquiesced in and permitted Al Kevelson, William Miller and Al

Bierman to act as officers and to participate in the said dower action. By reason thereof, Samuel Marcus is estopped by his conduct and is barred by his laches.

Eleventh Affirmative Defense

Defendant, Samuel Marcus, has waived any and all claims or rights by reason of his acts and conduct as hereinabove set forth.

Twelfth Affirmative Defense

Defendant, Samuel Marcus, has elected to affirm the contract, agreement and transaction of Sept. 14, 1948 with knowledge of all material facts relating thereto and is now barred from rescinding said contract, agreement or transaction or asserting any claim or complaint relating or respecting thereto.

Thirteenth Affirmative Defense

Samuel Marcus failed, neglected and refused to assert any claim of rescission for the alleged trickery, deceit, fraud and misrepresentations within a reasonable time after allegedly ascertaining the basis thereof, and is now barred from rescission by reason of his laches.

Fourteenth Affirmative Defense

Samuel Marcus entered into the agreement, contract and transaction of Sept. 14, 1948 with knowledge of all material facts relating thereto and is thereby barred from asserting any rescission thereof or any claim relating thereto.

Fifteenth Affirmative Defense

The defendant, Samuel Marcus, has executed written documents conveying, surrendering and releasing any right,

title or interest in or to Milmar Estate, Inc., or any stock certificates in Milmar Estate, Inc., and he has executed written documents resigning as officer and director of Milmar Estates, Inc.

Sixteenth Affirmative Defense

The agreement, contract and transaction of Sept. 14, 1948 is valid, effective, lawful and binding, and the same has been affirmed by Samuel Marcus.

Seventeenth Affirmative Defense

Samuel Marcus has asserted repugnant facts and claims in the various counts of his counterclaim and has waived any right to rescission or relief thereby.

Eighteenth Affirmative Defense

Samuel Marcus had knowledge of all material facts when he entered into the agreement, contract and transaction of Sept. 14, 1948 and if there were any facts which he did not know, the existence of which constitute any part of the alleged trickery, deceit, fraud or misrepresentations, he had knowledge of such facts as would place him under a duty to further inquire, and by his inquiry and the exercise of prudence, he could have avoided the consequence of the alleged trickery, deceit, fraud and misrepresentation.

Nineteenth Affirmative Defense

Samuel Marcus, by his act and conduct on Sept. 14, 1948 has waived any claim against this defendant and is estopped from asserting any claim against this defendant.

Answer of Al Kevelson, Defendant on Counterclaim to Counterclaim of Defendant, Samuel Marcus, and Cross-Claim

TWENTIETH AFFIRMATIVE DEFENSE

Samuel Marcus failed to exercise proper care to avoid the consequences of his alleged injury.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Samuel Marcus well knew, before entering into the contract, agreement and transaction of Sept. 14, 1948 all of the material facts relating to the said transaction, and notwithstanding such knowledge, he knowingly and voluntarily entered into the said contract, agreement and transaction, and is thereby now barred from any recovery or relief arising out of or relating to the said agreement, contract or transaction.

TWENTY-SECOND AFFIRMATIVE DEFENSE

The second, third, and fourth counts of the counterclaim are factually repugnant with the first count. Samuel Marcus has taken inconsistent and repugnant positions unauthorized by any rule or practice of court and the same constitutes an election or waiver of any right of rescission or other relief demanded in the first count of the complaint.

ANSWER TO SECOND COUNT

1. This defendant on counterclaim in answer to paragraph 28 repeats at length each and every allegation, statement, claim and paragraph hereinabove set forth in the answer to the First Count of the counterclaim to the same extent as if set forth at length herein, hereby incorporating the same by reference.

2. In answer to paragraph 29 this defendant on counterclaim states that the agreement of Sept. 14, 1948 is binding

Answer of Al Kevelson, Defendant on Counterclaim to Counterclaim of Defendant, Samuel Marcus, and Cross-Claim

upon Samuel Marcus and this defendant on counterclaim does not object to a payment to said Samuel Marcus in the sum of $35,000, together with interest thereon, which said sum has been deposited with this court. This defendant on counterclaim does not object to the payment of any sum due and owing to Samuel Marcus constituting the unpaid part of the obligation which was originally in the amount of $15,000 owed by William Miller.

FIRST AFFIRMATIVE DEFENSE

This defendant on counterclaim, Al Kevelson, repeats herein at length each and every affirmative defense hereinabove set forth as a defense to the First Count of the counterclaim of Samuel Marcus against this defendant on counterclaim to the same extent as if set forth at length herein, thereby incorporating same by reference and directing the same to the Second Count.

SECOND AFFIRMATIVE DEFENSE

The Second Count is repugnant to the other counts in the counterclaim of Samuel Marcus against this defendant on counterclaim. Samuel Marcus has taken factually inconsistent and mutually repugnant positions not authorized by any rule or practice of court.

ANSWER TO THIRD COUNT

1. This defendant on counterclaim in answer to paragraph 30 herein repeats each and every allegation, statement, claim and paragraph hereinabove set forth in the answer to the First and Second Counts of the counterclaim against this defendant on counterclaim to the same extent

as if set forth at length herein, thereby incorporating the same by reference.

2. Paragraph 31 is denied.

3. Paragraph 32 is denied except that it is admitted that certain shares of stock owned by William Miller were, for a period of time, pledged in a security transaction with Samuel Marcus to secure the payment by William Miller to Samuel Marcus of the sum of $50,000. This defendant on counterclaim further states that Samuel Marcus was never the owner of any stock which he held merely as security and that the stock pledged as aforementioned was released from the security transaction and the note of $50,000 was cancelled by the Sept. 14, 1948 transaction.

4. Paragraph 33 is denied.

5. Paragraph 34 is denied except it is stated that prior to Sept. 14, 1948 twenty shares of the stock of Milmar Estate, Inc. were issued to and in the name of Al Bierman.

6. Paragraph 35 is denied.

First Affirmative Defense

This defendant on counterclaim repeats herein at length each and every affirmative defense hereinbefore set forth as a defense to the First and Second Counts of the counterclaim against this defendant on counterclaim to the same extent as if set forth at length herein, thereby incorporating the same by reference and directing the same to the Third Count.

Answer to Fourth Count

1. This defendant on counterclaim in answer to paragraph 36 repeats each and every allegation, statement, claim and

paragraph hereinabove set forth in the answer to the First Count to the same extent as if set forth at length herein, thereby incorporating the same herein.

2. Paragraph 37 is admitted and reference is made to the agreement and documents constituting the transaction of Sept. 14, 1948 for the contents thereof.

3. Paragraphs 38 and 39 are denied. This defendant on counterclaim states that the sum of $35,000 has been paid into court in the interpleader action captioned as above pursuant to an order of this honorable court.

4. Paragraph 40 and 41 are denied.

First Affirmative Defense

This defendant on counterclaim repeats herein each and every affirmative defense hereinabove set forth as a defense to the First, Second and Third Counts of the counterclaim against this defendant on counterclaim, so the same extent as if set forth at length herein, thereby incorporating the same by reference and directing the same to the Fourth Count.

Second Affirmative Defense

On the 28th day of December, 1950, an order was entered in the above captioned matter in this honorable Court providing that the defendants herein and each of them and their respective officers, agents, servants and attorneys be restrained until further order of this Court from declaring an acceleration default of the balance of the said purchase price and from demanding the return by Abraham Lieberman, Esq., escrow agent to the seller of the stock deposited with him, and that the restraint against calling

an acceleration default and against demanding of said escrow agent the return of the said stock as aforesaid continue so long as the plaintiffs deposit with the Registry of this Court on or before time or times the same shall become due, the various installments of principal of the said obligation, together with interest thereon.

THIRD AFFIRMATIVE DEFENSE

Samuel Marcus has asserted in the second count of his crossclaim a demand for judgment in the amount of $35,000, together with interest and costs, and has thereby elected to take the fund deposited in court and has waived any right to claim any default.

FOURTH AFFIRMATIVE DEFENSE

Samuel Marcus is barred and estopped from declaring a default and is in laches with respect to any alleged right thereto.

CROSS-CLAIM OF AL KEVELSON AGAINST SAMUEL MARCUS

Al Kevelson, by way of cross-claim against Samuel Marcus says that:

1. This court has jurisdiction over all of the parties in the above captioned matter and the parties in this cross-claim and the issues and actions set forth herein.

2. This action is brought under the applicable provisions of the Judicial Code, 28 U. S. C. §2201 and other pertinent statutes and rules of the court because there is an actual controversy now existing between the parties in respect of which Al Kevelson is in need of a declaration of rights by this court.

Answer of Al Kevelson, Defendant on Counterclaim to Counterclaim of Defendant, Samuel Marcus, and Cross-Claim

3. Milmar Estate, Inc., is a corporation of the State of New Jersey, having issued and outstanding 1250 shares of capital stock.

4. On September 14, 1948, an agreement was entered into between the plaintiffs, Al Bierman and William, and the defendants, Samuel Marcus and Milmar Estate, Inc., whereby among other things, all of the issued and outstanding stock of Milmar Estate, Inc. consisting of 1250 shares was to become the property of Al Bierman and William Miller, and Al Bierman and William Miller were to pay $125,000.00 in the following manner: $30,000.00 upon the execution of the agreement, and the balance in monthly payments of $3,000.00 per month for each month that the night club known as Bill Miller's Riviera, and located on the real estate of Milmar Estate, Inc., was open for business, and $1,500.00 for every month that the said premises are closed.

5. Prior to the execution of the said agreement, the stockholders of Milmar Estate, Inc. were Samuel Marcus, Robert Schwartz, William Miller and Al Bierman. The agreement contemplated, among other things, that Al Bierman and William Miller should become the owners of all of the issued and outstanding capital stock of Milmar Estate, Inc., that all stock of Milmar Estate, Inc. not then owned by them should become their property, that Samuel Marcus should get out completely and sever all relations with Milmar Estate, Inc., that Samuel Marcus and Robert Schwartz should resign as officers and directors of Milmar Estate, Inc., that Samuel Marcus should release William Miller, Al Bierman, Milmar Estate, Inc. and Bill Miller's Riviera, Inc. from all claims except the obligation incurred on Sept. 14, 1948, and that William Miller, Al Bierman, Milmar Estate, Inc. and Bill Miller's Riviera, Inc. should

release Samuel Marcus from all claims. A number of papers were executed by the parties to effectuate the said transaction, among which was an agreement of said date between Milmar Estate, Inc., as seller, and William Miller and Al Bierman, as buyer, a copy of which is annexed to the answer of Samuel Marcus marked Exhibit A, except that the said copy omits the signature of Samuel Marcus and his designation as president.

6. As part of said transaction and with the consent of all the parties, all of the issued and outstanding stock of Milmar Estate, Inc. was marked cancelled on the stubs in the stock book, new stock in the amount of 1250 shares was issued in the name of Samuel Marcus, endorsed by him in blank and delivered to the plaintiffs, Al Bierman and William Miller and Abraham Lieberman, Esq., escrow agent, thereby divesting Samuel Marcus of all and any interest in said stock.

7. It was agreed among Al Bierman, William Miller and Al Kevelson that they shall be the owners of all of the issued and outstanding stock of Milmar Estate, Inc. in the following proportions:

Al Bierman—20%—250 shares
William Miller—40%—500 shares
Al Kevelson—40%—500 shares

8. There was paid to Samuel Marcus $30,000.00 upon the execution of the agreement, and thereafter installment payments totalling an additional $60,000.00.

9. The contract dated Sept. 14, 1948 named Milmar Estate, Inc. as the seller of the 1250 shares of stock, and named Al Bierman and William Miller as the buyer.

Answer of Al Kevelson, Defendant on Counterclaim to Counterclaim of Defendant, Samuel Marcus, and Cross-Claim

10. On December 23, 1950, the plaintiffs, Al Bierman and William Miller filed a complaint in the United States District Court to which reference is made for the full particulars thereof, pursuant to which complaint an Order of the United States District Court was entered on the same date, to which reference is made for the full particulars thereof.

11. The plaintiffs have paid into the Registry of the United States District Court the said installments of the purchase price totalling $35,000.00 together with an amount sufficient to cover all interest which became due thereon.

12. Notwithstanding all of the foregoing, Samuel Marcus has asserted a claim to ownership of the stock of Milmar Estate, Inc. in various amounts, has made claim that he is the lawful president and a director of Milmar Estate, Inc., that the agreement of Sept. 14, 1948 is invalid, and that Milmar Estate, Inc., Bill Miller's Riviera, Inc. and William Miller are indebted to said Samuel Marcus.

WHEREFORE, Al Kevelson prays relief as follows, to wit, that this Court adjudicate:

1. That Samuel Marcus has no right, title or interest or ownership of any kind or nature in any of the stock of Milmar Estate, Inc.

2. That the agreement of September 14, 1948 is a valid agreement.

3. That Samuel Marcus is not an officer nor a director of Milmar Estate, Inc.

4. That the note in the amount of $50,000.00 executed by William Miller to Samuel Marcus is cancelled.

Answer of Al Kevelson, Defendant on Counterclaim to Counterclaim of Defendant, Samuel Marcus, and Cross-Claim

5. That Al Bierman and William Miller, Milmar Estate, Inc. and Bill Miller's Riviera, Inc. are released from all liability to Samuel Marcus, except as to the liability of William Miller on the balance of a certain $15,000.00 note executed by William Miller to Samuel Marcus.

6. That Samuel Marcus is not entitled to the return of any stock, papers, agreements or documents deposited with Abraham Lieberman, Esq.

7. That the stock held by Abraham Lieberman, Esq., and all other papers held by him in this transaction be turned over to Al Bierman and William Miller.

8. That all of the stock of Milmar Estate, Inc. issued and outstanding is owned as follows:

William Miller—40%—500 shares
Al Kevelson—40%—500 shares
Al Bierman—20%—250 shares

9. That Samuel Marcus shall deliver up to Milmar Estate, Inc. all certificates of stock of Milmar Estate, Inc. which he may hold.

And Al Kevelson further prays that he granted such further relief as the Court may deem just and proper.

GEORGE KESSELHAUT,
Attorney for Al Kevelson,
defendant on counterclaim.

Answer of Samuel Marcus to the Cross-Claim of Defendant, Al Kevelson

(Filed—December 21, 1954)

Defendant on cross-claim, Samuel Marcus, in answer to the cross-claim of defendant, Al Kevelson, says that:

1. Paragraphs 1, 2 and 3 are admitted.

2. Paragraph 4 is denied.

3. Paragraph 5 is denied except the allegation that prior to the execution of the said alleged agreement, the stockholders of Milmar Estate, Inc. were Samuel Marcus, Robert Schwartz and Al Bierman. This allegation is admitted and likewise the allegation that on the said 14th day of September, 1948, "a number of papers" were executed by the parties in connection with said transaction. The charge is admitted.

4. Paragraph 6 is denied.

5. As to Paragraph 7 this defendant places cross-claimant upon his proof.

6. As to Paragraph 8 the allegations thereof are denied, except that payments totaling $90,000 were made to this defendant.

7. As to Paragraph 9 the allegations thereof are denied. The amount of stock involved in said transaction was 50% of the stock, no more.

8. Paragraphs 10, 11 and 12 are admitted.

Defenses

This defendant sets up the same defenses to the cross-claim of Al Kevelson as he asserts to the cross-claim of defendant, Milmar Estate, Inc. and by reference incorporates the same precisely as if repeated in words at length.

WHEREFORE, cross-claim defendant, Samuel Marcus, demands judgment dismissing the cross-claim of cross-claimant Al Kevelson.

ROBERT D. GROSMAN,
Attorney for Cross-claim Defendant,
Samuel Marcus.

JULES E. TEPPER,
Of Counsel.

Opinion of Modarelli, *D. J.*

(Filed—March 12, 1956.)

Appearances:

CHAZIN & CHAZIN, ESQS.
Attorneys for Plaintiffs
By: ABRAHAM CHAZIN, ESQ., and
THEODORE CHAZIN, ESQ.

MAURICE C. BRIGADIER, ESQ., and
SEYMOUR MARGULIES, ESQ.
Attorneys for Defendant Milmar Estate, Inc.

ROBERT D. GROSMAN, ESQ., and
JULES E. TEPPER, ESQ.
Attorneys for Defendant Samuel Marcus

GEORGE KESSELHAUT, ESQ.
Attorney for Al Kevelson

MODARELLI, District Judge.

This is an interpleader action filed on December 28, 1950, by Al Bierman and William Miller against Samuel Marcus

and Milmar Estate, Inc.[1] In order to understand the full significance of the matters in dispute in this case, I feel it necessary to make a synopsis of the pleadings in narrative form.

THE COMPLAINT

The complaint alleges that on September 14, 1948,[2] Milmar contracted to sell to Bierman and Miller all of its authorized and issued stock, consisting of 1,250 shares of common stock.[3] The purchase price was $125,000.00, payable $30,000.00 cash on September 14, 1948, and $95,000.00 in deferred payments: $3,500.00 each month certain premises at Fort Lee, New Jersey, were open for business, and $1,500.00 each month the premises were closed. On the date of the complaint, the unpaid balance of the purchase price was $35,000.00 and a payment of $1,500.00, plus interest, would be due on January 1, 1951; additional payments of $1,500.00 or $3,000.00, plus interest, would be due on the first day of each succeeding month. Marcus "* * * claims that he is entitled to the said $1,500.00 installment and in-

[1] The action is based on 28 U. S. C. A. § 1335, which provides for interpleader if "Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim * * *" to be entitled to the money in the possession of the plaintiff. Section 1332 confers original jurisdiction upon the federal district courts in all civil actions "* * * between: (1) Citizens of different States:" Plaintiffs allege that Bierman is a citizen and resident of North Carolina; Miller of New Jersey; Marcus of New York; and Milmar of New Jersey. The jurisdiction of this court will be discussed.

[2] See Schedule A attached to this opinion.

[3] Exhibit DM-22, a copy of DME-5, the contract, does not contain "up to 50%" in the 5th paragraph, and "at least 50%" in the 10th paragraph. Lieberman testified he called Schwartz and told him of the insertions and Schwartz approved of the same and said he would insert the same in his copy of the contract. Apparently Schwartz failed to do so.

terest, and to all the installments constituting the balance of the purchase price, to wit: $35,000.00, and interest, and demands payment of same. Defendant, Milmar Estate, Inc., may claim that it is entitled to the said $1,500.00 installment and interest, and to all the installments constituting the balance of the purchase price, to wit: $35,000.00 and interest." If plaintiffs pay any installment to the defendant not entitled to it, the other defendant might declare an acceleration of the entire balance of the purchase price.[4] Plaintiffs require the protection of this court in order that they will not be compelled to pay the balance of the purchase price twice and to restrain defendants from calling a default and invoking the acceleration clause. Plaintiffs have deposited the $1,500.00 installment and interest into the registry of the court and have alleged their willingness to deposit the amount of each installment as it becomes due.[5] They demand that the defendants interplead to determine their rights to collect the obligation described in the complaint; plaintiffs also demand a discharge from all liabilities to the defendants.

On December 28, 1950, on plaintiffs' motion the court (1) enjoined the defendants from commencing or prosecuting any legal proceeding affecting the obligation involved in the interpleader action, (2) ordered the defendants (a) to interplead and determine their rights, (b) not to invoke the acceleration clause of the alleged contract, (c) to show cause on January 15, 1951, why plaintiffs should not be discharged from their alleged liability under the alleged

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[4] The alleged contract contains an acceleration clause providing that if the buyer defaults in any payments, the unpaid balance shall become due and certain stock held in escrow shall be returned to the seller.

[5] The total original deposit was $1,700.00. Subsequent to the filing of the complaint, on various dates plaintiffs deposited a total of $34,400.00 into the registry of the court. Thus, the total fund is $36,100.00.

contract and why the injunctions in the order should not be made permanent.[6]

THE ANCILLARY CLAIMS

Milmar cross-claims against Marcus, demanding judgment that as a result of the September 14, 1948, transaction, Marcus has no right, title, or interest in any Milmar stock certificates issued prior to September 14, 1948; any Milmar stock certificates possessed by Marcus be delivered to Milmar for cancellation; the balance of the proceeds of the condemnation award[7] is the sole property of Milmar and should be delivered and paid to Milmar; an unlawful filing by Marcus of a lis pendens was a malicious use of process for which Milmar demands punitive damages of $100,000.00, and it was also a malicious abuse of process and a malicious prosecution for which it demands $100,000.00, and it was also a slander of title for which it demands $100,000.00, and it was also a malicious interference with a prosepective economic advantage for which it demands $100,000.00.

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[6] The return date of the order to show cause was adjourned by consent. Finally, the parties agreed that the issues arising under the order should be determined by the court as part of its final opinion and judgment. Those issues relating to whether certain requirements of the Interpleader Act have been met will be discussed.

[7] On February 18, 1954, Marcus applied to the court for the appointment of a receiver to take into possession the proceeds of a condemnation award of approximately $757,410.00 by the State of New Jersey for the condemnation of lands of Milmar. On that same day the court ordered the money paid to the Peoples Trust Company of Bergen County, Hackensack, New Jersey, and placed on deposit in an account designated "Walter G. Winne, Master of the United States District Court," District of New Jersey, not to be disbursed except by the express order of this court. In the same order, the court ordered $77,500.00, plus interest, paid to the holder of record of the first mortgage on the condemned lands of Milmar.

Marcus filed his responsive pleading on October 25, 1954, in which he cross-claims against Milmar and Al Kevelson,[8] and counterclaims against the plaintiffs. His claims are in the alternative: The September 14, 1948, document is null and void, and there is no contract relating to the sale of any Milmar stock; Lieberman must deliver to him all the stock and all other documents deposited by him pursuant to the September 14, 1948, document;[9] he is the owner and presently entitled to possession of 1,230 shares of Milmar; Bierman, Miller, and Kevelson are not the duly elected officers and directors of Milmar, have no right to act as such and must be restrained from so acting; in the alternative, if the September 14, 1948, document is a contract, $35,000.00, plus $15,000.00, must be paid to him; he is the owner and entitled to possession of 630 shares of Milmar stock; Miller, Bierman, Milmar, and Kevelson have defaulted in paying money due him under the September 14, 1948, contract, so that he has the right to the possession of the Milmar stock held by Lieberman as escrowee, who should deliver to him all documents held by him pursuant to that contract. He also cross-claims against Milmar for $46,801.23 allegedly loaned to it.

Bierman and Miller counterclaim against Marcus: The transaction of September 14, 1948, is a valid contract; Marcus has no right, title, or interest in any of Milmar's stock; Marcus is not an officer or director of Milmar; the $50,000.00 note executed by Miller to Marcus must be cancelled; Bierman, Miller, Milmar, and Bill Miller's Riviera,

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[8] His role in this controversy will be described *infra*. On January 14, 1955, the court granted Marcus' motion to join Kevelson as a defendant to Marcus' counterclaim. The order was based on findings that the counterclaim was a compulsory one over which the court had ancillary jurisdiction and that the joinder did not deprive the court of jurisdiction. The same order denied Marcus' similar motion to join Abraham Lieberman, whose role also will be described.

[9] Lieberman holds documents in escrow.

Inc., must be released from all liability to Marcus, excepting the liability of Miller on the balance of the $15,000.00 note to Marcus; Marcus is not entitled to the return of any documents held by the escrowee, Lieberman; all documents held by Lieberman pursuant to the September 14, 1948, transaction must be delivered to Bierman and Miller; all of the stock of Milmar is owned as follows: Miller, 40%; Kevelson, 40%; Bierman, 20%; Marcus must deliver to Miller all certificates of stock which he holds.

Kevelson cross-claims against Marcus, alleging essentially the same things as do the plaintiffs against Marcus.

ISSUES

As I see them, the legal and factual issues raised by the pleadings and the evidence are: (1) Has the court jurisdiction under 28 U.S.C.A. §1335?[10] (2) Are Marcus and Milmar "adverse claimants" who "are claiming or may claim to be entitled" to the unpaid balance of the purchase price of the Milmar stock?[11] (3) What substantive law governs the contract claim? (4) Did Bierman, Miller, Milmar, and Marcus on September 14, 1948, contract for the purchase and sale of any amount of Milmar stock owned by Marcus?[12] (5) If there is a contract, was Marcus fraudulently induced to enter into it? (6) Does Milmar owe Marcus any money which he loaned to it? (7) Was Marcus' filing of a lis pendens (a) malicious use or (b) abuse of process, (c) slander of title, or (d) malicious interference with a prospective economic advantage.[13]

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[10] See footnote 1, supra.

[11] See footnote 6, supra.

[12] Is there a contract? If there is, how much stock did Marcus sell?

[13] This issue was raised by Milmar's cross-claim against Marcus. Milmar now asks this court to reserve its decision concerning the issue. Accordingly, the decision will be reserved and if Milmar wishes to pursue that cross-claim, evidence must be submitted.

(1) JURISDICTION

The citizenship of the parties is: Plaintiff Bierman, North Carolina; plaintiff Miller, New Jersey; defendant Marcus, New York; and defendant Milmar, New Jersey. There is diversity of citizenship between the two defendants who allegedly are adverse claimants. But does the co-citizenship of Miller and Milmar jurisdictionally affect the requirement of diversity set forth in 28 U.S.C.A. §1335? The question is discussed in 3 Moore, Federal Practice, paragraph 22.09, page 3029 (2nd ed. 1948), where Professor Moore notes that *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66 (1939) does not settle the doubt "* * * whether, under the Interpleader Act, there must be diversity between the complainant and all the claimants, if the complainant has an interest and is not a mere stakeholder * * *." This court agrees with Professor Moore who believes that interpleader relief is proper despite the co-citizenship of a plaintiff with an interest and a defendant who is an alleged claimant. *Ibid.* The dicta in *Boice* v. *Boice*, 135 F. 2d 919 (CA 3 1943) is not contra. That case also involved a bill in the nature of interpleader. The appellate court affirmed the trial court's order dismissing the complaint which sought interpleader between the defendants. But the court also thought that "* * * the dismissal was right because of an absence of diversity of citizenship between the plaintiff and one of the defendants * * *." Confining that case to its facts, the dicta expresses the court's view that in a case involving a bill in the nature of interpleader where one plaintiff has an active controversy with respect to the subject matter of the suit with one of the defendants whose citizenship is the same as his, the court is without jurisdiction. Although this is also a case involving

a bill in the nature of interpleader,[14] that dicta does not apply. Here there is co-citizenship of plaintiff Miller and defendant Milmar. But not only are there two plaintiffs, one of whose citizenship differs from the two defendants, but further analysis demonstrates the inapplicability of that dicta.

Miller's theory pertaining to Milmar is that he and Bierman purchased all of Milmar's stock. Milmar's theory is the same as Miller's. Thus, there is no "active controversy" between Miller and Milmar. This is so even though the interpleader action was commenced on the ground that since the named seller is Milmar, it "may claim" the unpaid balance of the purchase price of the Milmar stock. But Miller (and Bierman) never have claimed a right to that money. In this case, it is important to distinguish between the phase of the case involving the fund and the controversy concerning the nature of the September 14, 1948, transaction. A similar distinction was made in the *Boice* case, where the Court of Appeals carefully referred to the plaintiff's " • • • active controversy with respect to the subject matter of the suit with one of the defendants • • •." This general language becomes meaningful by referring to the facts of the case described in the lower court's opinion. 48 F. Supp. 183 (D.C. N.J. 1943). In that case, the fund in court resulted from dividends paid to the plaintiff who was formerly a trustee of stock under a declaration of trust. The trust had been terminated, but the stock was still registered in his name. At the time plain-

[14] Bierman and Miller are not merely disinterested stakeholders. Clearly they are vitally concerned with the outcome of this action. Although they have never asserted a claim to the unpaid balance of the purchase price of the Milmar stock (see footnote 5, supra) which they have deposited into the registry of the court, their rights concerning the extent of their ownership in Milmar depend upon the court's decision pertaining to the issues raised by their complaint.

tiff commenced the interpleader action, there was a controversy between him and the settlor's wife concerning the right to the stock. Clearly, that plaintiff did not claim any right to the dividends he deposited in court. Thus, the Court of Appeals decided the district court was without jurisdiction because of the plaintiff's active controversy with one of the defendants and both of them were citizens of the same state. But in the case at bar, the two co-citizens (Miller and Milmar) do not have an active controversy with each other, even though one (Milmar) may have had a claim to the unpaid balance of the purchase price of the Milmar stock at the time the action was commenced because it was the named seller.

On the basis of the foregoing, the court concludes that it has jurisdiction under 28 U.S.C.A. §1335.

(2) The Interpleader Act

Previously, the court decided in an order dated March 24, 1953, that Marcus and Milmar are adverse parties. The question arose on a motion by Milmar to strike interrogatories propounded to it by Marcus. The court's order denying the motion was based on its finding that they were adverse parties. And clearly, on the date of the complaint Marcus was claiming to be entitled to the unpaid balance of the purchase price of the Milmar stock, and Milmar as the named seller in the basic document involved in the transaction "may claim" that money. Thus, they are adverse claimants within the meaning of the Interpleader Act.

(3) Governing Law

Before discussing the remaining issues, what substantive law governs this action?[15] *Kerrigan's Estate* v. *Joseph E.*

[15] In the sixteen briefs which have been submitted, there is no discussion of the conflict of laws phase of the case.

Seagram & Sons, 199 F. 2d 694 (CA 3 1952) was an interpleader action. The court held that the substantive law governing the action was the state law in which the federal court sat as that state's court had declared it, citing *Klaxon Co.* v. *Stentor Mfg. Co.*, 313 U.S. 487 (1941). In the case at bar commenced in this New Jersey federal court, there is a dispute concerning the interpretation of certain documents, which were executed not in New Jersey but in New York. The New Jersey conflict of laws rule is the general rule, viz., the reference regarding question of validity and interpretation of the obligations of the parties is to the place of contracting.[16] *Colozzi* v. *Bevko, Inc.*, 17 N.J. 194, 202 (1955); *James H. Rhodes & Co.* v. *Chausovsky*, 137 N.J.L. 459, 462; *Hinkly* v. *Freick*, 86 N.J.L. 281, 283. That place is New York. Thus the substantive law governing this action is New York law as the New York courts have declared it.[17]

Before I recite my findings of facts in this case, I should like to make some observations. The case was tried intermittently without a jury over a period of approximately four months, consuming nineteen full trial days beginning January 29, 1955. The transcript is 2,471 pages, in six volumes, and hundreds of documents are in evidence, with no attempt made to abbreviate them so that I should only consider the parts which were pertinent to the disposition of this case. The record is a very long one and its analysis was a tedious and rather unwelcome task because of truths evaded, half truths, half lies, some prejury, faulty recollection of events, of incidents, and conversations which took place some seven years before the trial. Thousands of

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[16] Of course, the threshold question is whether there is a contract. But the documents, whatever may be the legal consequences arising therefrom, were executed in New York.

[17] As a result of counsels' disregard of the conflict of laws problem, their briefs contain mainly New Jersey cases.

pages of depositions were taken and were used often to confront witnesses with statements made at the taking of depositions which were irreconcilable with the testimony given at the trial. Many of the characters involved in this litigation might be well characterized as Damon Runyon types, some of whom had a wholesome disregard for the spirituality of the truth and were actuated in testifying to facts which they thought more helpful to their cause than to establishing the truth of what happened. The record is replete with circumlocutions of the truth and the best that could be said for some of the witnesses is that they had no recollection of what actually happened, and so they said whatever came to their minds while on the stand. These factors made it rather difficult to find the facts, and I have done the best I can to establish the operative facts under the circumstances.

The bringing of this case to trial was characterized by much unnecessary delay. It appears to me from the activity of some of the litigants that it was deliberately planned to delay the trial of the issues. Countless motions were made before the trial and during the trial; many postponements of arguments on the motions were had for one reason or another. I do not find it necessary to specify who the delayers were. Motions were made during the trial for discovery of documents ~~and books~~ in an effort by one of the litigants to bolster up his case. Great inconvenience was caused in searching for documents which had long since been put away. It meant rummaging through countless files and thousands of papers in an effort to find something to bolster up the case, but all in vain. I found it necessary to force the trial on because several of the litigants were thoroughly disgusted with the delay and appealed to me personally over the heads of their counsel. Their appeals were justified. It became necessary during the course of the trial for the production of typewriter ex-

perts, which, in my opinion, were absolutely unnecessary. These facts are recited to show the antagonism which prevailed between the litigants and some of which flowed over and affected counsel, who at times became very antagonistic. In such an atmosphere, the court found it difficult at times to get at the true facts.

The Facts[18]

Bill Miller and Sam Marcus met for the first time in January, 1946. Miller was a well known night-club owner and operator. Marcus was an active enterpreneur in many enterprises and business man principally engaged in the photographic supply business. In April, 1946, they purchased from Michael Realty Co., property located at Fort Lee, New Jersey. The closing statement, dated April 5, 1946, shows that the purchasers were Miller and Marcus. The financing, however, apart from a $300,000.00 purchase money mortgage, was that Marcus contributed $93,750.00, Bierman $20,000.00, and Robert Schwartz $11,250.00.[19] Miller executed and delivered a $50,000.00 demand note, dated April 1, 1946, to Marcus.[20] Additionally, Miller later gave Marcus collateral security consisting of all stock issued to Miller in Milmar Estate, Inc., Bill Miller's Riviera, Inc., and Mocambo, Inc.[21] Shortly after the purchase of the property, Milmar Estate, Inc., was incorporated in New Jersey, and Miller and Marcus conveyed title to it. The Milmar stock-book stubs show that prior to Septem-

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[18] Since the issues principally involve an interpretation of documents allegedly comprising a contract, the court has been guided in finding the facts by the principles of law set forth *infra* under Issue (4).

[19] Schwartz also was Marcus' attorney.

[20] The note was renewed on June 1, 1947, payable $500 weekly, commencing June 1, 1948.

[21] Exhibit DME-40.

ber 14, 1948, certificates were issued: On April 15, 1946, 9 shares to Miller, 9 to Marcus, 2 to Marguerite K. Kane; on June 7, 1946, 982 to Miller, 1,107 to Marcus, 125 to Schwartz;[22] on June 7, 1947, 20 shares to Bierman. Milmar's corporate business was that of a landlord; its tenant was Bill Miller's Riviera, Inc., a New Jersey corporation,[23] whose business was the operation of a fashionable night-club known as "Bill Miller's Riviera."

Both Miller and Marcus were active, on-the-scene, continual participants in the affairs and operation of the Riviera night club enterprise, as evidenced by a letter dated April, 1946, written to Mr. William Miller, signed by Mr. William Miller and accepted by Samuel Marcus. On December 19, 1946, Bill Miller's Riviera, Inc., filed a petition in bankruptcy in the United States District Court for this District. Miller on behalf of the corporation stated in the petition that the corporation was insolvent or unable to pay its debts as they matured; he proposed an arrangement with the corporation's unsecured creditors under Chapter XI of the Bankruptcy Act. In the statement of executory contracts, Miller referred to the corporation's lease with Milmar at a yearly rental of $60,000.00. At the time, the petitioner-corporation owed to Milmar the rent for October, November, and December, 1946. The summary of the corporation's debts showed $183,982.21, as compared with assets of $27,500.00. On April 2, 1947, the Referee in Bankruptcy ordered the proposed arrangement confirmed.

When the Riviera failed to pay rent to Milmar, in July, 1947, Milmar commenced dispossess proceedings. The controversy was settled and a new lease was executed.

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[22] Since the parties included Schwartz' shares as part of Marcus' holdings, in this opinion the court will not separately refer to Schwartz's shares. Schwartz is not a party in this action.

[23] Miller was a principal beneficial owner of its stock and actively in control of the corporate operations.

The Riviera corporation's financial plight adversely affected the income of Milmar.[24] Marcus unsuccessfully attempted several times to sell his stock interest in Milmar. Finally, on July 27, 1948, he sent an option letter to Miller.[25] Although Miller never exercised his option, on August 18, 1948, Marcus gave a document to Miller.[26] Previously, Miller had asked Marcus for a written assurance of his participation in a proposed transaction. Miller wanted such a document to reassure Kevelson, with whom Miller anticipated financing the ultimate transaction; in fact, Miller already had received $5,000.00 from Kevelson. The contents of the document are set forth in the footnote.[27]

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[24] Milmar's only income was from Riviera rent. Moreover, Milmar, Miller, and Marcus needed money for their mortgage payments to Michael Realty Co. Despite two helpful modifications of the original mortgage, beginning August 1, 1948, and continuing until July, 1951, their obligation was to pay $5,000.00 each month.

[25] "This is to substantiate our verbal understanding that you are hereby given a ten-day option in which to purchase *my holdings* of the Milmar Estates Inc., owners of the Riviera property for the sum of $125,000.00 payable $30,000.00 cash and the balance at $4,000.00 per month.

"Inasmuch as I am dickering with other interested parties, I cannot make any more than a ten-day option at this price and this option expires midnight the 6th day of August, 1948." (Emphasis supplied.)

[26] Although the disputed transaction did not occur until September 14, 1948, the prior negotiations are relevant evidence in interpreting the legal consequences of the transaction. This is so because Marcus contends that this court should construe the documents involved in the transaction to mean something else than their words indicate. Under New York law, the parol evidence rule is not thereby violated. *O'Neil Supply Co. v. Petroleum H. & P. Co.*, 280 N. Y. 50, 55, 56 (1939); 1 *Corbin on Contracts*, § 22, p. 53 et seq. (1950).

[27] "Agreement made this day between William (Bill) Miller hereinafter called party of the first part also known as the buyer

(Continued on following page)

On or about August 26, 1948, Marcus gave another document to Miller.[28] It was a letter in which Bierman offered to buy all of Marcus' shares in Milmar " • • • consisting

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(Continued from preceding page)

and Sam Marcus hereinafter called party of the second part also known as the seller. The party of the first part agrees to purchase *all right title and interest including all outstanding stocks*, notes, I.O.U.'s options, agreements and any other transactions that the party of the second part has participated in with the party of the first part including the agreements in the following companies and corporations.

1. William (Bill) Miller
2. *Milmar Realty Corp.*
3. Bill Miller's Riviera, Inc.

The party of the second part herewith agrees to sell all of the above mentioned assets which he now claims he is the sole owner and agrees to the following terms of payment for all of the above mentioned items.

"The purchase price for all of the items herein mentioned is One Hundred and Twenty five Thousand Dollars ($125,000.00) to be paid as follows:

"The party of the first part agrees to pay $5,000.00 to the party of the second part upon the signing of this agreement.

" Dollars to be paid by the party of the first part to the party of the second part upon final signing of all papers releases and whatever other documents that will be necessary to be signed to release Bill Miller and all of the other companies and corporations herein mentioned.

"The balance of Dollars to be paid as follows:

"First payment of Three Thousand Dollars shall be paid one Month from date the final documents shall be signed and delivered. Thereafter a payment of Three Thousand Dollars shall be made each month that Bill Miller's Riviera shall be open for business. In the period that Bill Miller's Riviera shall be closed and not open for business a payment shall be made each month of One Thousand Five Hundred Dollars.

"Upon the signing of this agreement it shall be a legal and irrevocable contract." (Emphasis supplied.)

[28] Exhibit DME-2.

of approximately 62½% of the outstanding shares (described as all those shares not held by Bill Miller or Al Bierman) for the sum of $125,000. payable as follows: $19,000. on execution of this agreement, receipt whereof is hereby acknowledged. $11,000. upon execution of the necessary papers called for in this agreement. $3,000. each month on the first day of each and every month that the Riviera (or successor)[29] $1500. each month of the first day of each and every month that the Riviera is closed; * * *."

On August 27, 1948, Marcus received two $5,000.00 checks from Bierman. Marcus signed a receipt for the checks[30] which were a " * * * deposit pending negotiations for the purchase of my [Marcus'] stock of the Milmar Estates, Inc., which includes all outstanding stock excepting that stock owned by William Miller and Al Bierman." The receipt as typewritten contained the figure "$19,000"; "$10,000.00" was inserted in ink and the insertion was initialed by Marcus and Bierman.[31] This receipt was typed or dictated by Marcus on Riviera stationery.

On or about August 28, 1948, there was a meeting in Marcus' New York City office. The participants were Miller and his attorney Lieberman, Marcus and his attorney Schwartz. There was a discussion regarding the sale to Miller and Bierman of all the interests held by Marcus in Milmar. At the end of the conference Miller and Marcus instructed the attorneys, Lieberman and Schwartz, to prepare an agreement to provide for the sale by Marcus of all his interest in Milmar to Miller and Bierman for $125,000.-00. The attorneys knew the proposed terms of the contract

[29] The sentence is incomplete.

[30] Exhibit DME-1.

[31] Bierman's deposit was reduced $9,000.00 because when he produced two $5,000.00 checks and $9,000.00 cash, Marcus refused to accept the cash.

because the three above-described documents were shown to them during the conference.

On September 14, 1948, the same four men met in Schwartz's New York City law office. The purpose of their meeting was to conclude the pending transaction between Miller and Marcus regarding the sale of Milmar stock to Miller and Bierman.[32]

In the basic document the parties are identified as Milmar Estate, Inc., seller, and Al Bierman and William Miller, buyers. The document recites that Milmar has an authorized and issued stock consisting of 1,250 shares of common stock; "the buyer" (Bierman and Miller) desires to purchase from Milmar all of that stock; Milmar sells to the buyer " * * * all of the issued and outstanding shares of the Corporation."; the price is $125,000.00, payable $30,000.00 cash upon execution of the agreement, $95,000.00 " * * * by the Purchaser executing a Purchase Money Mortgage on the real estate and chattels, with interest at four (4%) per cent, and containing the following terms: * * *." $3,000.00 every month that the Fort Lee premises are open for business, $1,500.00 every month that the premises are closed. Further, it is provided that "The stock up to 50%[33] herein purchased by the Buyer and endorsed in blank shall be deposited in escrow with ABE LIEBERMAN, Esq. * * * immediately upon the execution of this Agreement with instructions to the said ABE LIEBERMAN to deliver the sale of the said stock to the Buyer upon payment of the full amount due hereunder." The document also contains a default clause, a promise by the buyer to as-

[32] Miller was authorized by Bierman, who was in North Carolina, to "* * * sign my name to all papers legalizing sale of Milmar Corporation to me."

[33] "Up to", of course, is imprecise language. Miller, Marcus, and their lawyers, however, in fact did deposit exactly 50% of the stock in escrow.

sume a first mortgage, taxes, and insurance debts of Milmar. It is signed on behalf of Milmar by Sam Marcus, President, and on behalf of Bierman by Miller, who also signed his own name.

Other pertinent documents executed by the parties on September 14, 1948, were:[34] (1) A letter addressed to Milmar signed by Miller confirms "our" understanding that Miller will deposit with Lieberman at least 50%[35] "of all of the stock of Milmar Estate, Inc., and 50% of Bill Miller's Riviera, Inc., which shall consist of my own and Al Bierman's." (2) An escrow receipt signed by Lieberman acknowledges that he held certain documents in escrow including "625 shares of Milmar Estates, Inc."[36] (3) A letter signed by Marcus as president of Milmar addressed to Bierman confirms their understanding that Milmar represents that it will pay all of the present outstanding obligations of Milmar " * * * consisting of the corporation's obligations for legal fees or other obligations and loans *to* Samuel Marcus personally." (Emphasis supplied)[37] (4) A real estate mortgage by Bierman and Miller as mortgagors, and Milmar as mortgagee, to secure the payment of the $95,000.00 debt resulting from the basic sale of Milmar stock. The subject matter of the mortgage was land, furniture, fixtures, and equipment then located on the premises as set forth in (5) A chattel mortgage with Bierman and Miller as mortgagors, and Milmar as mortgagee, to secure the payment of the $95,000.00 debt. It is recited that the

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[34] The parties intended all of the documents to constitute their transaction.

[35] "At least" also is imprecise language.

[36] As will appear *infra*, 625 shares was 50% of the *then* issued and outstanding shares of Milmar stock.

[37] This is another example of the sloppy drafting of the documents in this case. Obviously, the intention was by Samuel Marcus personally.

goods covered by the mortgage are "* * * mentioned in the schedule hereunto annexed * * *." However, the schedule page is blank.[38] (6) Marcus, acting as president of Milmar, confirmed with Miller their understanding arrived at September 2, 1948, which included "in the event that the contract of purchase, dated September 14th, 1948, is fulfilled, the said note of Fifty thousand ($50.000.00) Dollars is to be returned to you and we agree to exchange mutual releases."[39] (7) Statement signed by Miller to the effect that he promised to pay to Marcus $15,000.00, plus 4% interest, subject to certain conditions.[40] (8) Letter by Miller to Marcus confirming their understanding that all of Marcus' tabs and checks signed by him at the Riviera were cancelled. (9) Two identical letters by Marcus and Schwartz to Milmar: "The undersigned hereby resigns as an officer and director of the corporation, effective immediately." (10) Milmar Estate, Inc., stock certificate Nos. 17, 18, 19, and 20, totaling 1,250 shares. Marcus is named as the owner of the shares; on the rear of each share at the bottom of the printed form of assignment and transfer, Marcus signed his name, although no other handwriting appears thereon. Miller and Marcus agreed that the form of the transaction would be a sale of stock. Neither Miller nor Marcus produced their stock certificates for assignment to the purchasers. Thus, the mechanics of the transaction were that the certificate stubs of the then is-

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[38] The two mortgages are of doubtful legality for at the time they were executed the named mortgagors did not own the land or the chattels. Milmar was the owner of the real estate and Bill Miller's Riviera, Inc., of the personal property. When queried as to why these futile documents were drawn, both attorneys replied that Marcus demanded the same.

[39] See footnote 20, supra.

[40] Miller obligated himself to pay the $15,000.00 in addition to his obligation under the basic document "in order to sweeten up the deal."

sued and outstanding shares were marked cancelled, and the parties agreed that the absent certificates would be deemed to have been surrendered back to Milmar. Then the four new certificates totaling 1,250 shares were issued in Marcus' name; he endorsed in blank and delivered the certificates to Lieberman; two certificates representing 625 shares were given to Lieberman to be held by him in escrow, and two certificates representing 625 shares were left with Lieberman apparently in his capacity as Miller's lawyer.[41]

This court has found the above-narrated facts as they are evidenced by the many negotiation documents, those executed during the September 14, 1948, meeting and the believable testimony. What legal conclusions must be based thereon?

(4) Is There a Contract? If There Is, What Was Sold?

Marcus has made many arguments relating both to the existence of a contract and the interpretation of any contract held to exist. Thus, based upon research of New York law, the court will set forth the principles of contract law which a New York court would apply to the facts.

This court will not make a contract. If the parties intended to enter into a contract, however, the court will attempt to give effect to a transaction that was not only serious, but which is solemnly recorded by many documents signed by the two men who now are the principal disputants.[42] There is no doubt that the parties intended to make a contract. This court is clearly convinced that on September 14, 1948, the parties believed themselves to be making a contract, to be affecting their legal relations with

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[41] Undoubtedly, the documents drafted for the transaction lacked legal craftsmanship. Nevertheless, as will be discussed below, there is no doubt regarding the intentions of the parties.

[42] See 1 *Corbin on Contracts*, § 149, pp. 483, 486 (1950).

each other. Thus " • • • sound practical policy requires that their mutual expressions should be given an interpretation that will effectuate their belief and intention • • •." *Ibid.* The court's research of New York law did not disclose any cases contrary to such sound principles.

What was sold under the contract? "It is well settled that in construing the provisions of a contract we should give due consideration to the circumstances surrounding its execution, to the purpose of the parties in making the contract, and, if possible, we should give to the agreement a fair and reasonable interpretation. • • • " *Aron* v. *Gillman,* 309 N.Y. 157, 163 (1955). The ascertainment of the substantial intent of the parties is the fundamental rule in the construction of all contracts. *Madawick Contracting Co., Inc.* v. *Travelers Ins. Co.,* 307 N.Y. 111, 119 (1954). The court ascertains that intent not by a literal reading of the words of the contract, nor by a strict grammatical reading of the words, but by reading them in the light of the circumstances existing at the making of a contract. *O'Neil Supply Co.* v. *Petroleum H. & P. Co.,* 280 N.Y. 50, 55, 56 (1939); *Wirth & Hamid Fair Booking, Inc.* v. *Wirth,* 265 N.Y. 214, 219 (1934); *Becker* v. *Frasse & Co.,* 255 N.Y. 10, 14 (1930). The liberal New York law relating to the interpretation of a contract is shown by *Empire Properties Corp.* v. *Manufacturers Trust Co.,* 288 N.Y. 242, 248, 249 (1942), "We have said, 'The intention of the parties must be sought for in the language used. To understand the language we may put ourselves in their place and discern if possible the objects they had in view and the motives which dictated their choice of words. A wider meaning may thereby be disclosed.' (*Halsted* v. *Globe Indemnity Co.,* 258 N.Y. 176, 180.) The object which the parties had in view is, in this case, clear, and so are the motives which dictated their choice of words. The construction which has been placed upon the words the parties have chosen might defeat the object of the parties. The parties have chosen

words which leave room for construction. Even literal construction would leave the meaning of the words open to doubt. The courts should then choose that construction which will carry out the plain purpose and object of the indenture."

Applying these principles of interpretation, the court as is suggested by its previous finding of fact concludes that Bierman and Miller purchased *all* of Milmar's stock, consisting of 1,250 shares. The price was $125,000.00 payable to Marcus: $30,000.00 cash upon execution of the contract and $95,000.00 pursuant to the aforementioned installment payment formula. Miller contracted to pay Marcus an additional $15,000.00, plus 4% interest. Fifty per cent of the 1,250 shares being sold were deposited in escrow with Lieberman, who was to deliver them to Bierman and Miller when they made their final installment payment. Marcus contracted to release Miller from his $50,000.00 debt evidenced by his aforementioned June 1, 1947, note. Marcus and Schwartz resigned as officers and directors of Milmar.

Confronted with such evidence concerning the nature and extent of the sale of all Milmar stock, plus his complete withdrawal from active participation in the affairs of Milmar,[43] plus payment to him of $66,004.96 pursuant to the installment payment formula set forth in the contract,[44]

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[43] After September 14, 1948, although Miller was continually present at the Riviera night-club, he did not see Marcus again until 1951 when he testified by deposition in this case.

[44] Twenty-seven checks are dated from October 1, 1948, to December 1, 1950, to Marcus as payee, signed by either Miller or Kovelson (as president of Milmar) as payor, endorsed (strangely, two are not, although they appear to have been cashed) by Marcus and in amounts identical to the installment payment formula. With but two exceptions, on the face of every check is a computation of the interest and principal, which clearly evidences payments pursuant to the September 14, 1948, contract. And, also pursuant to that contract, the spring-summer-fall checks include $3,000.00 payments.

litigant-Marcus—compared with seller-Marcus—now asks this court to conclude either that no affirmative legal effect resulted from the documents executed on September 14, 1948, or that he sold only one-half of the total issued and outstanding shares of Milmar. In support thereof, Marcus cites cases which are authority for general and basic principles of contract law, e.g., the terms of the purported contract must be such that their meaning can be ascertained to a reasonable degree of certainty; there must be a meeting of the minds or there is no contract. But they are merely conclusions of law applied to the facts of a particular case. As has been discussed, the evidence clearly supports two main conclusions, viz., the parties intended to contract and to sell and buy all of Milmar's stock. Indeed, it was not until after the commencement of this action that Marcus' intent was otherwise, for his conduct prior to that date was that of a man whose legal rights in Milmar had changed.[45]

(5) Fraud

Marcus seeks rescission of the contract on the ground that there was " * * * a scheme of fraud on the part of Miller, starting in March 1946, and continuing up to and including the 14th day of September, 1948, designed to give an unconscionable advantage over Marcus." Disregarding Marcus' irrelevant and frivolous arguments, his theory of fraud is based upon his uncorroborated testimony that about August, 1948, Miller falsely represented to him that the Riviera night-club enterprise was losing money and that he was in danger of losing his entire investment. Under New York law, since Marcus does not seek damages he does not have to prove an intentional misrepresentation. His burden is, however, to prove a (1) misrepre-

[45] See footnotes 43 and 44, supra.

sentation, and that (2) it materially influenced the bargain. *Bloomquist* v. *Farson*, 222 N.Y. 375, 380 (1918). It is Hornbook law that in all rescission actions the victim must establish (1) that the defendant was guilty of fraud or misrepresentation, and (2) plaintiff was deceived thereby. There is no proof either that Miller made the statement or that it was false. Even assuming that there was such proof, there is a complete absence of any proof that Marcus was materially influenced or deceived by the misrepresentation. Indeed, the proof is otherwise, for during the trial this court noted that Marcus had used the opportunity granted to Milmar in its lease with Bill Miller's Riviera, Inc., to examine the books.[46] The court said: "I am convinced that Mr. Marcus knew more about the books prior to September 14, '48, than Mr. Miller will ever know. I can infer that from what I have heard already." The court's opinion has not changed, but, in fact, has been fortified. Marcus tried to create the impression that the Riviera was doing marvelous business. This despite the fact that the evidence discloses that it never paid its rent on time to Milmar, went through bankruptcy, and was constantly in arrears on the payments of interest and installments on the purchase money mortgage. As a matter of fact, the purchase money mortgage mortgagee sold the mortgage at a 15% discount. The evidence further discloses that Marcus had complete access to the books of both the Riviera and Milmar which were kept by Jacob Hoffman, who was Marcus' accountant, not Miller's. Hoffman testified that he reported weekly to both Miller and Marcus as to the business of the Riviera.

Marcus further attempted to prove by mathematical computations purportedly based on an examination of the

[46] "The Landlord shall have an absolute right to check any and all receipts, computations, cash registers, guest checks, billings for each and every book of account maintained by the Tenant."

Riviera's books that the Riviera was earning a profit during the time that Miller allegedly told him it was losing money. The evidence is incomplete, inconclusive, and does not support Marcus conclusions. Moreover, on July 27, 1948, Marcus sent the aforementioned option letter to Miller.[47] Thus, prior to the time when the alleged misrepresentations were made to him he had already decided not only to sell his interest in Milmar but at a price less than he ultimately received.[48] From these facts it is reasonable to infer that Marcus' decision to sell his Milmar stock was not based upon Miller's alleged misrepresentation but was a business decision made with full knowledge of the Riviera's financial status.

(6) The Alleged Loans

While the parties have raised many issues of fact in this case, none has been more bitterly contested than the issue relating to the money allegedly loaned by Marcus to Milmar. Marcus' cross-claim against Milmar for $46,801.23 is based on his allegation that beginning on July 16, 1946, through September 15, 1948, he loaned $67,997.23 to Milmar and Milmar has repaid him only $21,196.00. He also alleges that the repayments " * * * became due and payable five years from the 23rd day of July, 1947, and are now due and owing", evidently having in mind the statute of limitations. While there are numerous examples of Marcus' failure to prove the alleged loans, one will suffice for my purpose because it is typical. As evidence of a $5,100.00 loan on December 28, 1946, he relies upon a page from Milmar's general ledger, journal, and cashbook. The page

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[47] See footnote 25, supra.

[48] The option gave Miller the right to purchase Marcus' stock for $125,000.00. The final contract also called for $125,000.00, but Marcus and Miller agreed that he would pay an additional $15,000.00.

is entitled "Loans Payable S. Marcus." For the year 1946 it does not contain any $5,100.00 entry.[49] Not only has Marcus failed in his attempted documentary proof of loans, but his unconvincing testimony relating thereto does not support his contentions. Moreover, during his deposition on December 19, 1951, Marcus repeatedly was asked whether he had any claims against Milmar for money. At that time he didn't know whether he had such claims.[50]

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[49] Exhibit DM 14, page 10.

[50] "Q. I am not asking you about other people. I am asking you specifically whether you have any claims for money against Milmar Estates, Inc.? A. I do not know to whom I have to look for money for claims.

* * * *

"Q. What is your answer A. My answer is I do not know to whom I have claims for money.

"Q. Mr. Marcus, you are an intelligent man. You understand the question. I am asking you specifically: Do you have any claims for money against Milmar Estates, Inc.? A. And I am answering just as specifically: I don't know to whom I have to look for redress on money.

"Q. Then you do not know whether you have any money claim against Milmar Estates, Inc.? A. That's right, I don't know definitely to whom I have to look for money.

"Q. Do you have any other claims against Milmar Estates, Inc.? A. I don't know at this time.

* * * *

"Q. Do you have any money claims against Jacob Hoffman? A. Yes, I do.

"Q. Are they in any way related to Milmar Estates, Inc., * * * ? A. No, they are not.

"Q. Do you have any other claims against Jacob Hoffman relating to Milmar Estates, Inc., * * * ? A. I don't know at this time.

* * * *

"Q. * * * Do you know of any facts which may give you any claims against Milmar Estates, Inc., * * * ? A. I have been advised by my attorneys that the situation is so muddled up

(Continued on following page)

The claims were not made until he filed his cross-claim on October 25, 1954. Surely his memory was better in 1951 than in 1954.

The parties were instructed at the conclusion of the trial to submit to the court proposed findings of ultimate facts "with specific reference to where these facts are found in the transcript"[51] because the court realized in a lengthy case of this character where there was so much irreconcilable contradiction in testimony that "fact finding would be a difficult art," as has been stated many times by learned judges. Marcus' proposed findings of fact concerning the loans failed to cite a single reference to the transcript to support his statements. His failure to do so made it necessary for me to read many pages of testimony and to examine countless documents in order to establish the ultimate facts. With the state of the record, it was humanly impossible to find the truth in relation to the loans because there was nothing but hopeless confusion in testimony regarding the alleged loans. Marcus has failed to satisfy me by a fair preponderance of the evidence that Milmar owes him anything.

On the issue of credibility, I should mention that Marcus admitted that he often signed affidavits without reading them. I called his attention to the fact that affidavits were sworn statements, he still said he signed them often without reading them.

(Continued from preceding page)

that they could give me no advice of any definite character as to what our claims are, against whom the claims are to be instituted.

* * * *." Deposition upon oral examination of Samuel Marcus, dated December 19, 1951, pp. 95-100.

The excerpts from the deposition of Samuel Marcus were put into the record pursuant to a stipulation made in court. (T. 2468.)

[51] T. 2467.

It became necessary for Milmar to institute a dower action in the Superior Court of New Jersey against Sarah Marcus, the wife of Samuel Marcus. This action was settled for $7,500.00. This action was necessitated because the lawyers who handled the transaction did not realize that a wife's right of dower had not been abolished in New Jersey. This was in connection with the transfer of title from Marcus and Miller to Milmar Estate, Inc. Marcus claimed he knew nothing about this action and had nothing to do with it, despite the fact that he and his wife were living together in their matrimonial abode. This is an incredible situation, particularly since Mrs. Marcus was represented by Mr. Roth of the New York Bar who also represented Marcus. As a matter of fact, Mr. Roth sat in during the trial of this case as associate counsel for Marcus and appeared as a witness for him.

An order may be submitted in conformity with the findings of fact and conclusions of law expressed in this opinion.

Exhibit D-ME 5, Annexed to Opinion of Modarelli, *D.J.*

(Opposite) ☛

AGREEMENT made this 14th day of September, 194., in the City and State of New York between MILLER ESTATES, INC., a New Jersey corporation (hereinafter referred to as the "Seller", party of the first part, and ALBERT and William Miller both residing at Fort Lee, New Jersey (hereinafter referred to as the "Buyer"), party of the second part.

W I T N E S S E T H :

WHEREAS, the corporation is duly organized in the State of New Jersey and has an authorized and issued stock consisting of 12-50 shares of Common Stock; and

WHEREAS, the Buyer is desirous of purchasing from the Seller all of the issued and outstanding capital stock of the Corporation;

NOW, THEREFORE, it is mutually agreed as follows:

1. The Seller hereby sells to the Buyer, and the Buyer hereby purchases from the Seller all of the

the State of New Jersey and has an authorized and issued stock consisting of 12-50 shares of Common Stock; and

WHEREAS, the Buyer is desirous of purchasing from the Seller all of the issued and outstanding capital stock of the Corporation;

NOW, THEREFORE, it is mutually agreed as follows:

1. The Seller hereby sells to the Buyer, and the Buyer hereby purchases from the Seller all of the issued and outstanding shares of the Corporation.

2. The price for such shares of stock which the Buyer hereby agrees to pay shall be in the sum of One Hundred Twenty-Five Thousand ($125,000.00) Dollars, payable as follows:

-Thirty Thousand ($30,000.00) Dollars in cash upon execution of this agreement, receipt whereof is hereby acknowledged;

-Ninety-five Thousand ($95,000.00) Dollars by the Purchaser executing a Purchase Money Mortgage on the real estate and chattels, with interest at four (4%) per cent, and containing the following terms:

Three Thousand ($3,000.00) Dollars each month on the first day

SCHEDULE A

of each and every month that the premises in question located at Fort Lee, New Jersey, are open for business. Fifteen Hundred ($1500.00) Dollars each month on the first day of each and every month that premises are closed; and for the purpose of this clause, the question of whether or not the Riviera is open or closed during any given month shall be the state of affairs that prevails on the first day of each month. The said Purchase Money Mortgage shall be prepared upon the usual forms of any regular title company doing business in the State of New Jersey.

Time is the essence of this contract. The chattel mortgage shall contain a clause providing for a 50% release after every $25,000. shall have been paid.

3. The Seller is authorized to pay all of its outstanding obligations of whatsoever kind and description may be contained upon the corporate books, and to pay over at the closing the surplus remaining, if any.

4. The Seller and the Buyer agree that the liquor license will be continued until such time as may be required to transfer and turn over the said liquor license to the Buyer, but without any cost or expense to the Seller.

4 & 5 only.

5. The stock herein purchased by the Buyer and endorsed in blank shall be deposited in escrow with ABE LIEBOWITZ, Esq., of 4000 Bergenline Ave., Union City, New Jersey, immediately upon the execution of this Agreement with

tion may be contained upon the corporate books, and to pay over at the closing the surplus remaining, if any.

4. The Seller and the Buyer agree that the liquor license will be continued until such time as may be required to transfer and turn over the said liquor license to the Buyer, but without any cost or expense to the Seller.

5. The stock herein purchased by the Buyer and endorsed in blank shall be deposited in escrow with ABE LIEBERMAN, Esq., of 4000 Bergenline Ave., Union City, New Jersey, immediately upon the execution of this Agreement with instructions to the said ABE LIEBERMAN to deliver the sale of the said stock to the Buyer upon payment of the full amount due hereunder.

6. In the event of the Buyer failing to pay the amount due hereunder, or in the event that the Buyer shall default in making any one of the payments due hereunder, then the balance remaining unpaid shall immediately

become due and payable, and in such event the shares of stock remaining in escrow shall be returned by the said ABE LIEBERMAN to the Seller.

7. The Buyer agrees to assume and perform all of the outstanding contracts and obligations, consisting of first mortgage, taxes and insurance of MILMAR ESTATES, INC. and covenants and agrees to indemnify and hold the Seller and the stockholders of the said Corporation, its officers and directors harmless from and against said claims, demands, liabilities now existing and arising or that may hereafter arise, in connection with any such debts, liabilities, contracts and obligations whatsoever.

8. [redacted] The Buyer agrees not to encumber the property of the Corporation with any mortgages, including chattel mortgages, conditional Bills of Sale, liens or encumbrances of any kind or nature, without the written consent of the Seller first obtained, except as provided in chattel mortgage

9. It is understood that no representations

connection with any such debts, liabilities, contracts and obligations whatsoever.

9. The Buyer agrees not to encumber the property of the Corporation with any mortgages, including chattel mortgages, conditional Bills of Sale, liens or encumbrances of any kind or nature, without the written consent of the Seller first obtained, except as provided in a chattel mortgage

10. It is understood that no representations have been made by the Seller to the Buyer, as to the value of or the condition of the property of the Corporation, nor as to any other item or thing, except as set forth in this agreement.

10. The Buyer shall have the right to assign this agreement to a New Jersey corporation, without the consent of the Seller, provided, however, that William Miller and Al Bierman shall be the principal stockholders of the

said corporation. In the event such new corporation is formed, MILMAR ESTATES, INC. shall not be dissolved but shall be continued in existence. The parties further agree that ~~said~~ certificates of the shares of stock in the new corporation shall immediately be placed in escrow with ABE LIEBERMAN, ESQ., pending the fulfillment of each and every term of this agreement.

11. All of the terms and conditions contained in this agreement shall survive the transfer of title to the stock called for in this agreement.

12. In the event of condemnation of the property owned by MILMAR ESTATES, INC. all moneys ~~received by the Purchaser, or his executors, heirs and assigns~~ due the second mortgagee, will be paid over promptly to the Seller, and the Seller agrees to apply all such amounts received on account of this contract. In the event this contract is assigned, it is a condition of this agreement that the new corporation shall be bound by the terms of this clause. (AL, RS)

IN WITNESS WHEREOF, the parties have hereunto set their corporate seals the day and year first above written.

MILMAR ESTATES, INC.

By: [signature]

[signature]

By: [signature] Atty

ATTEST:

[signature]

[signature]

ty owned by MILMAR STATES, INC. all moneys ~~received by the Purchaser, or his executors, heirs and assigns~~ one the acoma mortgage, will be paid over promptly to the Seller, and the Seller agrees to apply all such amounts received on account of this contract. In the event this contract is assigned, it is a condition of this agreement that the new corporation shall be bound by the terms of this clause. (AL, RS) IN WITNESS WHEREOF, the parties have hereunto set their corporate seals the day and year first above written.

MILMAR ESTATES, INC.

By: [signature] Vice

[signature]

By: [signature] Atty

[signature]

ATTEST:

[signature]
Secretary.

Transcript of Testimony

Newark, N. J.
January 20, 1955

Before:

The Honorable ALFRED E. MODARELLI,
U. S. D. J.

Appearances:

CHAZIN & CHAZIN, Esqs.,
For the Plaintiffs,

By: ABRAHAM CHAZIN, Esq., and THEODORE CHAZIN, Esq.

MAURICE C. BRIGADIER, Esq., and SEYMOUR MARGULIES, Esq.,
For the Defendant Milmar Estate, Inc.

ROBERT D. GROSMAN, Esq., and JULES E. TEPPER, Esq.,
For the Defendant Samuel Marcus.

GEORGE KESSELHAUT, Esq.,
For Al Kevelson.

(2)* The Court: Well, Messrs. Chazin & Chazin, you filed the complaint in interpleader, didn't you?

Mr. Abraham Chazin: Right.

The Court: So who shall proceed first to present proof?

Mr. Brigadier: May I be heard on that, if your Honor please?

The Court: Yes, sir.

Mr. Brigadier: You will recall at the pretrial I pointed out that basically there were two questions; one was the nature of the transaction on September 14th, and, secondly, whether or not they are entitled to a rescission of that transaction.

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* All figures in parentheses indicate the number of each new page of the stenographic transcript.

Colloquy

I suggested at that time that it seemed to me that logically you would first try the rescission of the transaction, because if it were to be rescinded that would be the end of the whole problem. But your Honor thought otherwise and I adopted your Honor's suggestion, if you recall, and I said perhaps in the interest of clarity it would be the best thing if we went ahead first and established what the transaction was that took place between the parties.

Now, it becomes, it seems to me, doubly necessary that we do that first for another reason. You will that in the interpleader action Mr. Marcus filed an answer (3) in which he says he is unable to state whether he has any claim to the fund on deposit in this court until the Court first decides the other questions that have been raised, namely, the nature of the transaction and as to whether he is entitled to any rescission, because he says in that answer whether or not he can assert any claim to the fund on deposit will depend on how you first dispose of these other matters.

Therefore, I would suggest, for the sake of clarity, and otherwise, and also because I brought Judge Lieberman up from Florida, and he is very anxious to go back,—

The Court: I can't blame him for that.

Mr. Brigadier: —that I proceed to prove what the transaction was by calling as the first witness Judge Lieberman.

The Court: All right, sir.

Abraham Lieberman, called and sworn for the defendant Milmar Estate, testified as follows:

The Clerk: May we have your full name and address, please?

The Witness: Abraham Lieberman.

Abraham Lieberman—for Defendant Milmar Estate—Direct

The Clerk: And your address for the record.

(4) The Witness: 851 Boulevard East, Weehawken, New Jersey.

Direct examination by Mr. Brigadier:

Q. Judge Lieberman, are you a member of the bar of the State of New Jersey? A. I am.

Q. And when were you admitted? A. 1923.

Q. And are you a counsellor of law of the State of New Jersey? A. I am.

Q. When were you admitted? A. Three years later.

Q. You have been a magistrate, have you not? A. I have been.

Q. Of this State. A. I have.

Q. For how many years have you served as a magistrate—or did you serve as a magistrate in this State? A. I served twenty-one years as magistrate of Weehawken, New Jersey.

Q. Are you now serving as magistrate? A. I am not.

Q. Are you now engaged in the practice of law? (5) A. I am.

Q. With offices where? A. 4000 Bergenline Avenue, Union City, New Jersey.

Q. In or about August, 1948, were you then actually practicing law in this State? A. I was.

Q. With offices where? A. At the same—in Union City. I don't remember if I had moved as yet to another address.

Q. Now, do you know Samuel Marcus? A. I do.

Mr. Brigadier: Mr. Marcus, will you please stand up so that you can be identified for the Court?

(Defendant Marcus rises.)

Mr. Grossman: We will admit that he knows him.

Abraham Lieberman—for Defendant Milmar Estate—Direct

Q. And how long have you known Samuel Marcus? A. I believe I met him in 1947, somewhere around the beginning or middle of '47.

Q. By the way, have you at any time— A. I'm sorry. I think—I met him in the summer of 1946.

Q. I just want to interrupt that line of examination to ask another question instead. Down to the present moment, have you at any time in the past, down to the present moment included, held any stock interest (6) whatsoever in Milmar Estate, Inc.? A. I do not and never did.

Q. You never have. A. And never did.

Q. Have you at any time in the past, down to the present moment, held any stock in Bill Miller's Riviera? A. I never did and do not now.

Q. Have you ever represented Samuel Marcus as an attorney? A. Never.

Q. Do you know William Miller?

Mr. Brigadier: Will you stand up, please?

(Man in courtroom rises.)

A. I sure do.

Q. And how long have you known William Miller? A. I think I met William Miller some time in '46, the beginning or middle of the year, I don't remember.

Q. And have you represented him as an attorney? A. I have.

Q. Since approximately what date? A. Approximately when the Riviera went into bankruptcy. I then started to take care of Bill Miller's interests at that time.

Mr. Grosman: May I ask, your Honor, that (7) this witness answer responsively?

The Court: Yes, because that would presuppose that we know when the Riviera went into bankruptcy. When was it?

Abraham Lieberman—for Defendant Milmar Estate—Direct

The Witness: It was some time in 1946.

Q. In the transaction in question, the transaction which we will call September 14, 1948—affairs of that date, and the papers—did you represent William Miller in that transaction? A. Yes.

Q. Do you know Al Bierman? A. I do.

Mr. Brigadier: Will you stand, Mr. Bierman, please?

(Man in courtroom rises.)

A. I do.

Q. How long have you known him? A. I believe I met him in 1947.

Q. And in this transaction that we are referring to again, that culminated on September 14, 1948, did you represent Mr. Bierman? A. I did.

Q. Now, do you know Mr. Al Kevelson? A. I do.

Mr. Brigadier: Will you stand up, Mr. Kevelson?

(8) (Man in courtroom rises.)

A. I do.

Q. And how long have you known him? A. I met him shortly after September 14, 1948, after this agreement was signed.

Q. So that prior thereto you had not met him. A. Never met him.

Q. And you hadn't acted directly in any relationship of attorney and client with him. A. None whatsoever.

Q. Now, some time in the latter part of August, 1948—just answer the question directly—did you receive a communication from William Miller? Yes or no? A. Well, you say—

Q. Oral or in writing. A. Yes, I did.

Q. I am using it in the broadest sense. A. Oral, yes. He spoke to me.

Q. And as a result of his speaking to you was there a meeting arranged thereafter among yourself, Robert Schwartz, Samuel Marcus and William Miller?

Mr. Grosman: Your Honor, I object to that as leading.

The Court: Well, it's harmless leading. Go ahead.

(9) A. Yes.

Q. And where did the meeting take place? A. Took place in Mr. Marcus' office in New York City, I believe somewhere on 42nd Street.

Q. And who was present at that meeting? A. Bill Miller, Sam Marcus, his attorney, Robert Schwartz, and myself.

Q. And can you fix the date, as best you can, as to when this meeting took place? A. I would say it was somewhere around the 27th, 28th or 29th of August, toward the very, very end of August.

Mr. Grosman: May we have the year?

The Witness: Of 1948.

Q. Now, you say that at this meeting Robert Schwartz appeared as the attorney for Samuel Marcus? A. He did.

Q. Did he state that he was the attorney? A. Yes, I knew he was his attorney, anyway. We had had prior transactions.

Mr. Brigadier: Is Mr. Schwartz in the courtroom?

The Witness: Yes, he just arrived.

Mr. Brigadier: Will you stand up, please?

(Man in courtroom rises.)

Q. Is this the Robert Schwartz that you are referring

(10) to that was at that meeting? A. Yes.

Q. Now, will you tell us what took place at that meeting? A. I was told by Bill Miller just prior—

Mr. Grosman: I object to what he was told by Bill Miller.

The Court: Will you be very careful, please, about any hearsay, and stick to the rules of evidence.

Q. Tell us just what took place at the meeting in the presence of Samuel Marcus. A. A discussion took place as to the sale of all the interests that Sam Marcus had, any of his representatives, agents, everybody connected with Milmar, which was the holding company, the owner of the real estate in which the Riviera was a tenant.

Discussion took place at that time for the sale, all of Marcus' interests and his associates to Bill Miller and Al Bierman.

Q. And was there any agreement arrived at orally at this meeting as to what the terms were to be? A. Yes.

Q. Will you state what the agreement was that was arrived at?

(11) Mr. Grosman: Now, if your Honor please, we have an agreement that speaks for itself and they are suing on the agreement.

The Court: Well, in view of the fact that fraud is alleged I think it is very important that the Court have anything that happened before the signing of the agreement.

Mr. Grosman: I object to it and may I have my objection noted?

Q. Will you answer the question?

The Court: Naming each one and who said substantially what.

A. It was a general conversation from which I gathered that the price—

Mr. Grosman: Now, if your Honor please, I object to what he gathered. This man is a lawyer and he is supposed to know—

The Court: Now, Judge Grosman, we have no jury. I have just been through six days of that with a jury.

Mr. Grosman: I'm sorry, Judge. This man—

The Court: Let's get the story, please.

Mr. Grosman: He is hostile to my client and I must object.

The Court: Is your hostility so intense that (12) you would lie about the transaction and what happened?

The Witness: I certainly wouldn't.

The Court: Or will you give us your best recollection of what actually happened?

The Witness: The best recollection and the truth.

The Court: Do you hate Mr. Marcus so that you would prejure yourself—

The Witness: No. I don't like him, but I certainly wouldn't perjure myself for him or anybody else.

The Court: All right.

Mr. Brigadier: Judge, I think I can simplify this considerably.

The Court: I wish you would.

Q. At the end of this conference did you and Mr. Schwartz receive instructions from Sam Marcus and William Miller for the drafting of papers— A. Yes.

Q. —to carry out the agreement? A. Yes.

Q. What instructions did you receive from Samuel Marcus and William Miller, both you and Robert Schwartz, as to what was to be set forth in the agreement?

(13) Mr. Grosman: If your Honor please, may I have my same objection to all this line of testimony. I don't want to keep interrupting.

The Court: Yes, you won't have to repeat it, Judge. By the way, you don't happen to have any notes of what happened at this—

The Witness: No, I didn't keep any notes, Judge, but I know it pretty well because I have been through the papers.

The Court: All right.

A. We were told to prepare an agreement wherein Sam Marcus was selling out everything and every interest that he had in Milmar to William Miller and to Al Bierman for $125,000. I believe they were—I think we were instructed at that time to prepare the agreement thirty thousand dollars cash, ninety-five thousand dollars to be paid over a period of years—I think three thousand dollars a month when the Riviera was open, during the season, fifteen hundred dollars when the Riviera was not open, off season.

Q. Was there any discussion at the time, or any instruction at the time, as to who should appear as the seller in the agreement?

Mr. Grosman: Now, may I object to that as leading? I think he can ask him what happened. He was (14) there.

Mr. Brigadier: What's leading about a question that—I'm sorry.

Mr. Grosman: I object to it as leading.

The Court: He objects to your leading.

Mr. Brigadier: This is a lawyer, whom I am going to suggest the answer to.

The Court: I rule it is harmless leading. Proceed.

The Witness: May I just say this, if the Court

please—and to Counsel—I can save a lot of time by relating a story.

Q. Well, tell us.

The Court: You mean in narrative form?

The Witness: Yes, just what happened.

The Court: All right.

The Witness: I did the same thing in the deposition and we saved a lot of time.

A. There was a lot of discussion that day, a lot of arguments. First of all, the first thing I asked for was for the stock of Milmar. I knew it was a sale of all outstanding stock, because Sam Marcus was stepping out of this thing completely. He couldn't get out of it fast enough. I happened to know that the Riviera (15) at that time was losing a lot of money and he wanted to get out.

Mr. Grossman: I must object to this sort of testimony.

The Witness: This was all part of the discussion.

Mr. Grossman: Now, please.

The Witness: I heard it. They were arguing, Miller and Marcus were arguing constantly.

Mr. Grosman: Now, your Honor, may I have my objection noted. This man is giving us a lot of conclusions, a lot of his own impressions. I can't object—he will interject anything he sees fit in his testimony. And I object to it.

Mr. Brigadier: I feel at this point—I was going to sit back, because I think Judge Lieberman doesn't need me to defend him in that respect—but I think this is silly, the kind of thing that is going on. We are trying this as if this were a case to be tried by first-year law school students. We are raising objections

of questions being leading, suggesting answers to a lawyer—and the man distinctly said these are the things "I heard there said."

The Court: Was there a discussion there that the Riviera was losing money?

(16) The Witness: Plenty.

The Court: And did Mr. Marcus and Mr. Miller engage in this discussion?

The Witness: They sure did.

The Court: And you heard it?

The Witness: Heard it.

The Court: So what is the objection?

Mr. Grosman: He said, "It is my impression." I don't want his impressions. I want the facts as they were stated.

The Witness: I heard it.

A. (Continuing) As I stated, Sam Marcus wanted to get out, and he so told Bill Miller. As a matter of fact, I had a paper before me—one or two papers—and even saw a receipt that day that some transactions had gone on between Marcus and Mr. Bierman. I saw a receipt signed by Sam Marcus.

Q. Let us interrupt the examination to bring that in. I show you what purports to be a receipt dated August 27, 1948, purporting to have been signed by S. M. Marcus and ask you if that is the receipt you are referring to. A. This is the receipt that I am referring to.

Q. And that was exhibited to you in the presence of Samuel Marcus? (17) A. That's right.

Q. And was it stated that that amount set forth therein had been received by Samuel Marcus? A. Yes.

Q. And did Samuel Marcus admit signing that receipt? A. He did.

Abraham Lieberman—for Defendant Milmar Estate—Direct

Mr. Brigadier: I offer that in evidence.

Mr. Grosman: May I see it?

(Document handed to Counsel.)

Mr. Grosman: No objection.

The Clerk: Receipt dated August 27, 1948, marked D-ME-1 in evidence.

(Received and marked Exhibit D-ME-1.)

Q. Now, at the same time and place, Judge Lieberman, were you shown receipt bearing date August 26, 1948, addressed Mr. Sam Marcus, 10 East 42nd Street, New York City? A. I believe I was.

Q. And was this in the presence of Mr. Marcus? A. Mr. Marcus, Miller and Schwartz, because it was based on this, and I believe—

Mr. Grosman: I object to his volunteering any information. I want responsive answers from him.

The Court: Well, let's get this settled now. (18) One thing is definite, that if this method of procedure keeps up we will be here for a long time. We have no jury at all. And Judge Lieberman is a member of the bar. If he says anything that should not be considered, I assure you I will not consider it.

Mr. Grosman: Your Honor, I must, in the interests of my client, object. Now, I know how this man is going to testify.

The Court: In other words, if he was going to testify favorably you wouldn't care what he said, is that the idea?

Mr. Grosman: Well, I know that he is not going—

The Court. Don't we want to get the truth of this thing, if possible?

Mr. Grossman: Certainly I want the truth, and I want to get it in such a way that I can protect my client.

If I am not going to be permitted to do it, I want my objection noted on the record.

The Court: You can note all of them on the record, and note my ruling. What is the question? I was afraid this was going to happen.

(Discussion off the record.)

The Court: Do you object if Judge Grosman (19) puts some leading questions to his clients and witnesses? Harmless leading questions.

Mr. Brigadier: No.

(Discussion off the record.)

The Court: Now, do you know what you were going to say, after this interruption?

The Witness: Yes. Do you want me to continue?

The Court: Yes.

A. (Continuing) I believe there was another paper that I had at that time, and it was both of these papers, plus the receipt, that enabled Bob Schwartz and myself to get to the actual terms that they had in mind to prepare the agreement of September 14. Although these papers, I believe, were unsigned, there was some kind of a memorandum prepared by someone, but the four of us were there, and they said, "This is it." And that is what it was based upon.

Mr. Brigadier: I would like this one of August 26 just marked for identification. We will establish the paper by other witnesses later. But I want to make sure it is identified.

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The Clerk: Letter dated August 26, 1948, marked D-ME-2 for identification.

(Marked Exhibit D-ME-2 for identification.)

Q. I show you a paper dated August 18, 1948, and (20) ask you whether this is the other paper or memorandum that you referred to that was present at the time of this discussion? A. Yes.

Mr. Brigadier: And I ask that that be marked for identification.

The Clerk: Paper dated August 18, 1948, marked D-ME-3 for identification.

(Marked Exhibit D-ME-3 for identification.)

Q. Now, Judge Lieberman, will you now proceed to tell us—because I interrupted my examination before when you made reference to these papers—just what the discussions were that took place at this meeting between the parties, who said what to whom, and what was agreed upon, and what instructions were given by whom to you and Robert Schwartz as to the drafting of agreements? A. After I knew what the terms were, from these papers, and after discussing the matter with Miller, Schwartz and Marcus, and knowing it was supposed to be a sale of stock, the first thing I asked for was the stock certificates, so that they could be assigned. And I was told at that time by Sam Marcus—probably Bob Schwartz, too, who was his attorney—I don't remember—but it was told to me then and there that the certificates of Milmar were not available, just weren't around. And I (21) said to him, "I don't know what we are going to do, unless we probably have to work out—issue new certificates, or get affidavits and so forth."

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Well, Marcus had another idea, which he submitted, and which he wanted, and which he insisted on. He said, "I want whatever certificates are outstanding to be considered canceled, completely, consider them being surrendered back again to Milmar, even though I don't have them, and we will have Milmar issue new certificates covering the outstanding ones of twelve hundred and fifty shares, and we will make an agreement between Milmar, Bierman and Miller, wherein Milmar is going to sell the shares of stock to Bierman and Miller."

Well, Bob Schwartz and I—Bob, the attorney for Milmar and Marcus—thought this was a very, very silly way to do it. And we just couldn't agree to it. But Marcus insisted on it. That's the way he wanted it done.

Bill Miller, not knowing anything about the legal angle of it, and being anxious to get this transaction over with, said, "Work it out the best way you can." But Marcus insisted. I remember distinctly how Bob Schwartz, his own attorney, told him that he didn't like the idea, that it should be done by the assignment of certificates—of stock certificates.

(22) However, we wanted to get it finished and Marcus insisted. He had his own reasons. I don't know why. I didn't ask him, because there were too many arguments going on between Miller and Marcus, anyway, as to small details—chattel mortgages. The question of a chattel mortgage came up. Marcus insisted that—it's a fantastic thing—Milmar was selling the—was supposed to be selling the stock to Miller and Bierman. But to secure the balance of $90,000 he wanted a mortgage given back on the real estate to him. We told him at that time, "What are you going to get a mortgage on? Miller and Bierman don't own the real estate. Milmar owns the real estate." We told him then definitely, it was a useless mortgage. He wanted it. As I say—

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Q. When you say "we" told him, you mean— A. Bob Schwartz and I, as the attorneys, told him that. He insisted on it, really much to the chagrin of his own attorney—though he is sitting there, I must say so—really, because Bob is considered a pretty good lawyer in New York, from what I understand. But he insisted on it. And after we argued these various details, we then proceeded to another conference. That was the end of that conference in Mr. Marcus' office. I believe that practically—there were other details discussed.

The Court: How long did this first conference (23) take?

The Witness: It took, oh, three to four hours, Judge.
The Court: Three to four hours.
The Witness: Yes, in his office.

Q. Now, at this conference was there any discussion with respect to the putting up of stock in escrow? A. Oh, yes. Yes, I forgot that.

Q. Tell us what that discussion was. A. There was.

Mr. Grosman: Now, may I have one objection to all this line of testimony? Then I won't trouble your Honor any further.

The Court: You are not troubling me, Judge.

Mr. Grosman: All right. I don't want to be accused of holding up the trial.

The Cout: Well, that's all I have in mind. I don't care.

Mr. Grosman: I know you don't care.

The Court: You will be losing time here and so will everybody else.

A. Marcus felt that in order to be protected until he gets

his balance of $90,000, in addition to this mortgage, he wanted half of the 1,250 shares which he was selling to be put up in escrow, with a number of other (24) agreements that we were going to discuss to be put up in escrow with me as the attorney.

I was also to have put up with me, I think, fifty shares of the Riviera stock. A total of a hundred had been issued back in 1947, I believe.

The Court: Well, did Mr. Marcus have any Riviera stock?

The Witness: Originally, back in 1947, Judge. He finally disposed of it in 1947 when there was a dispossess suit started by him. He controlled Milmar at that time and he started dispossess against the Riviera, as a result of which new agreements were made. I was in that picture, too, with Bob Schwartz. And as a result of that the agreements were prepared.

Q. Was there any discussion at this first conference with respect to releases to be executed, or releases of any claims? A. There may have been. Are you talking about general releases?

Q. Yes. A. That may have come up later on. I don't know whether it was at that conference. We had two after that, Bob Schwartz and I.

Q. But you are certain that at this conference you had agreed on the amount—(25) A. Yes.

Q. —the purchase price, definitely you were both instructed as to that. A. That's right.

Q. The installments, under which they were to be paid. A. Yes.

Q. The mortgages.

Mr. Grosman: Now, if your Honor please, he is testifying, Counsel is testifying. I must object to it.

The Court: You are doing an awful lot of leading, Mr. Brigadier.

Mr. Brigadier: I will agree this time I am guilty. That is what I am doing.

The Witness: Although there is no question before me, can I add something, Judge? I merely was interested in one thing. He had had a lot of difficulty with Marcus, and I know about it because I was there when the difficulties went on.

Mr. Grosman: If your Honor please, there is no question before him.

The Witness: He was interested in one thing, to be sure that he was protected legally. In front of Marcus, and in front of Schwartz, he insisted on one thing, be sure that when the agreement is signed Marcus (26) is out completely, "I want no part of him." They just didn't get along.

The Court: Well, didn't Marcus feel the same way about Miller?

The Witness: Yes, they were glad to get rid of each other. Marcus wasn't so much glad to get rid of Miller as he was glad to get his money. Miller was glad to get rid of Marcus because he was a headache to him over there, he had dispossessed him, and there were a lot of arguments going on.

So that Miller insisted on one thing. He wanted to get him out once and for all. I said, "I will do everything I possibly can, Bill, although the papers aren't drawn the way I would like to draw them. But since Marcus insists on it that way, and his lawyer has no choice, and I have no choice, we will draw the agreement to the best of our ability." And we did.

Q. Now, was there anything said at this conference with

respect to the amount of stock, the number of shares that were being sold? A. Everything that—all the new stock that was being issued was considered being turned over to Bill Miller and to Bierman.

Q. And was that to be the complete issue, outstanding stock of the— (27) A. It was to cover every share outstanding because I checked the books at that time and found that 1,250 shares had been issued. So, of course, I insisted that the same new shares be issued.

Q. Now, was there any discussion about a $50,000 note at this conference? A. There certainly was.

Q. Why don't you tell us about it? A. I'd have to look at the agreement to refresh my memory.

Q. I wish you would.

The Court: Pardon me. Before you do that, didn't anyone ask Mr. Marcus what happened to his certificate, his shares of stock?

The Witness: I asked him.

The Court: What answer did he make?

The Witness: I asked him. Couldn't find them.

The Court: All right, so he couldn't find them.

The Witness: Couldn't find them. They were not available. I was mostly interested in getting the shares of stock because I wanted no trouble with him. It isn't in the agreement, but I do remember, Bill Miller had issued a note—

Mr. Grosman: Pardon me. May I ask what agreement the witness is referring to.

(28) The Witness: I am not referring to any agreement now, Judge.

The Court: You just had—

The Witness: I know, but it's not in the agreement.

The Court: You mean the agreement that is in this suit?

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The Witness: This agreement does not refer to the $50,000 note.

Mr. Grosman: All I asked, your Honor—

The Witness: There were separate papers, other papers.

Mr. Grosman: Will you wait just a moment, please? All I ask is that the witness identify the paper writing that he took out of his file and referred to as an agreement.

The Court: That's right.

The Witness: I looked at the agreement of September 14 that was marked in evidence, EP-4, December 19, 1951. There is nothing in here that refers—

The Court: That's all he wanted to know. You answered him.

Q. Now, Judge Lieberman, will you please listen to my question. We are all trying to expedite it a bit. (29) I asked you— Please, will you listen to me? A. Go ahead.

Q. I asked you whether at this conference in Mr. Marcus' office there was anything said about a $50,000 note. A. There was.

Q. Will you tell us what was said, and what this was about? A. About a year prior to September—I believe it was some time in June or July of 1947—Bill Miller made out a note of $50,000 to Sam Marcus, I believe payable in one year. That note was given at the time that the dispossess suit was adjusted.

Mr. Grosman: Now, I assume the witness was there and knows this of his own knowledge.

The Witness: Know all about it.

The Court. Was this while you were still having that conference?

The Witness: Oh, no, this was back in 1947, Judge.

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The Court: This discussion about the $50,000 note.

The Witness: Oh, yes.

The Court: That was brought up.

The Witness: That was all brought up, yes. (30) It was an integral part of this discussion.

The Court: And the facts you are now relating you know of your own knowledge, is that right?

The Witness: That's right.

The Court: All right. Proceed.

The Witness: As a matter of fact, part of the discussion in Marcus' office—and I remember distinctly Miller telling Marcus that there is one thing he wants to be sure of and that is that this $50,000 note is eventually cancelled.

A. (Continuing) Miller had made out this note in June, 1947, payable in one year. Part of the consideration of Miller and Bierman buying the shares of stock—or buying out all the interests that Marcus had was that if and when the $90,000 was eventually paid, that $50,000 note was to be cancelled. And it was with that understanding that papers were prepared accordingly. And I have papers to that effect, that the $50,000 note—as a matter of fact, I hold the $50,000 note. All those papers were left with me.

Q. All right, let's get to the papers. After this conference, attended by the four of you, did another meeting take place between you and Bob Schwartz? A. It did.

Q. For the purpose of drafting—

(31) Mr. Grosman: Are you referring to the first conference?

Mr. Brigadier: Yes, the conference that he has just testified to.

Q. Did you and Bob Schwartz then proceed to draft the documents? A. Bob drafted them and then I met him at his office.

Abraham Lieberman—for Defendant Milmar Estate—Direct

Q. I see. Now, do you have in front of you the documents that were drafted? A. I have.

Q. And when would you say those documents had been drafted, approximately when? A. I would say the early part of September, 1948, several days after our conference in Marcus' office.

Q. Now, at this conference between Schwartz and yourself, for the drafting of papers, was anyone else present? A. I only think Bob and myself were.

Q. I see. Now, was there a subsequent meeting at which the papers were executed? A. There was.

Q. And when did the subsequent meeting take place? A. September 14, 1948.

Q. And who was present at that meeting? A. Bob Schwartz, Bill Miller, Sam Marcus and myself.

(32) Q. And was Bob Schwartz appearing as attorney for Samuel Marcus at that time? A. He was. And it was in his office. It was in Bob Schwartz's office.

Q. I see. Now, will you produce the agreement which was drafted pursuant to the instructions that had been received by you and Mr. Schwartz at the first conference? A. This is it.

(Document handed to Counsel.)

Q. And were there changes made after the draft had been typed? A. Many.

Q. And insertions made on it? A. Many.

Q. I direct your attention first to the signatures appearing on the last page and I ask you whose signature appears under "Milmar Estates, Inc., by"? A. Sam Marcus, President.

Q. And whose signature follows thereafter? A. The next one is "All Bierman", signed, "William Miller, Attorney." And then under that "William Miller."

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Q. Was Al Bierman present? A. He was not.

Q. And was William Miller acting under a power of (33) attorney for him? A. A telegram that he had received.

Q. All right. Will you let me have that telegram?

(Document handed to Counsel.)

Mr. Brigadier: (To Counsel.) You have seen this before.

I wish to offer this telegram in evidence.

The Witness: Bierman was ill in the hospital at the time, down south.

The Clerk: D-ME-4 in evidence, telegram dated 9-12-48.

(Received and marked Exhibit D-ME-4.)

Mr. Brigadier: Would your Honor care to look at it?

The Court: Authorization to sign for him?

Mr. Brigadier: Yes.

The Court: May I see it?

(Document handed to the Court.)

Mr. Grosman: May I say that I don't object to the telegram—to the fact that the telegram was received by him, but, of course, I object to its being proof of the fact.

Mr. Brigadier: I have Mr. Bierman here to support the telegram. I represent to the Court that he is here and will do so.

(34) Q. Judge Lieberman, I direct your attention to the signature that appears under the word "Attest" and ask you whose signature that is. A. Robert Schwartz, signed "Secretary."

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Q. And were all these signatures signed in your presence? A. They were.

Q. And on what date? A. On September 14, 1948.

Q. Now, before the signatures were attached— Well, let me first put that in evidence.

Mr. Grosman: May I see it, please?

(Document handed to Counsel.)

Mr. Brigadier: I offer this in evidence.

The Court: It may be marked.

The Clerk: D-ME-5 in evidence, agreement dated 14th day of September, 1948.

(Received and marked Exhibit D-ME-5.)

Q. Judge Lieberman, I direct your attention to the first line of Exhibit D-ME-5 and ask you when the figure "14" and the letters "th", 14th, was inserted on that. A. On the 14th of September.

Q. Was it before or after execution, after signature? (35) A. Before.

Q. Now, I direct your attention to the insertion appearing in the fifty line, and the added words, "and William Miller, both", then following the typewritten words "residing at" come the handwritten words "Fort Lee, New Jersey," and ask you when they were written in, before or after execution. A. Before execution on September 14.

Q. And do you know whose handwriting that is in? A. That's Robert Schwartz.

Q. And that was initialed by you and Robert Schwartz, right? A. And Robert Schwartz.

Q. Now, I direct your attention to the first "whereas" paragraph, and to the third line of that paragraph, and ask you when the handwritten figures "1,250" were inserted in that exhibit? A. Prior to execution on September 14th.

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Q. And by whom? A. Bob Schwartz.

Q. And that is in his handwriting? A. That's right. And we both initialed it.

Q. And again initialed by you and Mr. Schwartz. A. That's right.

(36) Q. Now, I direct your attention to paragraph 3 on page 2 of this exhibit, through which entire paragraph lines have been drawn, and ask you when those lines were drawn? A. Prior to execution.

Q. And by whom? A. Well, I don't know if Bob or I drew the lines, but we both initialed it.

Q. So that it was excised as the result of an agreement between the parties. A. That's right.

Q. Now, I direct your attention to paragraph 5 and the words "up to fifty percent" that are inserted in the first line of paragraph 5 and ask you in whose handwriting that insertion is. A. That's my handwriting.

Q. And when was that insertion made? A. That was inserted on September 27, 1948.

Q. Will you tell us the circumstances under which it was inserted by you? A. It was the intention of the parties, as I stated before, that only—

Mr. Grosman: I object to that.

A. (Continuing) It was agreed upon by the parties that only fifty percent of the stock of Milmar was to (37) be deposited in escrow with me. As a matter of fact, there are several other instruments, other than this, which will show that only fifty percent was to be deposited with me in escrow.

Q. Do you want to refer to those other instruments right now so that they will help clarify this picture? A. Letter dated September 14, 1948, addressed to Milmar Estate, Inc. "Gentlemen: This is to—"

Mr. Grosman: May I object to— Who signed it?

The Witness: Signed by William Miller.

Mr. Grosman: Now, I object to it.

The Witness: In the presence of Sam Marcus, his attorney, and myself.

Mr. Grosman: May I see it, please?

(Document handed to Counsel.)

Mr. Grosman: I object to it.

The Court: On what ground?

Mr. Grosman: There is nothing to show that my client—that it was signed in the presence of my client, or that my client had any part in connection with the signing of this letter.

Mr. Brigadier: Judge Lieberman just testified that it was signed in the presence of his client (38) and delivered in his presence to his client.

The Court: That's what I heard him say. Is that so?

The Witness: That's right. Judge, may I say this? Every paper that I have here was signed in the presence of all four of us, every paper, every paper I have here, both in escrow and otherwise.

Q. Judge Lieberman, will you proceed with your explanation? A. And it says, "Gentlemen: This is to confirm our understanding that I will deposit with Abraham Lieberman, Esquire, at least fifty percent of all of the stock of Milmar Estate, Inc., which shall consist of my own and Al Bierman's."

We then made a correction because I realized—or Bob realized that we left out the Bill Miller's stock, so we inserted in ink "and fifty percent of Bill Miller's Riviera, Inc." in Bob Schwartz's handwriting, initialed by both of us.

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The second paragraph read, "I further agree that until a certain contract of purchase dated September 14, 1948 shall have been paid in full that I will not vote the said stock without the written consent of Samuel Marcus. Very truly yours, William Miller."

Mr. Brigadier: May I offer this in evidence?

(39) Mr. Grosman: I object to it, your Honor, for the reasons stated.

The Court: It may be marked.

The Clerk: D-ME-6, letter dated September 14, 1948, signed by William Miller.

(Received and marked Exhibit D-ME-6.)

Q. You said there was a second paper that made reference to this. Do you have that? A. Yes. From the escrow file I have the escrow receipt signed by me, dated September 14, 1948, paragraph 2 says, "625 shares of Milmar Estates."

Now, there was a correction made there because I insisted on scratching out these two lines, "being all of the shares of the said corporation authorized and outstanding."

Well, 625 shares were not all the shares, 1,250 were the shares. So we scratched it out, Bob Schwartz initialed it and I initialed it.

Q. And those are Robert Schwartz's initials on the left-hand side and those are yours on the right. A. That's right.

Q. And this is addressed to Samuel Marcus, is it not? A. Addressed to Samuel Marcus, signed by me as the escrowee.

(40) Q. Was a copy of this delivery to Samuel Marcus at the time? A. To his attorney.

Q. To his attorney, Robert Schwartz. A. That's right.

Mr. Brigadier: I ask that that be marked in evidence.

The Court: Show it to Judge Grosman. Maybe he has never seen it.

Mr. Brigadier: If your Honor please, there isn't a single paper that has not not only been seen, in the course of the depositions was shown to Judge Grosman and to Mr. Marcus. So I don't understand what this delay is that we are having now.

(Document handed to Counsel.)

The Court: You might run into something he didn't see, though.

Mr. Brigadier: I promise that when I reach a paper that has not been exhibited. I will make the statement.

Mr. Grosman: If your Honor please, I must object to this on the ground that it is a self-serving declaration. It is not signed by my client, it is signed by this witness himself.

Mr. Brigadier: As the escrow agent.

(41) The Court: Are you serious about that, Judge Grosman?

Mr. Grosman: Yes.

The Court: The objection is overruled. It may be marked.

The Clerk: Escrow receipt dated September 14, 1948, marked D-ME-7 in evidence.

(Received and marked D-ME-7 in evidence.)

Q. Will you proceed with your explanation which I had interrupted in order to get into evidence these two papers you referred to, as to how the insertion "up to fifty per-cent" came to be made by you after the execution of the agreement. A. I never had occasion to look at these papers again that were signed on September 14 until the morning of September 27. I probably had to look for something.

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As I read through the agreement, I noticed, much to my surprise, that paragraph 5 said "the stock herein purchased by the buyer" and so forth "shall be deposited." And I knew immediately that all of the stock was not to be deposited with me because we have these other instruments to show it and the intention was only to deposit in escrow with me 625 shares. And that's all I had in escrow, anyway.

And as I read further I noticed that paragraph (42) 10, toward the end of the paragraph, said, "The parties further agree that at least fifty percent"—no, I am sorry, strike that— "The parties further agree that all of the shares of stock in the new corporation shall immediately be placed in escrow with Abe Lieberman" and so forth. Realizing that this was an oversight, purely, by Bob and myself, I immediately called Bob Schwartz. The reason I know the date is because I have a copy of a letter confirming my conversation. I called up Bob, and I says, "Bob, we both overlooked something in our making so many changes that day" because we were together for quite a few hours on the 14th. And I told him what it was and he said, "I agree with you a thousand percent."

I said, "Now, look, Bob, the papers have been executed. I am not going to start to send the papers over to you, and you send them back to me for initialing, we can trust each other." I mean, as attorneys. I didn't know a lawsuit was going to come out of this. I probably would have done it otherwise.

I said, "Here is what I am doing, Bob." I said, "I am taking paragraph 5 and I am writing in the words 'up to fifty percent.' I am putting my initials there. Paragraph 10, next to the words 'the parties further agree that' I scratched out the word (43) 'all'," I told him, "and I am putting in 'at least fifty percent.' I am putting my initials there. Now, Bob, will you do me a favor and put

your initials on your copy?" He still had all the papers, he told me. He said, "You're perfectly right." He said, "What I will do is this, I will talk to Marcus, and if there is no objection, you won't hear from me. Don't worry about it." I never heard from Bob. I sent him this letter, dated September 27, confirming my telephone conversation.

Is it all right to read it?

The Court: Yes, it is all part of the transaction.

A. (Continuing) "Robert Schwartz, Esquire, 9 East—"

Mr. Grosman: Now, if your Honor please, we deny that we ever received the original of that letter and I must object to it.

The Court: Who is it sent to, Robert Schwartz?

Mr. Lieberman: Robert Schwartz, by me.

Mr. Brigadier: If your Honor please, we served a notice to produce, which Judge Grosman will admit, and therefore this becomes secondary evidence, since we haven't been able to get the original. And I wish to offer that letter in evidence.

The Court: What I want to know now from Judge (44) Grosman, does he deny that Robert Schwartz received the letter dated September 27, 1948, from Abraham Lieberman?

Mr. Grosman: My recollection of Robert Schwartz's testimony is that he said he doesn't remember ever receiving it.

Mr. Brigadier: No, he says he doesn't have a recollection. But he says this, that he recalls the telephone call very distinctly, and he confirms this complete telephone call. He says he has not the file, because he turned over all the papers to Mr. Marcus and he, therefore, has no recollection of the letter. But the call he remembers and he confirms everything that Judge Lieberman has just said.

Mr. Grosman: We are now talking about the letter.

The Court: Did you mail it, put it in the box with a stamp on it, addressed to Mr. Schwartz?

The Witness: I don't know if I did, but certainly either the girls in my office—I caused it to be done. I personally didn't mail it.

The Court: Well, you know what the cases hold. We learned it in the first year of law school.

The Witness: That's right.

The Court: If we are going to get ridiculous, (45) we'll all get ridiculous in this case.

Go ahead, please.

Mr. Brigadier: Judge Grosman, do you admit I served you with a notice to produce?

Mr. Grosman: Yes.

Mr. Brigadier: I offer this as secondary evidence.

The Court: You may, sir.

Of course, I will admit that rule of law was made long before the mail service was as it is today. But it is still the law.

The Clerk: D-ME-8, copy of letter dated September 27, 1948.

(Received and marked Exhibit D-ME-8.)

Mr. Brigadier: May I hand it up to your Honor? Do you want to look at it first?

The Court: Yes, sir.

(Document handed to the Court.)

Q. Now, Judge Lieberman, I direct your attention to Exhibit D-ME-8 and ask you to whom you sent that letter? A. Sent it to Robert Schwartz, Mr. Marcus' attorney.

Q. And that was pursuant to the telephone conversation that you had?

The Court: Don't repeat it. He said that.

(46) Mr. Grosman: It sounds better if he says it twice.

The Witness: I will add this, Mr. Brigadier, that I was present here when depositions were taken. I heard Mr. Schwartz say he didn't recollect that he received—

The Court: Why are you volunteering information? It makes more trouble. Just answer the question, will you, please?

The Witness: All right.

Q. Now, Judge Lieberman, I direct your attention to paragraph 7 of Exhibit D-ME-5, and in particular to the second line of paragraph 7, which sets forth in handwriting the words "consisting of first mortgage, taxes and insurance" and ask you when that insertion was made in relation to the execution of this agreement? A. Prior to execution. I insisted on it.

Q. And in whose handwriting is it? A. Robert Schwartz's.

Q. And initialed by whom? A. By both of us.

Q. Will you identify the people? A. Yes, A. L. and R. S.

Q. Now, I direct your attention to the typewritten words that are stricken out "of whatever kind and (47) nature" and I ask you who struck those words out? A. It may have been written by Bob or myself, I don't remember.

Q. When was it done? A. At the same time that the words were written in "consisting of first mortgage, taxes and insurance."

Q. So that it was prior to execution. A. Prior to execution.

Q. That's what I want to find out. Now, I direct your attention to the sixth line of paragraph 7 and ask you when

the word "all" was stricken out, the typewritten word? A. At the same time, all prior to execution.

Q. And who inserted the words set above it? A. Robert Schwartz.

Q. And I direct your attention to the last three and a quarter lines that are stricken out, beginning with the word "demands" and ending with the word "whatsoever" of paragraph 7 and ask you when that was stricken out, before or after execution? A. Prior to execution. And initialed by both of us.

Q. I see. Was there any discussion before the insertions in this paragraph were made and the striking out took place with respect to this paragraph? A. There were discussions—anything scratched out (48) in this paragraph, there were plenty of discussions, anything stricken out in any other paragraph we had plenty of discussions.

Q. This was prior to the execution? A. All prior to execution. There were plenty of arguments before this instrument was executed.

Q. On September 14th. A. That's right. Not so much between Bob and myself—

Q. Just answer my questions, Judge Lieberman, and we'll get along faster. A. Prior to execution.

Q. Will you tell us what discussions, what arguments, arose with respect to paragraph 7 as it had been originally drafted.

The Court: Let me see paragraph 7 so I can understand it when he testifies.

(Document handed to the Court.)

The Court: All right. Now it will make sense to me when he testifies.

A. Yes. I didn't want Bill Miller or Al Bierman to be

stuck with a lot of obligations we knew nothing about. And I felt that the words "of whatever kind and nature" may involve a lot of obligations that were incurred by Sam Marcus. I therefore insisted that they only assume the obligations of the first mortgage, taxes and insurance. (49) And that is why I had that scratched out.

Q. And you struck out the rest of the paragraph as to any other obligations? A. That's right, I limited—I wanted the liabilities limited—obligations limited.

Q. Now, at the same time as the execution of Exhibit D-ME-5 on September 14th did you procure the execution of another writing, separate writing, dealing with the similar subject matter? A. A number of them.

Q. Well, the one in particular with respect to claims.

Mr. Grosman: Mr. Brigadier, if you don't mind, will you refer to the exhibit number on these various documents that were assigned to them on the taking of the depositions, because I can't follow them.

Mr. Brigadier: I would be very glad to do it, Judge Grosman, but I don't want to confuse this record, because there will be a different set of numbers. Can we have it understood that when I call out the other number that the stenographer doesn't take it down, so that it won't confuse the record.

Mr. Grosman: I don't know why it should confuse if you refer to it as the deposition exhibit.

Mr. Brigadier: All right, if that is what you (50) prefer.

The Court: Do they all have numbers now, Judge Grosman?

Mr. Grosman: Yes, a great many of them.

Mr. Brigadier: I am referring to deposition Exhibit DM-214.

The Witness: I have it right here.

Abraham Lieberman—for Defendant Milmar Estate—Direct

Q. Now, who signed this paper that you have just produced? A. Milmar Estates by Sam Marcus, President.

Q. Did you see Samuel Marcus sign that? A. I did.

Q. And who attested the signature? A. Bob Schwartz.

Q. And you saw Robert Schwartz sign it? A. That's right.

Mr. Brigadier: I wish to offer this in evidence.

Mr. Grosman: May I see it, please?

Mr. Brigadier: It is the same as the one we gave you a photostatic copy of.

(Document handed to Counsel.)

Mr. Grosman: Go ahead, if you want to offer it.

Mr. Brigadier: I wish to offer it in evidence.

The Clerk: D-ME-9, letter dated September 14, (51) 1948.

(Received and marked Exhibit D-ME-9.)

The Court: Hold it, Mr. Brigadier. We shall take a five-minute recess.

(Short recess.)

Q. Judge Lieberman, before the recess I had directed your attention to paragraph 7 of the exhibit, D-ME-5, and you had testified with respect to the insertions and the lines stricken out therein. A. That's right.

Q. Now, I direct your attention to Exhibit D-ME-9, which you testified was signed by Samuel Marcus at the same time as the execution of D-ME-5, is that right? A. That's right.

Q. Now, will you tell us the circumstances under which D-ME-9 was drafted and executed? A. Yes. I at that time mentioned to Marcus and to Bob Schwartz—I wanted to make sure that Bill Miller and Bierman wouldn't be

obliged to pay any legal fees that he may have incurred prior to this transaction, or any other obligations, and I insisted on getting this additional letter. It was addressed to Al Bierman, in care of Bill Miller's Riviera. It was addressed to Al Bierman because—you may find several others that way—because we inserted William Miller's name in the agreement (52) later on, which I insisted on, which we discussed previously, and which was initialed by Schwartz and myself. It should have been addressed to Bierman and to Miller.

Q. Now, I direct your attention to the fact that in paragraph 7 of D-ME-5 you had limited the buyers assumptions of obligations to the mortgage, taxes and interest, had you not? A. That's right.

Q. Mortgage, taxes and insurance. A. That's right.

Q. And had struck out any reference to any other claims— A. That's right.

Q. —that might exist against Milmar, is that right? A. That's right.

Q. Now, I direct your attention to Exhibit D-ME-9, and how did that read? A. This was a—these were supposed to be personal obligations of Sam Marcus. In going over these papers subsequently—as a matter of fact, not subsequently, since the trial came up I went through these papers and I noticed that this should have been signed by Sam Marcus personally, not by Milmar. Sam Marcus should have signed (53) this personally, but it was an oversight on Bob Schwartz and my own, as we overlooked several other matters in our desire to get this matter finished and all the papers that had to be finished. This should have been signed by Sam Marcus, not by Milmar Estates.

Q. You can see from the reading of paragraph 7 in the principal agreement— A. That's right.

Q. —that this would not make any sense unless it was—
A. Exactly.

Q. —just let me finish—the individual obligation of Samuel Marcus, is that right? A. That's right.

The Court: Do you know what I was just thinking, gentlemen of the bar, I have had many cases here where because lawyers rushed things it ended up in litigation. If they only took a little more time before, they wouldn't have had the litigation. It reminds me of the old precept that Mr. Walsh had, who always told me, "When your client wants to rush a big matter, tell him to get another lawyer." I don't rush for anybody.

Is there a question pending?

Q. I direct your attention again to Exhibit D-ME-9, and you will find that in the fifth sentence—fifth line (54) of the first paragraph there is an insertion in handwriting, is there not? A. Yes, there is.

Q. And what are the words that are inserted in handwriting? A. "All other obligations."

Q. And whose handwriting is that? A. Robert Schwartz.

Q. And who initialed that insertion? A. Schwartz and myself.

Q. Will you produce, Judge Lieberman, all other papers that were executed on September 14th? A. I have them all here, escrow and non-escrow papers, both. I'd like to keep them separate here. All right, you can mix them up. We can separate them later.

Q. I direct your attention to deposition exhibit DM-223 and ask you whose signature appears on that exhibit. A. William Miller.

Q. And when was that signed? A. On September 14, 1948.

Abraham Lieberman—for Defendant Milmar Estate—Direct

Q. And was it delivered at the same time as this transaction was consummated? A. Yes.

Q. On September 14th. (55) A. That's right.

Q. And it is addressed to— A. Milmar Estate.

Q. And who had drafted it? A. Bob Schwartz or myself. We may have drafted it together. I don't know just who drafted it. I will say this, that all papers were prepared in Bob Schwartz's office. I didn't prepare any paper in my office. We may have drafted them together, but everything was prepared in Bob's office.

Q. Now, I direct your attention to the third paragraph on this paper and ask you when the lines striking out the paragraph were placed thereon. A. Prior to execution.

Q. And by whom? A. Initialed by myself and Bob Schwartz. I don't know who did the actual scratching of it.

Q. And this was done before execution and before delivery? A. That's right.

Mr. Brigadier: I ask that that be received in evidence.

Mr. Grosman: May I see it, please?

(Document handed to Counsel.)

Mr. Brigadier: Would your Honor like to look (56) at this before I question him?

(Document handed to the Court.)

Q. Now, was there any discussion between William Miller, Samuel Marcus, in your presence, prior to the execution and delivery of Exhibit—

Mr. Brigadier: I haven't put it in evidence yet. I am sorry.

The Clerk: D-ME-10, letter dated September 14 to Milmar Estates and signed by William Miller.

Abraham Lieberman—for Defendant Miimar Estate—Direct

(Received and marked Exhibit D-ME-10.)

Q. Was there any discussion between William Miller and Samuel Marcus—now make it yourself and Robert Schwartz—on September 14th in the presence of all parties with respect to this paragraph which now appears stricken out? A. There must have been, otherwise we wouldn't have scratched it out. I don't actually remember—

Mr. Grosman: I object to that and ask that it be stricken.

A. (Continuing) I just don't recollect. We must have had—anything that was scratched out required a lot of discussion and this, no doubt, is one of them.

The Court: It seems like a logical conclusion from the circumstance that it was stricken out. But you don't know why.

(57) The Witness: I really don't. I don't remember just offhand.

Q. I direct your attention to the tenth paragraph of Exhibit D-ME-5, and in particular to the last sentence of that paragraph, and ask you whether that refreshes your recollection as to why this paragraph was being stricken out? A. I don't remember why the entire thing was scratched Mr. Brigadier. I can see the distinction here—"I will arrange to have all of the stock of said new corporation placed in escrow"—that refers particularly to paragraph 10. I don't remember what led up to the rest of it, but it was scratched out, and we both initialed it. It was agreed upon by the parties. I honestly don't remember.

Q. The provision is D-M-10, the last paragraph, calls

for the deposit in escrow of all the stock of any new corporation that would be organized to whom this contract might be assigned, is that right? A. That's right.

Q. Had William Miller agreed— A. No.

Q. --that he would deposit in escrow all of the stock? A. We had already agreed in the agreement it was only (58) fifty percent.

Q. Well, does that refresh your recollection as to what discussion took place about depositing of stock in escrow? A. The general discussion was that I was only supposed to have fifty percent in escrow. Now, of course, I could very easily have changed the paragraph to confine it, but I probably may have said to Bob Schwartz, "Bob, this whole thing isn't necessary, let's scratch it out." I don't remember the exact discussion. It didn't portray the thoughts of the people involved, that's the important thing. But I could have changed this, if necessary, to conform with it. But I think I may have said, as I did in several other instances, "This is unnecessary, let's scratch it out. We are just repeating a lot of the same stuff over and over again."

Mr. Grosman: Now, for the record, your Honor, may I ask that the witness' answer be stricken out in its entirety?

The Court: That's no answer, Mr. Brigadier, I may have and—

Mr. Brigadier: I have no objection.

The Court: All right, strike it out.

Mr. Brigadier: Not the least.

(59) Q. I direct your attention, Judge Lieberman, to the fact that in paragraph 10 of D-ME-5 you have already testified that you made the handwriting insertion "at least fifty percent". A. That's right.

Abraham Lieberman—for Defendant Milmar Estate—Direct

Q. And struck out the word "all". A. Right.

Q. And you did this after the execution of the agreement pursuant to the telephone conversation you had with Mr. Schwartz. A. Right.

Q. Didn't this therefore adequately replace the provision that it was stricken out?

Mr. Grosman: I object to that question as being leading.

Mr. Brigadier: Withdraw the question.

The Court: You know better, Mr. Brigadier.

Mr. Grosman: I don't blame him for trying, but it's objectionable.

The Court: The objection is sustained. I think you tried hard enough to refresh his recollection.

Mr. Brigadier: I thought I had refreshed it before today, sir.

The Court: I am sure while the witness was in Florida he wasn't worried about testifying here.

(60) The Witness: Only about catching a plane.

The Court: And that's a problem, too, I understand.

Q. I direct your attention to a letter produced by you, dated September 14, 1948, addressed to Mr. Al Bierman and William Miller, signed Milmar Estates, Inc.—purported to be signed Milmar Estates, Inc., by S. M. Marcus, President, and ask you whether that was signed by Mr. Marcus. A. It was signed by Mr. Marcus.

Q. And on September 14th? A. September 14, 1948.

Q. And as part of the same transaction? A. That's right.

Q. And at the same time that all these documents on September 14 were executed by him— A. That's right.

Q. —and all the parties. A. And also initialed and attested by Robert Schwartz, Secretary.

Abraham Lieberman—for Defendant Milmar Estate—Direct

Q. Now, who inserted the handwriting, the name William Miller? A. That's Bob Schwartz's signature—handwriting.

Q. And initialed by both you and Bob Schwartz? A. That's right.

(61) Q. And who inserted "and William Miller" opposite the words "Dear Mr. Bierman"? A. Bob Schwartz.

Q. That's his handwriting. A. That's correct.

Q. And initialed by you and him. A. Right.

Q. Now, this refers to the $95,000 mortgage, is that right? A. That's correct.

Q. Was there a mortgage drawn on September 14th? A. There was.

Q. And drawn by whom to whom? A. Drawn, I believe, by Bill Miller and Al Bierman.

Q. To whom? A. To Samuel Marcus.

Mr. Brigadier: Do you have that mortgage, Judge?

Mr. Grosman: I think we have.

Mr. Brigadier: I call upon you to produce it.

Mr. Grosman: I think it was marked in evidence on the deposition. If you will give me the deposition marking I will be glad to get it for you.

Mr. Brigadier: It was marked P-15 for identification. 14 and 15.

(62) Mr. Grosman: Here they are, Mr. Brigadier.

(Documents handed to Counsel.)

Q. I show you what purports to be a mortgage dated September 14, 1948, and ask you whether that is the instrument that you are referring to? A. Yes, this is the instrument.

Mr Brigadier: I wish to offer this in evidence.

The Clerk: D-ME-11, letter dated September 14, Mr. Al Bierman, signed Samuel Marcus.

Abraham Lieberman—for Defendant Milmar Estate—Direct

Mr. Grosman: Signed what?

The Clerk: Signed Milmar Estates by Samuel Marcus, President.

(Received and marked Exhibit D-ME-11.)

Q. Now, the mortgage instrument that you have before you, Judge Lieberman, is that the mortgage instrument that is referred to in D-ME-11? A. Yes.

Q. And that mortgage is signed by whom? A. By Al Bierman and William Miller.

Mr. Brigadier: I wish to offer this mortgage in evidence.

Mr. Grosman: May I ask you on what property that mortgage is?

Mr. Brigadier: I will cover that.

(63) The Clerk: D-ME-12, mortgage dated 14th day of September, 1948.

(Received and marked Exhibit D-ME-12.)

Q. Now, Judge Lieberman, in this mortgage who appears named as the mortgagors? A. Al Bierman and William Miller.

Q. And who appears as the mortgagee? A. Milmar Estate, Inc.

Q. And the principal amount of the mortgage is what? A. $95,000.

Q. And the terms at which it is to be paid are what? A. $3,000 per month commencing October 1, 1948, $3,000 on the first day of each and every succeeding month that the premises presently known as Bill Miller's Riviera, Fort Lee, New Jersey, are open for business; $1,500 on the first day of each and every month that the premises are not open for business.

Abraham Lieberman—for Defendant Milmar Estate—Direct

Q. I see. Now, the mortgage covers what premises? I don't want you to read the description. You know it. A. It covers the Riviera building, the owner of which was Milmar. This is the mortgage I referred to before that was a silly mortgage that Marcus insisted on, and (64) that Bob Schwartz told him he was crazy, but he insisted on it, and we made it. It was a waste of time.

Q. So that the mortgagee is actually the title owner of the fee. A. That's right. They had nothing to convey. We felt like fools.

Q. And the mortgagors did not even have any title to the premises. A. Of course not. It was owned by Milmar. We didn't know what was in the back of this man's mind. He wanted it. His own lawyer was fighting with him. It was his client, not mine.

Mr. Brigadier: May the record show that I have asked Judge Grosman to produce, and that he has produced the exhibit that was marked in the deposition as P-14 for identification.

Q. I direct your attention, Judge Lieberman, to what was marked in the deposition as Exhibit P-14, and ask you what that is. A. That's the bond of this mortgage, guaranteeing the mortgage, dated the same day.

Q. And that bond is signed by whom? A. By Al Bierman and William Miller.

Q. In their individual capacities? A. As individuals.

(65) Q. Now, I direct your attention to Exhibit— Withdraw that question.

Mr. Brigadier: I wish to offer in evidence the bond by Al Bierman and William Miller to Milmar Estates, Inc., as produced by Judge Grosman.

Mr. Grosman: No, not the bond.

Mr. Brigadier: That's the bond.

I am wrong. I am sorry. We have confused it. This is not a bond, that is a chattel mortgage.

The Witness: I'm sorry. This is a chattel mortgage.

Mr. Brigadier: Judge Grosman, do you have a bond that goes with this?

Mr. Grosman: If you will give me the exhibit number, I will try to find it. I don't know.

(Discussion off the record.)

Mr. Brigadier: I think I was mistaken about that.

Mr. Grosman: Marcus didn't insist upon a bond, apparently.

The Court: Even though he insisted on a mortgage made to the fee holder.

Q. Judge Lieberman, I direct your attention to the exhibit that was marked P-14 for identification and ask you to please look at that exhibit which you (66) identified as a bond. A. It's a chattel mortgage.

Q. Are you mistaken about that? A. Yes, it's a chattel mortgage.

Q. Chattel mortgage given by whom? A. By Al Bierman and William Miller.

Q. To whom? A. To Milmar Estates, Inc.

Q. And what does the chattel mortgage cover? A. It covers the—it says, "Premises known as Bill Miller's Riviera, Hudson Terrace, Fort Lee, New Jersey." There was supposed to be a schedule attached to it. An inventory was made, I believe.

Mr. Brigadier: Do you have any such schedule, Judge Grosman?

Mr. Grosman: I gave you what I have.

Abraham Lieberman—for Defendant Milmar Estate—Direct

Q. Well, was this also to cover the chattels that were in the premises? A. This was to cover the chattels. And again we told Marcus at that time—Bob Schwartz and I—William Miller and Al Bierman didn't own the chattels of the Riviera. It was a corporation known as Riviera—Bill Miller's Riviera. They had nothing when they conveyed this. But he wanted that and he wanted the real estate mortgage.

(67) Q. Well, was this mortgage, the chattel mortgage, to embrace any chattels that were owned by Milmar? A. I would say yes, because I believe all the chattels in the place belonged to Milmar at that time. Riviera only had a lease of the property. I don't think under the lease it had the chattels.

Q. And, therefore, you had the same situation, a mortgage given by mortgagors who did not have title to a mortgagee who had the very title to the very chattels that were being encumbered. A. Yes.

Q. And your explanation for that is the same as to the real estate mortgage? A. That's right, the same. Mr. Marcus insisted on it.

Mr. Brigadier: I offer this in evidence, the chattel mortgage.

The Court: This would make a good subject matter for a sketch by Smith and Dale, acting as lawyers.

The Clerk: Chattel mortgage dated the 14th day of September, 1948, marked D-ME-13 in evidence.

(Received and marked Exhibit D-ME-13.)

Mr. Brigadier: Judge Grosman, with your permission—I have marked a copy in evidence, we also have the original—may I substitute the original in (68) place of the copy.

Mr. Grosman: Surely.

Abraham Lieberman—for Defendant Milmar Estate—Direct

The Clerk: Copy marked D-ME-11 withdrawn and replaced by original in lieu thereof.

Q. I direct your attention, Judge Lieberman, to the exhibit that was marked in the deposition DM-215 and ask you who signed that, whose handwriting is the signature? A. William Miller, President of Bill Miller's Riviera.

Q. And below the typewritten word "Accepted" whose signature appears? A. By Sam Marcus, President, Milmar Estates, Inc. Witnessed by Robert J. Schwartz, Secretary.

Q. And is that the signature of Robert Schwartz? A. It is.

Q. You saw him sign it, you saw Samuel Marcus sign it? A. I did.

Q. Did you see William Miller sign that? A. I did.

Q. And I direct your attention to the last line of the first paragraph, to the words as they presently are stricken out, and ask you whether that was stricken out before signature. A. Stricken out before signatures.

(69) Q. And in whose handwriting were the words "with Abraham Lieberman, Esquire" inserted? A. By Bob Schwartz.

Q. I see. And whose initial appears under that? A. My initials.

Q. I see. And this was executed as part of the same transaction on September 14th. A. That's right.

Q. The same time as the rest of the transaction. A. The same time.

Mr. Brigadier: I offer that in evidence.

(Document handed to Counsel.)

The Clerk: D-ME-14, letter dated September 14,

1948 to Milmar Estates, signed by Bill Miller's Riviera by William Miller, President.

(Received and marked Exhibit D-ME-14.)

Q. I direct your attention, Judge Lieberman, to a paper you have produced which has been marked in the depositions as DM-221 and ask you whether that was executed at the same time on September 14 as the remaining papers in the transaction, as all the papers in the transaction? A. It was.

Q. Now, whose signature is that below Milmar Estate, Inc.? (70) A. Sam Marcus, President.

Q. And alongside of it, on the left? A. Robert J. Schwartz, Secretary.

Q. Now, I direct your attention to the second paragraph, paragraph bearing No. 2 on this exhibit, and ask you whether the alterations appearing therein and the handwriting insertions were made before the execution thereof? A. They were.

Q. And by whom were they done? A. Bob Schwartz.

Q. And initialed by? A. Both of us, Schwartz and myself.

Q. Bob Schwartz and yourself. Now, I direct your attention to the first paragraph and ask you what mortgage —I am sorry Withdraw that.

Mr. Brigadier: I want to offer that in evidence.

(Document handed to Counsel.)

The Clerk: D-ME-15, letter dated September 14, 1948, to Bill Miller, signed Milmar Estates, by Samuel Marcus, President.

(Received and marked Exhibit D-ME-15.)

Abraham Lieberman—for Defendant Milmar Estate—Direct

Q. I direct your attention to the first paragraph of Exhibit D-ME-15 and ask you whether the mortgage (71) referred to in that paragraph—

Mr. Brigadier: If you object to the question as being leading, Judge Grosman, I can reword it.

Mr. Grosman: No.

Q. (Continuing) —is the same mortgage as that which you have identified as Exhibit D-ME-12? A. Is that the real estate mortgage? Yes, that's the real estate mortgage.

Q. It refers to that mortgage. A. That's correct.

Q. Now, in paragraph 2, the reference to second mortgage, is that also to this Exhibit D-ME-12? A. That's the second—real estate mortgage, that's correct.

Q. Do you recall the discussion that led to the drafting of this paragraph 2 in Exhibit D-ME-15? A. Yes.

Q. Will you tell us what it was? A. It seems that Al Bierman wanted to be sure, in the event this agreement—there was a default on the agreement—no, I will withdraw that. I'm sorry. I wanted to make sure that in the event there was a default at least Bill Miller would be credited with the moneys that were paid on account of the closing agreement, so that it shouldn't be defaulted.

(72) Q. What sum? A. To the extent of— "I agree to credit you personally with 37½ percent," which includes Al Bierman's ten percent, and this was to be applied toward the $50,000 note which Bill Miller owed to Marcus, about which I testified before.

Q. What are the receipts that are referred to here—receipts received by Milmar—meaning what receipts? A. All moneys received under the agreement, the $125,000 agreement.

Q. Including the $30,000 that was being paid. A. That's right, the hundred and twenty-five—anything that was to be paid on this contract. In the event there had been a

default I wanted to make sure that Bill Miller would receive his proportional credit on the $50,000 note. And that's why I insisted that this paper be prepared.

Q. And how is the figure, 37½%, arrived at? A. That also caused a lot of argument and discussion. Marcus at that time claimed that Bill Miller only had 37½% interest in Milmar. I asked Miller. Miller said, "To tell you the truth his man kept on taking papers from me, kept on taking stock from me. I never got any shares of stock from him. I'm supposed to be a (73) fifty percent owner."

This was all said in front of Marcus. The fighting was terrific. He said, "But, look, if it means closing the deal, and if there is a default, and I am only going to get 37½% credit, let it go, because eventually, when this is all paid, I'm owning the whole place anyway. And I don't think there is going to be a default in this thing. So let him have it."

I said, "You want 37½%, Bill, O. K."

There were terrific discussions. Bill Miller said, "I own 50%." He said, "You only own 37½%."

Q. Now, I direct your attention to the third paragraph of Exhibit D-ME-15, where you find references made to a $50,000 note. A. That's right.

Q. Now, I want to take you back to the prior conference for a moment, the conference at which you received your instructions, you and Robert Schwartz, you testified at that time that the discussion came up as to the $50,000 note. A. That's right.

Q. Do you have that note? A. I do.

Q. Will you produce it, please?

(Document handed to Counsel.)

(74) Q. It is a note by whom to whom? A. It is a note dated June 1, 1947, signed by William Miller to the order of Samuel Marcus, due June 1, 1948.

Abraham Lieberman—for Defendant Milmar Estate—Direct

Q. In what sum? A. In the sum of $50,000.

Mr. Brigadier: I wish to offer that in evidence.

The Clerk: D-ME-16, $50,000 note dated 6-1-47.

(Received and marked Exhibit D-ME-16.)

Q. Now, going back to the first meeting, the meeting at which you and Robert Schwartz met with William Miller and Samuel Marcus and received your instructions as to what the agreement was and as to what you were to draft. You said that at that time a discussion came up as to the $50,000 note. A. It did.

Q. Is this that same note which has now been marked as D-ME-16? A. That's the note.

Q. Was there anything said at the time of this meeting as to what this note had been given for, if you know? A. I believe there was a discussion at that time. However, I knew what it was, because I was present when (75) the note was originally given.

Q. In the original transaction in '47. A. That's right. I don't remember the discussion on that in 1948, but I was present when this note was made out in '47.

Q. I see. And did this note replace a former note between the parties for the said sum of fifty thousand? A. It did, it replaced another note of fifty thousand.

Q. And do you know from a discussion that took place in the presence of Samuel Marcus what the original note was given for and the replacement note was given for? A. I do.

Q. What was it given for? A. It was given for moneys that Marcus advanced for Bill Miller, representing his share in the purchase of the real estate of Bill Miller's Riviera—or Milmar.

Q. I see. Now, at this meeting at which you received the instructions, you and Bob Schwartz, which, as I recall, you placed either in the latter part of August or the early

part of September, what was said and what was agreed upon should be done with the $50,000 note? A. It was agreed that if and when the agreement of September 14th were consummated Bill Miller's note was (76) to be canceled, and he didn't owe him a cent. And the note was left with me, as a matter of fact—not even in escrow, it was left with me.

Q. Now, on— A. And Bill Miller was glad for me to get possession of it, by the way, so at least he could make sure that that wouldn't be lost when it had to be canceled. That was the discussion, that was the fight, and I insisted on holding the note because stock had been lost. I remember that distinctly. That was a bone of contention.

Q. Now, on September 14, when the papers were ready for execution, did any question arise as to a change in the consideration of the transaction? The instructions that you had received—let me go back for a moment to the prior conference—were that the price was $125,000. A. That's right.

Q. And the agreement that you drafted was for $125,000. A. That's correct.

Q. Now, did any question arise as to any additional sum of money? A. We were just about to execute the papers when I heard a big argument between Miller and Marcus, a terrific argument. It seems at the last moment Marcus (77) wanted Bill Miller personally to give him another $15,000. What went on after that is almost unbelievable. They almost came to blows. But evidently—not evidently, but once again Miller said, "What can I do? I want to get rid of this man once and for all." So he made out a note to him for $15,000, separate and distinct of this transaction.

Q Do you have that document here? A. I told Marcus at that time—I almost got into blows with him—I told him it was a shakedown.

Abraham Lieberman—for Defendant Milmar Estate—Direct

Here it is.

(Document handed to Counsel.)

Q. You have produced a paper—

The Court: Didn't they say what the $15,000 was for?

The Witness: It seems that he said he owed it to him for some reason or other. I didn't get into the actual conversation. They were battling back and forth.

The Court: That was a private fight.

The Witness: It was a private fight. It had nothing to do with this agreement, the same as it was a private fight about canceling Marcus' tabs—I have a letter here—he wanted all his tabs—

The Court: We will give you time to get to (78) that. Just don't rush.

Q. Now, the paper that you have exhibited bears date September 14, 1948? A. Yes.

Q. And is signed by whom? A. William Miller.

Q. And this paper, you say, was executed at whose request? A. Sam Marcus' request.

Q. And was then delivered to you to be held by you, is that it? A. This is evidently a copy. I mean there were two copies made. The note was in favor of—this is not in escrow. This is the original copy.

Q. This is the original. A. That's right. There may have been two originals, because I wasn't going to hold the note. Marcus, no doubt, received a similar one.

Q. But the original remained in your possession. A. I don't know if—there may have been two originals, Mr. Brigadier. I don't know.

Q. All right. A. I don't know how I ever got possession of this. Maybe they trusted me with it. I honestly don't

know. They trusted me with all the other papers, they probably (79) said, "Hold that, too."

Mr. Brigadier: We have marked in evidence the escrow receipt, haven't we?

The Witness: No, it never went in evidence.

Mr. Margulies: No. 7.

The Witness: Maybe it was.

Q. The papers that you were to hold in escrow are those that are recited in Exhibit D-ME-7, is that right? A. That's right.

Q. And that does not include this paper that you have just produced? A. It does not.

Q. I see. But this one that you have just produced is an original. A. That's right.

Q. You call it an original copy, but it is the original typing. A. Oh, yes.

Q. And was delivered to you? A. That's right.

Q. To be held by you? A. That's right.

Mr. Brigadier: I offer this in evidence.

(Document handed to Counsel.)

Mr. Brigadier: It is a paper you have already (80) seen. I have given you a photostat of it. This is the same one that was marked in the deposition, Judge Grosman, as 222, of which I furnished you a photostat.

Mr. Grosman: You did.

The Clerk: Letter dated September 14, 1948, signed by William Miller, marked D-ME-17 in evidence.

Mr. Brigadier: I would prefer that the word "letter" be not used since it doesn't appear to be a letter. I would suggest we call it a writing.

The Clerk: A writing dated September 14.

Abraham Lieberman—for Defendant Milmar Estate—Direct

The Court: I think Judge Grosman made the best suggestion. It is always safer to call it a document.

(Received and marked Exhibit D-ME-17.)

The Court: Does that cover the $15,000 item?

The Witness: Yes.

(Document handed to the Court.)

Q. Judge Lieberman, I direct your attention now to Exhibit D-ME-15, the fourth paragraph thereof, which reads, "In the event that the contract of purchase dated September 14, 1948 is fulfilled the said note of $50,000 is to be returned to you and we agree to exchange mutual releases." Can you tell us what discussion led up to the insertion of that paragraph in that writing, if any? A. I wanted mutual releases exchanged and I would hold (81) them in escrow the same as I was holding everything else, so that upon the completion—or the payment of the contract, consummation of the contract, we would just have to exchange—give each other releases and there would be no further problem.

Sam Marcus did not want any releases held in escrow. That he insisted on. So I wanted to cover myself and I had that paragraph put in there, upon the consummation of the deal at least mutual releases will be exchanged.

Q. Well, now, Judge Lieberman, I direct your attention to the fact, first, that the signature that appears hereon is that of Milmar Estate, Inc., Sam Marcus, President, is that so? A. That's correct.

Q. I direct your attention, however, to the fact that paragraph 3 deals with a $50,000 note that was then held by whom, Milmar Estate? A. No, held by Sam Marcus.

Q. Individually? A. Absolutely.

Q. I direct your attention to the fact that paragraph 2 of this writing deals with the crediting of moneys re-

ceived, which were going to be received by whom? (82) A. It was being received by Milmar, but it was really—the contract was Milmar, but it was Sam Marcus who was receiving the money for the sale of the stock.

Q. Well, you know, of course, that it was Samuel Marcus who was selling it. A. That's correct.

Mr. Grosman: I object to that as leading—

Mr. Brigadier: Oh, he has already testified a dozen times.

Mr. Grosman: Completely outside the four corners of the contract.

The Court: What is the question?

(Question read.)

A. That's right. I said that several times.

Q. And yet this exhibit, D-ME-15, which deals with the receipts that would be received by the seller from the purchaser to be credited, and which deals with the $50,000 note that was held by Samuel Marcus, individually, is signed in the name of Milmar Estates, Inc. A. Correct.

Q. Can you explain why it was signed that way— A. The same as the other—

Q. —instead of—let me finish my question—Samuel Marcus, individually, in view of the fact the substance of the papers deals with his individual take (83) rights? A. The same, Mr. Brigadier, as that other paper I testified to that should have been signed by Sam Marcus individually, this should have been signed by Sam Marcus individually. It was evidently purely an error on the part of Mr. Schwartz and myself, with all these papers. We were confused. There is no question about it. Because of this whole setup, that Milmar was selling the stock, which was a ridiculous thing to begin with as I stated before, and as a result of that no doubt the papers were prepared, everything in that whole setup, thinking of Milmar, dis-

posing of everything, Milmar was put in here instead of the name Sam Marcus individually.

Q. I want to get this clear, Judge Lieberman, what was the true understanding between the parties as to who was really selling and what was being sold?

Mr. Grosman: Now, if your Honor pleases, I must object. We have writings here and they speak for themselves.

Mr. Brigadier: Oh, no.

Mr. Grosman: May I point out to you this. There is no suit here on the part of the plaintiffs in this case to reform that contract. They are suing on the contract.

(84) Mr. Brigadier: We are not seeking reformation on the contract and I would like to be heard as to what I am doing now.

I am seeking to offer parole evidence for the purpose of interpreting these documents. And if there is anything established in the law of parole evidence it is that parole evidence is always admissible to explain what the parties intended to do. If your Honor would like me to I could read—

The Court: I don't want to hear it. I just brought it out in this other trial. I had to bring the book in and show it to the lawyers. Of course it's admissible.

Mr. Brigadier: To establish, first, what was it the parties intended. Then we will look at the documents to see—

The Court: First you look at the four corners of the contract to see what was intended by the parties. That is where you look first. If you can't get it from there, then you can have parole evidence.

Mr. Brigadier: Certainly by this time we have established the fact that there are certain documents that refer to Samuel Marcus individually, there are

others that refer to Milmar Estates. What we are trying now to do is to find out what meanings shall be given to (85) these documents that would render them completely meaningful in interpretation. And they do become meaningful the moment you recognize that wherever Milmar appears here, if you substitute Samuel Marcus as the seller, every document takes on complete meaning, including the releases, the wiping out of claims, and everything else will take on complete meanings, for, as I understand the earlier testimony, that is exactly what did happen. It was Marcus who was selling. For some reason that I needn't go into Marcus insisted on the use of this corporate device, against the wishes of lawyers.

But the true intent of this transaction is that Marcus is the seller. And, therefore, if you substitute him as the seller, the transaction is completely simple and meaningful.

Mr. Grosman: Now, I can understand that Mr. Brigadier would like, if he could, to change this contract. He wants to take out the parties to the contract, substitute new parties and make a wholly new contract for the parties to this suit.

Now, that can not be done. There is no application here to reform the contract. We are standing on the contract as drawn, as you repeatedly said, by two very able lawyers, Judge Lieberman and Mr. Schwartz

And I object to this line of testimony where (86) they are asking this witness to say what the meaning of this contract was, who the parties—

The Court: He didn't ask him that. What the intention of the parties was, that's what I understand he is asking. I decide the meaning, after I hear it.

Mr. Grosman: I understand. And whether or not it was not Milmar Estates that was supposed to be the

party, but Marcus was supposed to be the party.

Mr. Brigadier: I submit I am not seeking to reform, sir. I am trying to do just what you pointed out, find out, first, what the parties intended. You can then decide thereafter whether or not what we are doing is contradiction of an agreement that they arrived at.

Mr. Grosman: I object to it.

The Court: That is my understanding. I will allow it only for the purpose of showing what the intention of the parties was.

Q. Judge Lieberman, will you answer the question, please?

The Court: I am willing to say at this point, some of this is inexplicable to me. In fact, it's incredible that it could be done this way.

Mr. Brigadier: I will accept your second adjective, sir, but I am hoping to satisfy the first, (87) that it can become explicit. But I do think it is incredible.

The Court: What was the question, Mr. Bremer?

(Question read.)

The Court: As expressed by the parties, not as he concludes.

Mr. Brigadier: Oh, yes, as expressed by the parties.

The Court: That's right.

Mr. Brigadier: As stated by William Miller and Samuel Marcus in the presence of each other, and in your presence and in the presence of Robert Schwartz.

A. I will repeat what I stated at the very beginning of my testimony. Sam Marcus was selling everything that he and all his interests had in Milmar, any and all issued outstanding stock, wherever it may be, selling it to William Miller and to Al Bierman. Sam Marcus was stepping out

completely and Bill Miller and Al Bierman were paying for it.

Q. What about the claims that Samuel Marcus might have against Milmar or against William Miller, was there anything said about those? A. I don't quite understand.

Q. Well, you testified to a note of $50,000 that Samuel Marcus held of William Miller. Was there any (88) understanding about that? A. These papers so state, that it was to be canceled, any and all obligations of Bill Miller's to Samuel Marcus, and vice versa, everything was going to be canceled, considered paid and forgotten, if the agreement of September 14 was lived up to, and mutual releases to be exchanged.

Q. Exchanged by whom to whom? A. By all parties. We were going to get— I wanted releases from Miller to Marcus, Marcus to Miller, Bierman to Marcus. That's what I wanted at the beginning, Milmar—completely, so that they would never have to bother with each other again. That was the feeling of both. They didn't like each other too much. And Schwartz and I were in the middle of it.

Q. You have produced from your file—you have produced what purports to be two certificates of stock, one for one share and one for forty-nine shares, issued by Bill Miller's Riviera, Inc. Who delivered these shares to you? A. Bob Schwartz or Sam Marcus. I don't remember who, but it was given to me on September 14th.

Q. And— A. I'm sorry. No. I'm sorry. I'll withdraw that. I don't know if—there were 51 shares, I believe, of (89) Riviera that was delivered to me on that day because—of Bill Miller's Riviera, because Marcus held 51% of Bill Miller's Riviera as security for the performance of an agreement made in 1947. Well, forty-nine shares I had. This other one share I got from Marcus.

Q. Making a total of fifty shares. A. That's right.

Abraham Lieberman—for Defendant Milmar Estate—Direct

Q. And is that the fifty percent of Bill Miller's Riviera that is referred to in D-ME-6, "This is to confirm our understanding that I will deposit with Abraham Lieberman at least fifty percent of all of the stock of Milmar Estate and fifty percent of Bill Miller's Riviera, Inc."? A. That's the letter.

Q. Is that the stock referred to in D-ME-6? A. That's correct, that's Bill Miller's Riviera.

Mr. Brigadier: May they may be marked as one exhibit, Judge?

(Documents handed to Counsel.)

Mr. Grosman: I think, under the circumstances, we better mark them separately. There are only two of them.

Mr. Brigadier: I offer in evidence certificate No. 16 for one share of stock of Bill Miller's Riviera, issued to William Miller, and endorsed in (90) blank by William Miller.

Mr. Grosman: No, no.

Mr. Tepper: It is not endorsed.

Mr. Brigadier: Excuse me.

The Clerk: That certificate will be marked D-ME-18A.

(Received and marked Exhibit D-ME-18A.)

Mr. Brigadier: I offer in evidence certificate No. 17, 49 shares, issued by Bill Miller's Riviera, Inc., dated July 23, 1947. No endorsement on the back.

The Clerk: Marked D-ME-18B.

(Received and marked Exhibit D-ME-18B.)

Q. Now, I direct your attention again to the fact that D-ME-6 provides, or reads as follows, "This is to confirm our understanding that I will deposit with Abraham Lie-

berman, Esquire, at least fifty percent of all of the stock of Milmar Estate, Inc." Was such stock deposited with you? A. It was.

Q. And do you have it here? A. I have them here.

Q. And it is represented by how many certificates? A. Two certificates, No. 20, representing 125 shares, and certificate No. 18, representing five hundred shares, both made out to Samuel Marcus, endorsed in blank by (91) Samuel Marcus, signed in my presence.

(Documents shown to Counsel.)

A. (Continuing) Those are not the shares, Mr. Brigadier, that are in escrow. I have my separate escrow—

Mr. Grosman: I don't hear what the witness says.

The Court: Repeat what Judge Lieberman said at the end.

(Record read.)

A. (Continuing) —file.

The Court: I think Mr. Brigadier said that the shares mentioned in an exhibit—

Mr. Brigadier: Yes, I'm going to have to correct that. I am in error.

Q. I referred, Judge Lieberman, to the shares that are referred to in Exhibit D-ME-6. Now, the shares that you have produced you say are not those that are in the escrow, is that right? A. That's correct.

Q. So that these are not those that are referred to in D-ME-6, is that right?

The Court: Make sure.

A. Well, they are not identified. I mean the certificates are not identified. This letter—

Abraham Lieberman—for Defendant Milmar Estate—Direct

(92) Q. Judge Lieberman, how many shares were you to hold in escrow? A. Six hundred and twenty-five shares.

Q. We all want to know that, the Judge, myself and everybody else. A. Six hundred and twenty-five shares.

Q. How many shares do you now have here all together? A. What are you referring to, that I have on the table?

Q. On that table. A. Twelve hundred and fifty shares.

Q. Will you please produce the six hundred and twenty-five that are to be held in escrow. A. That's different. You didn't ask me for it.

Q. I said the mistake was mine. A. They are not identified on this letter.

Q. I said the mistake was mine. A. Oh, I'm sorry.

Q. And I thank the Judge for having caught it. I made the mistake. A. I'm sorry.

Q. Now, you produced certificates No. 17 and 19. A. That's right.

Q. And that totals how many shares? (93) A. Certificate No. 17 is five hundred shares made out to Samuel Marcus, endorsed by Samuel Marcus in blank, marked Exhibit DM-200; certificate No. 19 for 125 shares made out to Samuel Marcus, marked Exhibit DM-201, endorsed in blank by Samuel Marcus, both certificates being signed by Samuel Marcus as President, Robert J. Schwartz as Secretary-Treasurer. These are the ones I hold in escrow.

Mr. Brigadier: May the record show that the DM references are to the deposition numbers, so that will not confuse the record.

(Documents handed to Counsel.)

Mr. Grosman: May I see the others?

Mr. Brigadier: Yes, I am going to put them all in in a moment.

(Documents handed to Counsel.)

Abraham Lieberman—for Defendant Milmar Estate—Direct

Mr. Brigadier: I wish to offer in evidence certificate No. 17 for five hundred shares issued by Milmar Estate, Inc.—

The Court: That's enough, because he described them already.

The Clerk: That will be marked D-ME-19A.

(Received and marked Exhibit D-ME-19A.)

Mr. Brigadier: And certificate No. 19 for 125 shares issued by Milmar Estate, Inc.

(94) The Clerk: That will be marked Exhibit D-ME-19B.

(Received and marked Exhibit D-ME-19B.)

The Court: I suggest that we recess for lunch, Mr. Brigadier.

Mr. Brigadier: Thank you, sir.

The Court: Return at two o'clock.

(Noon recess)

AFTERNOON SESSION

ABRAHAM LIEBERMAN, resumed the stand.

Direct examination by Mr. Brigadier (continued):

Q. Judge Lieberman, I direct your attention to Exhibit D-ME-19A and ask you who wrote the words "Samuel Marcus" that appears opposite the printed phrase "This certifies that"? A. I think it was Bob Schwartz.

Q. And the figure "five hundred" on the next line? A. Bob Schwartz.

Q. And the date, 14th of September, 1948? A. I believe Bob Schwartz.

Q. Now, this signature of Samuel Marcus, did you see it written? A. Yes.

Abraham Lieberman—for Defendant Milmar Estate—Direct

(95) Q. By whom? A. Sam Marcus.

Q. And the signature of Robert Schwartz? A. By Robert Schwartz, in my presence.

Q. All this on the 14th? A. All on the 14th.

Q. In your presence. Now, what about the signature on the back? A. Endorsed in blank by Samuel Marcus.

Q. And you saw him sign that in your presence? A. I did.

Q. Now, is the same also true—would all your answers hold true as to No. 19 as well? A. That's right.

Q. Now, in addition to these two certificates do you have in your possession two other certificates? A. I do.

Q. Those are the ones that were previously identified as certificates No. 18 and 20? A. That's correct.

Q. And Certificate 18 is for five hundred shares? A. Yes, made to Samuel Marcus.

Q. And Certificate No. 20 is for— A. 125 shares to Samuel Marcus, signed the same way, same date, both endorsed in blank. These were the ones (96) that were left with me and which were not in escrow.

Q. And made up the total of 1,250 shares. A. These made 625, plus the 625 which I held in escrow made a total of 1,250 shares.

Mr. Brigadier: I wish to offer these in evidence.

The Clerk: D-ME-20A, certificate No. 18 for five hundred shares of stock. D-ME-20B, certificate No. 20 for 125 shares of stock.

(Received and marked Exhibits D-ME-20A and D-ME-20B.)

Q. I show you what purports to be the stock book of Milmar Estate, Inc., and ask you whether you have ever seen this book? A. I did.

Q. And was this book present at the closing of September 14? A. That's the first time I saw it.

Abraham Lieberman—for Defendant Milmar Estate—Direct

Q. And produced by whom at that time? A. By Marcus or Schwartz, I don't know.

Q. I see. Now, I direct your attention to the stubs—the stub for certificate No. 20 and ask you in whose handwriting the handwriting appearing on that stub is? A. I believe Robert Schwartz.

Q. And that is a stub that corresponds to the (97) certificate that you have already testified to— A. That's correct.

Q. —for 125 shares issued to Samuel Marcus, September 14, 1948, right? A. Right.

Q. I direct your attention to stub for certificate 19 and was that also written on September 14th? A. Same date.

Q. By Robert Schwartz? A. I believe by Robert Schwartz.

Q. And that is for the corresponding amount? A. Corresponds with certificate No. 19.

Q. And the same as to certificate No. 18 for five hundred shares? A. The same thing.

Q. The handwriting— A. I believe written by Bob Schwartz, September 14, made to Samuel Marcus.

Q. And certificate No. 17. A. For five hundred shares to Samuel Marcus, September 14, 1948, I believe written by Bob Schwartz.

Q. Now, were these the stubs that were for the stock that was drawn, executed and delivered as you have already testified to? A. 1,250 shares.

(98) Q. On September 14, totaling 1,250 shares. A. Yes.

Q. Now, I direct your attention to certificate No. 16 and ask you in whose handwriting the word "canceled" is? A. I believe that's Bob Schwartz.

Q. And when was that placed thereon? A. That was done on September 14, the date that we closed the deal.

Q. And I direct your attention to certificate No. 15 and ask you in whose handwriting the word "canceled" is? A. I believe Bob Schwartz.

Abraham Lieberman—for Defendant Milmar Estate—Direct

Q. And when was that placed thereon? A. On the same date, September 14, 1948.

Q. And is that true as to the word "canceled" on the certificate No. 14? A. Certificate 14, yes.

Q. I want to expedite it a bit. 13? A. Yes.

Q. 12? A. Yes.

Q. 11? A. Yes.

Q. 10? (99) A. Yes.

Q. 9? A. Yes.

Q. 8? A. Yes.

Q. 7? A. Yes.

Q. 6? A. 6. Now, I want to make sure, Mr. Brigadier, because I was very careful to see that there was at least 1,250 shares there. Now, I don't know what they total, if you are going beyond that. May I add these? I know that these were—

Q. I would rather you answered my questions. I think it will be quicker. A. All right, I'm sorry.

Q. I just want to know whether these cancellations were all written that same day by Robert Schwartz. A. That was.

Q. Now, let's skip to certificate No. 1. Was that also written on that day by Robert Schwartz? A. That's something I don't remember. I honestly don't.

Q. All right, we will find out from Robert Schwartz. What about certificate No. 2? (100) A. I honestly don't remember that.

Q. What about 3? A. It looks like the same handwriting. It may have been done on the same day.

Q. I only want your recollection. If you don't know, say so. I have Robert Schwartz in court. A. Just a minute. I think I insisted that all the shares of stock that appeared in here be canceled because they had no shares of stock and I received no affidavit. I believe that's what it was.

Abraham Lieberman—for Defendant Milmar Estate—Cross

The Court: Just canceled the stubs then.

The Witness: The stubs. There were no shares of stock. There were none around. I didn't see any. If there were any, I didn't see any.

Mr. Brigadier: I wish to offer the stock book in evidence.

Mr. Grosman: May we see it, please?

Mr. Brigadier: It's the same as the photostats we furnished you before.

(Stock book handed to Counsel.)

Mr. Brigadier: May the record show that this had a deposition number P-78 for identification.

Mr. Grosman: If your Honor please, may I ask the witness a few questions about this book? I'd like to show it to Mr. Marcus for a moment.

(101) *Cross examination by Mr. Grosman:*

Q. Judge Lieberman, you say that this book was present on September 14, '48? A. Yes.

Q. And you saw Mr. Robert Schwartz mark each stub canceled?

Mr. Brigadier: He hasn't testified each stub. He testified only as to the stubs I called to his attention. There was one stub I did not call to his attention because obviously it's in a different handwriting. And I want it to be clear, so that the witness is not confused, that I did not ask him about stub No. 5. Your Honor will remember I went from—

Q. All right. With the exception of that, did you see Mr. Robert Schwartz mark each of the other stubs "canceled"? I don't think I saw him mark 491. I am not too sure. I am not too sure about No. 5. I am certainly sure

from 6 up to 20. And prior to that I believe they already may have been marked. I wanted to be sure of one thing, that is, that everything in there was marked "canceled". I may not have seen him mark every one.

Q. But you are sure you saw him mark the stubs that you say were marked by him "canceled"? (102) A. Yes.

Q. Do you know why he didn't put his initials on there? A. I don't know.

Q. You didn't ask him, did you? A. No.

Q. You didn't put your own initials on there? A. No.

Q. That was done on the 14th? A. On the 14th.

Q. September 14th. A. Those that I saw him sign were done on the 14th.

Mr. Brigadier: I offer the stock book, which previously bore the deposition number of P-78 for identification.

The Clerk: It will now be marked D-ME-21 in evidence.

(Received and marked Exhibit D-ME-21.)

Direct examination by Mr. Brigadier (continued):

Q. Judge Lieberman, do you have other papers there that were executed on September 14th? A. Yes. There is one of them. I will give you the rest.

(Document handed to Counsel.)

Q. You produced here letter—or document dated (103) September 14, 1948, signed by whom? A. Bill Miller's Riviera by William Miller, President, addressed to Samuel Marcus.

Q. When was that signed? A. On September 14th.

Q. And when was it delivered? A. The same day.

Q. As part of the same transaction? A. As part of the same transaction.

Mr. Brigadier: I offer that in evidence. It's deposition DM-220.

(Document handed to Counsel.)

The Clerk: D-ME-22, letter dated September 14th to Mr. Samuel Marcus, signed Bill Miller's Riviera by William Miller, President.

(Received and marked Exhibit D-ME-22.)

Q. Now, you have certain papers in your escrow file for that escrow receipt, do you not? A. Yes, sir.

Q. Some of which are already in evidence. A. Yes.

Q. Others have not yet been put in evidence. A. Right.

Q. I now want you to produce all the remaining papers in your escrow file, according to your escrow (104) receipt. A. They are right here.

Q. You have produced what purports to be a letter signed by whom? A. Samuel Marcus.

Q. Dated? A. September 14, 1948.

Q. Addressed to? A. Milmar Estates, wherein he resigns as an officer and director of the corporation effective immediately.

Mr. Brigadier: It's deposition exhibit DM-205. I offer that in evidence.

The Clerk: D-ME-23, letter dated September 14, 1948, to Milmar Estates, signed by Samuel Marcus.

(Received and marked Exhibit D-ME-23.)

Q. You have produced next from your escrow file a document dated what? A. September 14, 1948, signed by Robert Schwartz, addressed to Milmar Estates, wherein he also resigns as an officer and director of Milmar effective immediately.

Q. Did you see Robert Schwartz sign that? A. I did.

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Mr. Brigadier: This is deposition exhibit (105) DM-204.

Q. I think I omitted to ask you—if I can go back for a moment—D-ME-23, whether you saw Samuel Marcus sign that resignation? A. Yes.

Mr. Brigadier: I offer that in evidence.

The Clerk: D-ME-24, letter dated September 14, to Milmar Estates, signed Robert J. Schwartz.

(Received and marked Exhibit D-ME-24.)

Q. You have produced from your escrow file a document dated September 14th, signed by whom? A. By Al Bierman, by William Miller, Attorney.

Q. Did you see William Miller sign that? A. I did.

Q. And it is accepted by whom? A. Accepted by Samuel Marcus, individually, and accepted by Milmar Estates, by Samuel Marcus, President, attested to by Robert J. Schwartz, Secretary.

Q. I see. And did you see these signatures all placed thereon? A. I did.

Q. And were they placed thereon as part of the same transaction on September 14th— A. All the same.

Q. —at the time of the execution of all the (106) other documents? A. All part of the same transaction.

Mr. Brigadier: I offer it in evidence. It is deposition Exhibit DM-208.

(Document handed to Counsel.)

The Clerk: D-ME-25, letter dated September 14, 1948, to Samuel Marcus, signed by Al Bierman by William Miller, Attorney.

(Received and marked Exhibit D-ME-25.)

Abraham Lieberman—for Defendant Milmar Estate—Direct

Q. Judge Lieberman, I direct your attention to the fact that in Exhibit D-ME-25 you have a document that is addressed to Samuel Marcus, is that right? A. That's correct.

Q. It is not addressed to Milmar but to Samuel Marcus. A. To Samuel Marcus.

Q. Yet it is accepted by whom? A. By Samuel Marcus individually and by Milmar Estates.

Q. Do you have any recollection as to why the acceptance was put on in that form? A. It may have been due to the general pattern, Mr. Brigadier, that we had there of Milmar Estates being the seller, and probably to follow through the general pattern we also had an acceptance there by Milmar. I can't remember just why we had put on there.

(107) Mr. Brigadier: I didn't get your answer. Would you read that answer back?

(Record read.)

Q. You produced next from your escrow file document dated September 14, 1948, signed by whom? A. By Milmar Estates, Samuel Marcus, President, attested by Robert Schwartz, Secretary. Both signed in my presence.

Q. I see. And this one is addressed to Bill Miller's Riviera, is it not? A. That's correct.

Mr. Brigadier: I offer this in evidence. It is Exhibit DM-207 of the depositions.

The Clerk: It will now be marked D-ME-26.

(Received and marked Exhibit D-ME-26.)

Q. You produced from the escrow file document dated September 14, 1948—

Mr. Grosman: Pardon me. Will you identify that for the record?

Abraham Lieberman—for Defendant Milmar Estate—Direct

The Clerk: Letter dated September 14, 1948, to Bill Miller's Riviera signed Milmar Estates by Samuel Marcus, President.

Q. You have produced from the escrow file document dated September 14, 1948, addressed to whom? A. Addressed to William Miller, signed by Sam Marcus, (108) referring to the—that refers to the $15,000 note and states that in the event that the contract dated September 14th for the sale of Bill Miller's Riviera is not fulfilled, in that event the undersigned agrees to release you from the terms of the said note—that referred to that $15,000 note.

Q. I see. You say that was signed by Samuel Marcus individually? A. Samuel Marcus individually.

Q. No reference made here to Milmar, is there? A. No.

Q. I direct your attention to the second paragraph of this letter, which refers to "For the sale of Bill Miller's Riviera." A. Well—

Q. Why was that language employed? A. Because the building was known as the Riviera and it was owned by Milmar. We weren't too technical about that. Bill Miller's Riviera.

Q. So that at times in these documents you referred to it as Milmar and at other times you referred to it as Bill Miller's Riviera. A. Because that was the only thing that was being sold were the shares of stock of Milmar.

Q. You saw Samuel Marcus sign that? (109) A. Yes.

Q. And this was part of the same transaction, the same day? A. That's right. As a matter of fact, we initialed it, Bob Schwartz and I initialed the beginning of the second paragraph, we inserted, "In the event that the contract"—we inserted, "dated September 14, 1948," we both initialed it.

Mr. Brigadier: I offer it in evidence.

(Document handed to Counsel.)

Abraham Lieberman—for Defendant Milmar Estate—Direct

The Clerk: D-ME-27, document dated September 14, to Mr. William Miller, Fort Lee, New Jersey, signed Samuel Marcus.

(Received and marked Exhibit D-ME-27.)

Q. You have produced from the escrow file lease dated July 23, 1947, running from Milmar Estates to Bill Miller's Riviera, Inc., is that right? A. Yes.

Q. And that is the lease that is referred to in some of the writings that have already been marked in evidence in connection with this matter? A. That's the lease, yes.

Mr. Brigadier: I wish to offer that in evidnece.

(Document handed to Counsel.)

(110) Mr. Brigadier: It bore deposition No. 209. And I now wish to offer it in evidence.

The Clerk: It will be marked D-ME-28, lease dated July 23, 1947.

(Received and marked Exhibit D-ME-28.)

Q. You have produced from the escrow file a certificate No. 15 for fifty shares of stock of Bill Miller's Riviera, Inc., which contains upon it the handwriting, "subject to agreement dated July 23, 1947," and I ask you whether that was delivered to you to be held in escrow, for which you gave the escrow receipt? A. It was.

Q. That was delivered by Samuel Marcus, wasn't it? A. Either Marcus or Bob Schwartz, either one of them.

Mr. Brigadier: I offer it in evidence.

(Document handed to Counsel.)

The Clerk: D-ME-29, stock certificate No. 15 for fifty shares of Bill Miller's Riviera, Inc.

(Received and marked Exhibit D-ME-29.)

Abraham Lieberman—for Defendant Milmar Estate—Direct

Q. You have produced from the escrow file, and it is set forth in your escrow receipt, a lease dated September 14, 1948, from Milmar Estates, Inc., to Bill Miller's Riviera—was that executed, incidentally, on September 14th? A. That was executed on September 14, 1948.

(111) Q. And the signature of Samuel Marcus, was that made by Samuel Marcus? A. Milmar Estates by Samuel Marcus, President.

Q. It was signed by Samuel Marcus. A. Signed by Samuel Marcus.

Q. In your presence? A. That's right.

Q. What about the signature of Robert Schwartz? A. In my presence as Secretary of Milmar Estates and then Bill Miller's Riviera, Inc., was signed by William Miller, President.

Q. You saw these signatures placed thereon? A. I did.

Mr. Brigadier: I offer that in evidence. That's deposition number DM-210.

(Document handed to Counsel.)

The Clerk: D-ME-30, lease dated September 14, 1948.

(Received and marked Exhibit D-ME-30.)

Q. Judge Lieberman, I have but one question, but I would like to get an answer to it. Will you describe the manner in which all of the exhibits that we have put into evidence, dated September 14, 1948, were executed, signed and delivered by the respective parties, were they done separately, was it done all at one time? You (112) describe what occurred. A. Most of them already had been prepared prior to the 14th. There were some that were actually prepared on the 14th. The changes—I would say most of the changes were made on the 14th when Mr. Marcus and Bill Miller were there in addition to Bob

Schwartz and myself. It took us quite a few hours. The reason it took us such a long time is because each and every paper was read thoroughly by Sam Marcus. He suggested changes, he was arguing with Bob Schwartz about changes, he was arguing with me about changes, he was arguing with Bill Miller about changes. Bill left it to me. He didn't look at any of the papers, except he knew what the contents were. He may have glanced through it. But Marcus kept on insisting on changes, additions—it just dragged the matter out. We finally finished the papers and then we started to sign them. We all sat around the table.

Q. When you say "we all" will you identify them? A. Marcus was there, Miller, myself and Schwartz. As Miller would sign a paper, we'd hand it over to Marcus, or vice versa. If I had to sign a paper, I signed it, and I handed it to Schwartz, or vice versa. We always signed at one time. We were handing from pile to pile. That's the way it was going, because that was (113) the last thing was being done because we spent so much time in the preparation of them. And we handed them one to the other and it was signed.

Q. And you are positive that Mr. Marcus examined each of these papers before he signed them, in your presence? A. I'd say he examined each paper two and three times, carefully. It got overbearing.

Q. At what time did the September 14th meeting begin. A. Well, I think it started just prior to lunch. Now, whether or not Marcus and Miller were there, I don't know. I think I met Bob in his office prior to lunch, or as near twelve o'clock as possible, and I don't think it broke up until six o'clock, or even a little later.

Q. But at what time prior to six o'clock did the clients show up, how long would you say the clients— A. Oh, they were there for at least five or six hours. I didn't know

if they had come in before twelve, though. They were there at least five or six hours, Miller and Marcus.

Q. Now, was there any confusion when you came to the execution of the documents? I have reference to the fact that during the deposition Judge Grosman suggested to you in his questioning that there was a state (114) of confusion at the time of the execution of the documents. A. There was no confusion whatsoever. There was a lot of argument going on prior to the execution, a lot of fighting going on, but there was no confusion when it came to the signing of the agreements, because that was all settled long before they ever actually attested their signatures. And the last argument was that $15,000 note, which was thrown in the last minute.

Q. That took place, as I recall your testimony before lunch, before execution of any of the papers. A. Before the execution. That was the last argument.

Mr. Brigadier: That is all. Your witness.

Mr. Grosman: Is there going to be any cross examination by—

Mr. Abraham Chazin: Not of this witness.

Mr. Kesselhaut: The same thing for me, not of this witness.

Mr. Grosman: All right.

Cross examination by Mr. Grosman:

Q. Judge Lieberman, will you tell us once again, please, how many conferences were there with respect to this transaction, one, two, or three? A. That I was present at?

Q. Yes. (115) A. Three.

Q. When was the first one? A. I would say the latter part of August, probably the 27th, 28th or 29th, around there somewhere.

Q. Well, have you any idea exactly when that first conference was held? A. I can almost give you an exact date,

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basing it upon the receipt that was introduced here in evidence of Mr. Bierman's, which is August 27th. I'd be guessing if I said it was the 28th or the 29th, Judge Grosman.

Q. Didn't you say on direct examination that it was about the 23rd? A. No, you misunderstood me.

Q. You didn't say that? A. No.

Q. And you now say that the first conference was about the 27th of August? A. No, I would say it was after the 27th, because now that I recollect the date of that instrument is the 27th. It was a day or two after that.

Q. And you didn't say on direct examination that that first conference was held about the 23rd? A. No.

Q. Of August, 1948? A. No, I did not.

(116) Q. All right. Now, the second conference was held when? A. Around September 2nd or 3rd.

Q. Let me ask you, that first conference of about August 28, '48, was held where? A. At Mr. Marcus' office in New York.

Q. And who was present? A. Sam Marcus, Bill Miller, Robert Schwartz and myself.

Q. Now, at what hour did you meet? A. It may have been around noontime. I can not recollect the exact time.

Q. Well, was it before lunch or after lunch? A. It may have been before, it may have been after. I honestly don't remember.

Q. You don't remember that? A. I don't remember that. I'd be inclined to say it was after lunch because it was difficult for Miller to get up early in the morning. He used to stay up till all hours at the nightclub. That may guide my decision.

Q. Well, all I want to know from you is— A. I really don't know, Judge.

Q. —when it was. A. I really don't know.

Abraham Lieberman—for Defendant Milmar Estate—Cross

Q. How long did that first meeting last? A. That lasted several hours, probably two or three (117) hours.

Q. And what was done at that first meeting? A. We practically discussed all the terms and all the conditions that were put into the agreement and the various papers that were introduced in evidence this morning—practically all. There may have been a few things omitted which we added probably at our conference of September 2nd and September 14th. But, in essence, we had it all.

Q. You think that you covered everything that you finally agreed upon at the first meeting in August at Marcus's office? A. Practically.

Q. Was that a harmonious meeting, or was there any exchange of words between Miller and Marcus? A. A lot of arguing.

Q. What was the argument about? A. Oh, the question of the shares of stock, the question of where they were—where the shares of stock were, the question of the $50,000 note. Then there was a further argument as to why the agreement should be made in the name of Milmar instead of the name of Samuel Marcus and Miller and Bierman. Many other arguments. Had a lot of personal bickerings.

Q. Such as what? (118) A. Such as the argument that Miller got into the—kept on repeating that constantly—that he got into the Riviera without putting up his money, that he loaned him the fifty thousand, and so on and so forth. He was always throwing it up to Bill Miller, always throwing it up to him.

Q. Now, you say that at that meeting the matter of the stock was discussed? A. Oh, yes. I asked for it.

Q. And what answer did you get? A. He didn't have any. Marcus said he didn't have any, couldn't find any stock.

Q. How about Miller, what did he say about his stock? A. Miller never had any. He never had any Milmar stock.

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He told me whatever he had he always turned over to Marcus.

Q. So at that meeting Miller's stock, if any, was in the possession of Marcus? A. From what I gather, from their conversation.

Q. Well, you were Miller's lawyer, were you not? A. That's right.

Q. You were there for the purpose of protecting his interest? A. That day?

(119) Q. Yes. A. Yes.

Q. And all other days. A. Well, when I started to represent him, yes. Not when the first Milmar stock was issued. I wasn't his lawyer then.

Q. The first meeting in August? A. Yes, I was.

Q. At Marcus' office, you were there in your capacity as legal representative for Miller? A. That's right.

Q. And Bierman? A. Right.

Q. And you continued as such throughout all of these conferences? A. Yes. I also represented the Riviera there, Judge Grosman, at the same time.

Q. Yes. You represented the Riviera. And you still represent Miller, do you not? A. In these proceedings?

Q. Well, I don't mean actively, you are still his lawyer, are you not? A. I would say no. He has no legal business now. He is out west.

Q. When did you stop representing Miller and (120) Bierman? A. I would say shortly after the Riviera closed.

Q. That was when? A. As a matter of fact, I will withdraw that. I think I stopped representing him at the time that these suits were started. I didn't represent them any more. The Chazins and Brigadier got into the picture and I just stepped out. And I don't think I represented him any more individually.

Q. Did you have anything to do with retaining Mr. Brigadier or the Chazins? A. I did not.

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Q. And you say that since they took over you have had nothing to do with representing Mr. Miller? A. As to any legal matters.

Q. Yes. A. He is still a very dear friend of mine.

Q. Do you represent him in any other capacity? A. No.

Q. You are not his attorney in fact? A. No.

Q. Now, this was not a hasty transaction, was it? A. No, it certainly was not.

Q. It took a lot of time to discuss the various details of how this stock was to be transferred from (121) Marcus to Miller and Bierman? A. Yes.

Q. You had a second meeting, did you not? A. Correct.

Q. Let me ask you this. Did you reach any definite agreement at that meeting on August 28, 1948? A. We did.

Q. What did you agree on, what conclusion did all of you people come to at the meeting of August 28, '48? A. That all the outstanding stock of Milmar would be canceled, if any stock certificates could be found they would be returned and canceled, and would consider all the stock as having been surrendered to Milmar so that there would be no shares of Milmar outstanding and, in turn, Milmar would issue new shares of stock to the extent of 1,250, which amount was being delivered to Miller and Bierman in consideration of that contract. And that was to represent every and all shares of stock ever issued by Milmar.

Q. Anything else agreed on at the meeting of August 28th? A. Oh, yes; the terms of the contract.

Q. As finally— A. As finally drawn.

Q. —incorporated? (122) A. Yes, that's right.

Q. The final contract of September 14, 1948? A. Correct.

Q. Those were all agreed on back on August 28, 1948. A. That's right. Oh, I may say this, Judge. There were changes made in the contract—that is, in its final draft. As you will notice, changes were made on September 14th

that were initialed by Schwartz and myself. I mean we had the general idea of the contract, subject to changes.

Q. Other than those changes, everything else was agreed on at the meeting of August 28, '48. A. Practically, as I said before.

Q. Well, now, will you take a look at that contract, please. I think it is marked. A. That's it.

(Document handed to the witness.)

Q. Tell us which of its provisions were not agreed on at your meeting of August 28, 1948? A. Well, I would say in paragraph 7—

Q. Yes. A. —that Miller and Bierman were certainly not going to pay all of the outstanding obligations.

Q. That was not agreed on. (123) A. No, I would never have assented to anything of that kind.

Q. And who do you say drew this agreement, P-5? A. I think Bob Schwartz drew it some time between—

The Court: He didn't say when. He said who drew it?

The Witness: I'm sorry.

A. Well, I say, I think Bob Schwartz drew it.

Q. After conferring with you, Miller and Marcus. A. On August the—the date in August.

Q. August 28. A. Which may be the date.

Q. You say what? A. Which may be the date. I am not sure if it's the 28th or 29th, Judge.

Q. One of those two dates. A. It's one of those two dates.

Q. All right. Now, what else? A. Well, I gather there was something at the beginning of paragraph 8. I don't know what is in there, but I evidently must have objected to it, because it is all "x'd" out.

Abraham Lieberman—for Defendant Milmar Estate—Cross

Q. That was not agreed on on August 28th or 29th? A. I gather not, if I had it "x'd" out before we even executed it. We didn't even initial it.

(124) Q. Bob Schwartz put something in there that had not been agreed on? A. He may have and he may not have, or I may not have liked it. It's certainly not intentional.

Mr. Brigadier: May I interrupt to suggest whether or not Judge Grosman will stipulate with me on what that phrase is. We have got it written out. I wonder would it be of any help to the Court?

The Court: Do you have it?

Mr. Grosman: I wasn't there.

Mr. Brigadier: We had it blown up. May I read it to your Honor?

The Court: Yes.

Mr. Brigadier: The phrase reads, "The buyer shall furnish the seller with a monthly statement of operations showing the profit and loss until such time as the full amount due hereunder shall be paid and • • • "

In other words, that "t" was a small "t" and became a capital.

The Witness: I certainly would have objected to that clause because—may I just tell you why, Judge?

Mr. Grosman: I don't know. There is no question now.

The Court: You volunteer an awful lot. You know, the safest thing is just to answer what you are (125) asked.

Q. Well, do you say that that is what was in this contract, paragraph 8, and x'd out? A. I don't know. I heard Mr. Brigadier say that they blew it up. I can't swear under oath that that's what's in there. Let the man who blew it up testify as to that. I don't know.

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Q. All right. A. But if that was in there, I certainly would have objected to it because I didn't want Sam Marcus around the Riviera mixing in his business. He sold everything out. We were glad to get rid of him. Certainly wanted no part of him around there.

Q. And did you figure that by the contract of September 14, '48, marked D-5 as of this date, you had gotten rid of Samuel Marcus? A. Completely.

Q. Completely. A. You mean D-ME—

Q. So that he had no further interest in this transaction? A. Are you referring to D-ME-5, this contract?

Q. Yes. A. The only interest he had was to get $95,000.

Q. Well, didn't you consider that to be a substantial (126) interest? A. Surely. But he had nothing to do with running the business. He already had conveyed everything.

Q. He had certain safeguards, did he not, in order to be sure that he got his $95,000? A. Sure, I held papers in escrow for him so that in the event of a default he'd get everything back.

Q. Everything he was supposed to get back? A. Everything he was supposed to get back, as per the agreement, he would have received if there had been a default here. They trusted me to that extent.

Q. Did you agree also that the stock escrowed with you, the Milmar stock, was not to be voted? A. There is a letter to that extent, that it wasn't to be voted.

Q. Now, you did permit that stock to be voted. A. I don't know if I did or not. That question was asked me in the deposition, Judge. I think the purpose of that sentence in there was that it shouldn't be voted to deprive Marcus of any inherent right that he may have had. But if it was voted to elect officers of Milmar to continue their business, I don't think it was a violation. We didn't even need those shares. We had 625 that I was holding. We

didn't need it. But I think that was the purpose of it, so that we shouldn't (127) deprive Marcus of any of his rights.

Q. Do you recall what you said about that subject on your deposition? A. I may have said the same thing.

Q. You think that is what you said? A. I don't know. You'll have to refresh my memory.

Q. Didn't you say, substantially, in answer to that same question which I propounded to you, "Well, I did it"? A. Well, I what?

Q. "Well, I did it." I asked you, "Why did you permit this stock to be voted?"

Mr. Kesselhaut: What page are you reading from, Judge?

Mr. Grosman: I am not reading from anything. I am asking him whether he didn't say that.

The Witness: You will have to read the question and answer, Judge Grosman. I am not going to recollect what you are guessing. If you will read the question and answer, I will answer you.

Q. Will you say that on examination on your deposition you gave the same answer then to this question as you give now? A. I do not know until you read the answer.

Q. You say you will not commit yourself— (128) A. That's right.

Q. —unless I read the answer? A. That's correct. I didn't read the testimony since then.

Q. All right.

Mr. Brigadier: I would like to ask Judge Grosman to point to the deposition where he says—

Mr. Grosman: Well, if you want me to take the time out—

Mr. Brigadier: Yes, because you have charged him with having said in a certain tone of voice, which even

a deposition won't show, "I did it." And I say those words don't appear in the deposition.

Mr. Grosman: All right. With the Court's permission I will try to find that question.

If your Honor please, may we take a recess at this time. It's going to take me ten, fifteen minutes to find it.

The Witness: I'll help you find it much sooner, Judge.

The Court: You will?

The Witness: Yes. I have it right here.

The Court: What page is that?

The Witness: I'll find it in just a second.

Q. I thought you said a minute ago that you didn't (129) read— A. I did not. But I happened to have the testimony here, knowing that you would probably question me about it.

Q. That's a good guess. A. That's right.

Mr. Brigadier: I think you will find it at page 71, Judge Lieberman.

The Witness: That's right. It's on page 71, Judge. About the middle of the page. Glancing at it, the testimony seems to be exactly the same as I just gave you, Judge.

Mr. Grosman: Well, we'll soon see.

Q. I asked you this, Judge Lieberman—

Mr. Brigadier: What page are you reading from?

Mr. Grosman: Just give me a moment.

Q. At the top of page 71 you were asked this question and gave this answer:

"I thought half of the stock of Milmar Estates was deposited with you in escrow—"

Abraham Lieberman—for Defendant Milmar Estate—Cross

And you answered, "That's right." Do you remember that? A. That's right.

Q. Do you follow me, page 71? A. Yes, I have it. Go right ahead.

(130) Q. "Q. —not to be voted—" Your answer, "That's right."

"Q. —until Marcus' money was fully paid out.

"A. I think there may have been some provision of that kind. I may have overlooked it at the time.

"Q. Isn't that a fact?

"A. I think there may be some provision in there that said it was not to be voted upon. I may have overlooked it. It wouldn't have made any difference, because they could have voted the 625. They had sufficient votes to hold the meeting. It didn't make any difference.

"Q. But you concede that the minutes, DM-300, are erroneous in that respect?

"A. Not at all.

"Q. Well, Kevelson didn't have 500 shares.

"A. Of course he did."

Now, if I say anything that's improper you stop me.

Q. And were they available?

Mr. Brigadier: That's not in the record.

Mr. Grossman: No, I'm just remarking—

Mr. Brigadier: I'm sorry.

Q. "A. The mere fact that it was in escrow with me didn't matter. That was subject to the fulfillment (131) of the contract.

"Q. Even though the contract provided that that stock was not to be voted?

"A. That's right.

"Q. You didn't think that was important?

Abraham Lieberman—for Defendant Milmar Estate—Cross

"A. I didn't think there was anything wrong in that. Certainly not for the purposes of this meeting. I think the intention of Marcus was—I want to wait until the Judge hears me—all right, Judge, I was continuing to say that certainly not for the purposes of this meeting did it matter whether they voted those shares of stock. I think it was Marcus' intention when he put—and so I understood when we had these conversations, when he was placing the stock in escrow—he didn't want anything done or voted with that stock that would in any way deprive him of any rights that he had in Milmar that he may lose as a result of a vote. But certainly Marcus had no intention of preventing the electing of officers, and, I am sure, didn't care whether they voted 1,250, 625, or a thousand shares. He wasn't being deprived of anything. And that is all I am interested in, that he shouldn't be deprived of anything, as an escrowee.

"Q. That was your interpretation of your undertaking not to permit that stock to be voted?

(132) "A. I don't quite understand you.

"Q. This statement you have just made is your interpretation of the provisions of the contract, P-4, that the stock deposited with you in escrow was not to be voted?

"A. That's right. I think what Marcus meant there—and I think I knew pretty well what the intentions of the parties were, because we had so many discussions about it—his intentions were that he should not be deprived of any rights that he may have in Milmar, in the event that it should be placed back in status quo because of a default. And certainly in the election of officers—they had to function, they had to have officers immediately after he stepped out—it didn't matter if they voted 1,250 or voted 625.

Abraham Lieberman—for Defendant Milmar Estate—Cross

"Q. Well, you realize, of course, that if they didn't vote this stock, your stock, they couldn't organize this corporation.

"A. Couldn't have voted the 625?

"Q. It would not have been a majority of the stock.

"A. But it certainly wasn't the intention of Marcus that they shouldn't function, and have no officers. Who would sign the checks?

"Q. I am asking you whether or not you realize (133) that if you hadn't permitted the stock escrowed with you to be voted they could not have organized this corporation.

"A. I never took that into consideration.

"Q. And they could not have functioned.

"A. I never took that in consideration.

"Q. So that notwithstanding the express understanding that you were not to permit this stock to be voted, you permitted it to be voted.

"A. That's right. And I had it right in there, 1,250 shares, that's correct. And I don't think there was any violation or breach on my part whatsoever."

Now, you say that your testimony then was the same as it is now? A. That's right.

Q. You did permit this stock to be voted? A. It may have been voted, it may not have been voted, Judge. Let me explain the situation. This wasn't a corporate meeting as we have of large corporations. This was an informal gathering—a week after Marcus got out, which was September 14th—an informal gathering of Bill Miller, Al Kevelson—who I met for the first time, I had never seen the man, he came to the Riviera with a man by the name of Kamiel, I believe, a friend, an accountant, and a Mr. Schaefer. We sat (134) down and they said, "What do we do now? We've got to elect officers." So there we were. No ballots taken. You know how closed corporations op-

erate, as well as I, Judge. There we were. So they decided Al Kevelson would be president, I think Bill Miller vice president, I think they elected Bierman secretary-treasurer, or vice versa—maybe Bierman vice president and Bill Miller secretary-treasurer—I don't think Bierman was there.

Now, in making up the minutes I probably never even gave instructions to my girl in the office, I didn't type it. She typed it and she knew there were 1,250 shares, and you and I know that in typing a corporation we always put down that everybody votes for each other—period. And that's the way it was done. No evil intentions, no thought of whether we were voting 1,250 or 625.

But from a technical standpoint I say that even if we only voted 625, we still had sufficient shares to elect officers, because Bill Miller owned 625 shares that were not in escrow, besides owning the others.

Q. Let me ask you this, Judge. You had entered into an agreement to hold in escrow 625 shares of stock of Milmar Estates, Inc., delivered to you in trust under the terms of this agreement and this special writing, (135) and that you were not to permit that stock to be voted, isn't that a fact? A. That's correct.

Q. Now, you did permit that stock to be voted. A. I don't know if it was voted or not, Judge.

Q. Well, didn't you say on your deposition hearing that it was voted and you didn't consider that it made any difference? A. The only reason I said it was voted was to justify the 1,250 that appears in the minute book. That's the only reason I say—I say that now.

Q. Were you trying to square your testimony with the entries in the minute book? A. If I were trying to square my testimony, Judge, I didn't have to produce that piece of paper showing 1,250 shares. I have nothing to hide in this case. And I am not shaping my testimony to justify anything.

Abraham Lieberman—for Defendant Milmar Estate—Cross

Q. Well, I thought you said a moment ago that the only reason you made that statement was in order to make it square with the minute book. A. You asked me at that time if the 1,250 were voted. And according to the book they were voted. I don't know if 625 were voted or if a hundred were voted. I told you how it was an informal gathering. And there it was, the two stockholders, Bill representing the others, and (136) they decide, "You be president, I be vice president, and the other man will be secretary."

Mr. Brigadier: If your Honor please, I have endeavored to refrain from objections, and I'd like to continue, but I think at this point you should be alerted to the fact that these minutes that they are talking about are not signed. You might be under the impression that they are talking of a signed set of minutes. These are blank minutes. They have never been signed.

The Court: Do you think I would get excited about this? I've had corporation minutes turned over to me by lawyers of corporations ten years old with nothing signed in the minutes, and no minutes kept, mistakes of all kinds. I know how lawyers take care of these private corporations, closed corporations, they call them. I know how carefully giant corporations keep them, too.

Mr. Grosman: I am not concerned, your Honor, with how the minutes —

The Court: I know you are not. You want to know why he voted that stock when there was a solemn obligation not to vote them, is that right?

Mr. Grosman: That's right.

The Court: That's what he wants to know, (137) whether it was through carelessness, inadvertence, absentmindedness, or what.

Abraham Lieberman—for Defendant Milmar Estate—Cross

As a matter of fact, you can't even say you voted 1,250 shares at that meeting, can you?

The Witness: I beg your pardon, Judge.

The Court: Can you say you actually voted 1,250 shares of stock at that meeting?

The Witness: No, I don't know what was voted. They were there. The people who owned everything were there.

The Court: I know how they do it, they pass out the cigars— Who wants to be president; who wants to be vice president; who wants to be secretary; who wants to be treasurer? And I've had it where nobody wanted the offices.

The Witness: They were tossing it around. That's just what happened.

The Court: So for putting it in the minutes now you're in trouble, even if they were unsigned.

You didn't actually prepare ballots, did you, and put them in a ballot box, and have watchers and inspectors?

The Witness: I should say not. There was no waiver of a meeting, there was nothing.

The Court: Next question.

(138) Q. Now, under the terms of your escrow writings, isn't it a fact that you were supposed to return to Sam Marcus, in the event of a default, all of the shares of stock that had been issued on September 14, '48? A. Oh, no, not according to the agreement, not according to the escrow agreement.

Q. Was he supposed to be restored to status quo? A. That's right, 625 shares were his status quo for the purposes of this agreement.

Q. How about the Miller stock that he held immediately prior to the making of this agreement of September 14, '48? A. Can I explain that in detail?

Abraham Lieberman—for Defendant Milmar Estate—Cross

Q. Sure, go ahead. A. As I testified under direct examination, Miller himself didn't know how many shares of stock he had in Milmar. There is a certain paper was introduced in evidence which shows something like 37½% that he had, including Bierman's. This was one of the arguments that we had in Marcus' office, what was going to be Miller's situation if and when there is a default? And I was the one who insisted that once and for all Bill Miller should know where he stands, so that in the event of a default he will actually become a fifty percent owner, (139) which he was entitled to be to begin with, and I said, "As long as I am in it you will get the shares of stock you are entitled to get." So that even though he only would have been credited with 37½% based on what he had had previously, if in the event of a default the escrow stock would have gone back to Marcus to the extent of 625 shares, so that he and Miller would have been equal partners, as they were supposed to be at the beginning.

Q. And what was to become of the five hundred shares of stock earmarked for Miller which was in the possession of Marcus at the time that the contract, D-5, was executed? A. What stock of five hundred shares? I never saw any stock.

Q. Of Milmar Estates, Inc., which he held as security for the payment of this $50,000 note. A. I never saw such stock. Was it at the closing?

Q. Yes. A. Well, I was there, Judge. I didn't see any. I asked for stock ten times. I didn't see any.

Q. You didn't see any? A. No, never.

Q. Did the records that you examined indicate that such stock had been issued and outstanding? A. It may have and it may not have. I was interested (140) in the canceled—I was interested in the stock certificates being returned. And they said they didn't have any.

Abraham Lieberman—for Defendant Milmar Estate—Cross

Q. You told us on direct examination that Marcus repeatedly accused Miller of not having put a dollar into this corporation, isn't that a fact? A. That's right.

Q. Now, don't you know that Miller instead of putting money into the corporation, as he was supposed to do, put up a note for $50,000? A. That's correct.

Q. And that he had never paid that note. A. I gather he didn't.

Q. All right. Now, under the contract, D-5, of September 14, 1948, that note was turned over to you, was it—rather, not under the contract—at the time of the signing of that contract, under a separate writing that note was turned over to you? A. Right.

Q. And is still in your possession? A. Right.

Q. That $50,000 note. A. Right.

Q. Wasn't that supposed to be returned to Marcus in the event of a default— A. Right.

(141) Q. —under the contract? A. That's right. Not under this contract. There were other papers for that.

Q. Well, papers incident to the contract. A. Yes.

Q. And you say that no stock was to be returned to him, none of the stock earmarked for Miller was to be returned to him in the event of a default, returned to Marcus? A. 625 shares, in the event of a default. The stock that I held in escrow was to go to Sam Marcus and restore everything else status quo.

Q. So that Miller, who, upon the signing of the contract, D-5, of September 14, 1948, was obligated on a note to Marcus for $50,000, and had no stock in Milmar Estates, Inc., according to your statement, if there was a default he was to wind up holding five hundred shares of stock of Milmar Estates, Inc? A. That's not correct.

Q. No? A. 625 shares.

Q. Miller was to wind up holding 625— A. I'm sorry. Pardon me, hold on just a minute, because Bierman was in

this thing. May I figure this a minute, because Bierman was in this thing. Let me just (142) figure this thing out.

Yes, in the event of a default I think that's what he was to get. He was to have 625, yes, and Bierman and Miller were to have 625, that's right, because then Kevelson would have been out of the picture in the event of a default. That's correct. I'm sorry. I was confused.

Q. So Miller stood to profit by a default to the extent of 625 shares of Milmar, less whatever was due to Bierman, is that right? A. I don't know if you would call it that he stood to profit. I don't know what you mean by that.

Q. You were going to turn over to him, or permit him to retain 625 shares less Bierman's stock in the event of a default. A. That's correct.

Q. Now, when was that agreement, that portion of the agreement made? A. That was all discussed, I believe, the morning—or afternoon in Marcus' office.

Q. I think you said that you were going to see to it that Miller what you say was coming to him. A. That's right, because the man never had any papers. He never knew what he had with this fellow Marcus.

Q. Did the man ever put any money into this (143) transaction? A. Yes, he did.

Q. What money did he put in and when? A. I understand when they first purchased it— I think he put up $20,000. I am not too sure.

> The Court: When they first purchased what?
>
> The Witness: When they first went in with Marcus, when they first purchased from Ben Marden. I believe Miller at that time put in—I wasn't his lawyer—as long as you ask me, I think he put in $20,000.

Q. Are you sure about that? A. I am almost certain, Judge.

Abraham Lieberman—for Defendant Milmar Estate—Cross

Q. And who told you that? A. I think I heard that from Marcus himself. Whether he put up his own money, or whether he got somebody else's money, I don't know. But it was put up by Bill Miller.

Q. You think that Bill Miller initially put up $20,000? A. I think so.

Q. Do you think he had twenty thousand to put up at that time? A. I don't know. I don't know what he has today.

Q. You weren't his lawyer? A. I was not.

(144) Q. And you heard that from somewhere and you are not sure—

The Court: Heard it from Mr. Marcus.

The Witness: I think Marcus himself.

Q. Well, you say definitely now— A. Well, the reason I say that, because in their argument I think Marcus was shouting, "You didn't put anything up. You only put up twenty thousand, and that was somebody else's money." That's what I heard in the argument.

Q. Now, why didn't you put these provisions in the contract of September 14, '48, D-5, if they were so clear and well understood? A. They had separate agreements pertaining to that. They had other agreements which covered it.

Q. Show me any agreement made on September 14, or at any other time, bearing out what you have just told us. A. About the note?

Q. About that in the event of a default Miller was to wind up owning—Miller and Bierman were to wind up owning 625 shares of stock of Milmar, Inc.? A. Where are those papers? May I look at those papers there that are in evidence?

(Documents handed to the witness.)

Abraham Lieberman—for Defendant Milmar Estate—Cross

(145) The Court: Off the record.

(Discussion off the record.)

The Court: We will take a five-minute recess to see whether Judge Lieberman can find it.

(Short recess.)

The Court: Are you ready to answer the question now, sir?

The Witness: Yes.

Q. Go ahead. A. Well, I refer to the three instruments that, in my opinion, would show that upon a default, as escrowee, I would be obliged to return 625 shares to Sam Marcus. The original agreement dated September 14th, marked D-ME-5, paragraph 5, where it says, "The stock up to fifty percent herein purchased by the buyer and endorsed in blank shall be deposited in escrow with Abe Lieberman," and so forth. And then paragraph 10, it says here, "The parties further agree that at least fifty percent of the shares of stock in the new corporation shall be immediately placed in escrow with Abe Lieberman pending the fulfillment of each and every term of this agreement." That's the one.

Then we have letter of September 14th signed by William Miller, addressed to Milmar Estates, referring to the exhibit, D-ME-6, says, "This is to confirm our (146) understanding that I will deposit with Abraham Lieberman at least fifty percent of all of the stock of Milmar Estates, Inc., and fifty percent of Bill Miller's Riviera, Inc., which shall consist of my own and Al Bierman's."

And then the escrow agreement, which is marked in evidence D-ME-7, which says, under paragraph 2, "625 shares of Milmar Estates, Inc." And among other things it says here on the bottom, "The undersigned acknowledges"—that's myself—"that all of the above instruments

are held in escrow pending the full and complete performance of each and every covenant of a certain contract of purchase executed the 14th day of September."

Q. What are you reading from? A. The escrow agreement. I'll start over again. I said under paragraph 2 we have 625 shares of Milmar Estates, Inc., which was left with me in escrow. And the next to the last paragraph states as follows, "The undersigned acknowledges that all of the above instruments are held in escrow pending the full and complete performance of each and every covenant of a certain contract of purchase executed the 14th day of September, 1948 between Milmar Estates, Inc., and Al Bierman. In the event that the contract is fully performed then in that event the undersigned will turn over all of the (147) above-described papers held by him in escrow to the proper parties. In the event that there is a default in the terms of the said contract then upon written notice to me I will immediately return all of the above applicable documents and papers to Robert Schwartz, Esquire, 9 East 40th Street, New York City."

With these three instruments my thought certainly is that upon a default I was to return the 625 shares and everything else I had in escrow to the proper party, and that was Sam Marcus.

Q. What was to become of the 625 shares held by Bierman and Miller which they didn't have prior to the execution of the agreement of September 14, '48? A. Belonged to Bierman and Miller.

Q. Without payment? A. Without what?

Q. Without further payment. A. That's correct. Without further payment?

Q. Yes. A. Well, I don't know what you mean by further payment. That was it.

Q. Bierman— A. I don't know what they paid.

Abraham Lieberman—for Defendant Milmar Estate—Cross

Q. Bierman paid $20,000 for his stock, Miller had paid nothing, except this rumor that you heard that (148) some time he had given—contributed $20,000? A. I think in addition—

Mr. Brigadier: I object to the question as based on a false assumption of fact. There is no evidence yet, except Judge Grosman's assumption, that nothing has been paid. In other words, there is still evidence to be offered as to what was paid, whether Miller did put in anything. There isn't any evidence at this moment except what you elicited from him as something he heard from Marcus. Now you are basing a question and saying there was nothing paid except the rumor you heard.

The Court: You mean that is not established yet.

Mr. Grosman: My understanding, your Honor, was that Judge Lieberman said that nothing had been paid by Miller on account of this stock, except he believes that he heard somewhere—

The Court: I remember exactly what he said. That's exactly what Lieberman said. That doesn't make it a fact.

Mr. Brigadier: I don't think he said there is nothing paid. He didn't know whether anything had been paid, but he understood from what Sam Marcus had said that—

(149) The Court: Well, that's all he knows about it, what he says Marcus told him.

Q. Well, at any rate, according to your figuring, in the event of a default Mr. Miller was to have—Miller and Bierman were to have jointly 625 shares of stock, none of which Miller had to begin with. A. Well, I don't know about none of which he had. I never said that, Judge.

Abraham Lieberman—for Defendant Milmar Estate—Cross

Q. Well, didn't you say several times that Miller never had any stock— A. He didn't own it physically.

Q. He what? A. He may not have had it physically. But according to one of the papers Marcus himself signed a paper where he admitted he owned 37½%. And he was going to credit him with 37½% of any moneys paid in the event of a default.

Q. While we are talking about that paper—

Mr. Grosman: Will you produce that exhibit, please? Let's see what it does say.

The Witness: I have it right here, D-ME-5.

Mr. Grosman: I'm having a little difficulty with these exhibits, your Honor, because they are marked differently.

The Court: I noticed that. In the taking of (150) the deposition, you mean? Is the deposition number marked in the back?

The Witness: Yes, it's DM-221. Here is the original, if you want it, Judge.

Q. I have it. Go ahead. A. What do you want to know?

Q. You say that this Exhibit D-ME-15 acknowledges the fact that Bill Miller was the owner of 37½% of the stock of Milmar Estates, Inc.? A. Including Al Bierman, I would say that, because knowing Sam Marcus, he never would have credited him with 37½% if Bill Miller didn't have at least that many shares of stock.

Q. Didn't you tell us a little while ago that it was your impression that under this writing, Exhibit DM-221, Bill Miller had 37½% of the stock of Milmar Estates, Inc.? A. Under this agreement?

Q. Yes. A. According to this, yes.

Q. According to what provision of this agreement do you say that Bill Miller had 37½%— A. Including—

Q. Wait.

Abraham Lieberman—for Defendant Milmar Estate—Cross

The Court: Why don't you wait till he finishes (151) the question.

Q. —37½% of the stock of Bill Miller's—of Milmar Estates, Inc.? A. Paragraph 2.

Q. Yes? You read the provision. A. "In the event that there is a default in meeting the terms of the said second mortgage and in the event that the lease between Milmar Estates, Inc., and Bill Miller's Riviera, dated July 23, 1947, is reinstated without litigation on the part of William Miller, I agree to credit you personally with 37½%, which includes Al Bierman's ten percent, of all net receipts received by Milmar Estates, Inc., or myself, which said credit shall be applied towards the $50,000 note which you have executed in my favor."

Q. Now, what is there in that paragraph which you say verifies the ownership by Bill Miller of 37½% of the stock of Milmar Estates, Inc.? A. This, plus the conversation of Sam Marcus and Bill Miller at the time of the closing.

Q. Not anything contained in one of the three documents that you referred to? A. Well, this is the only one that refers to 37½%.

Q. You spoke of three documents that you examined which caused you to make the statement that Bill (152) Miller was the owner of 37½% of Milmar— A. I did not. I said— I'll correct myself, Judge. I never made such a statement. I said that the three instruments referred to 625 shares, one instrument refers to 37½. Please don't misquote me in my testimony.

Q. Now, didn't you say a little while ago that the agreement—that the writing, Exhibit 221, was the basis of your statement that Bill Miller was the owner of 37½% of the stock of Milmar Estates, Inc.? A. Plus Sam Marcus' conversation with Bill Miller that day. And I will elaborate on that, that Bill Miller—

Abraham Lieberman—for Defendant Milmar Estate—Cross

Q. Please. A. —said, "I am entitled to 50%."

Q. Please don't elaborate on anything. Do you concede that there is nothing in this writing, Exhibit 221, to justify your statement that Bill Miller was ever the owner of 37½%—

Mr. Brigadier: I object.

Mr. Grosman: Will you let me finish, please?

The Court: I never had such eager beavers in my life—one to answer and one to object. Please wait till he finishes the question, either before you object or before Judge Lieberman answers.

Mr. Grosman: How far did I get with my question?

(153) (Question read.)

Q. (Continuing) —of the stock of Milmar Estates, Inc.?

Mr. Brigadier: May I be heard, sir, on the objection? The reason I am making the objection is that this 37½% as it is recited in here is being credited against the note of fifty thousand. That note is already in evidence. And we know that Al Bierman is in no way on that note or answerable in any way on that note. Therefore, the phrase which includes Al Bierman's ten percent speaks for itself. And I don't think he has the right to ask him a question which is going to be a decision as a matter of law as to what that refers to. In other words, he might ask him, "Well, what does that ten percent refer to?" But on the face of it, since he is in no way involved on this note, it seems to me—

The Court: Since who is in no way involved?

Mr. Brigadier: Al Bierman. Notice that interpolation. If that interpolation there didn't appear—which includes Al Bierman's ten percent—Judge Grosman could very well argue, as he is attempting to argue,

that this is a credit merely of money against a note. But notice how it reads. It reads, "37½%" altered from 27½, and then adds "which includes Al Bierman's ten percent."

(154) So that since Al Bierman is in no way obligated on the note, the only reference could be to Al Bierman's ten percent ownership of the stock, which is what he owns.

Now, my objection is that I don't think that he can bind me on cross examination by asking him to concede something which as a matter of law is not accurate. What the ownership of stock will be will develop from whatever proofs are put in and not by what he is going to have him construe this paper to say what we owe. He can merely construe what this paper means. And the reason I am emphasizing that ten percent is because on the fact of it it doesn't make any sense to say that this applies only to a payment of a note when Al Bierman was in no way obligated on that note. So that the ten percent could only refer to his stock.

The Court: I know, but Judge Grosman's point, as I conceive it to be, is he wants to know how this witness comes to the conclusion that the defendant Marcus acknowledged in any instrument that Miller, or Miller and Marcus together—or Bierman, is it?—or Bierman together were the owners of 37½% of the stock of Milmar. Is that what you want to know?

Mr. Grosman: That's all I asked.

The Court: That's a simple question.

(155) Mr. Brigadier: I don't want to prolong it. I think he has a right to ask that. My contention is that he does not have the right to put it in the form of, "Do you concede that—" He can't concede anything.

The Court: He doesn't concede anything. He can't concede anybody's stock away—not clients'.

Mr. Brigadier: As long as that is understood I am willing to withdraw my objection.

The Court: You understand what he is talking about.

The Witness: I know what he wants to know. And I am ready to answer, Judge.

The Court: You do have somewhere a concession by the defendant Marcus that Miller alone, or Miller and Bierman in combination, were the owners of 37½% of the stock prior to whatever memorandum you are going to refer to?

The Witness: That was part of the argument. And that's how they arrived at this figure.

The Court: Well, it's not down in that many words that it refers to stock, is it?

The Witness: That's right, no.

The Court: All right. And you say because of the argument or the discussion that prevailed—

The Witness: That's right.

(156) The Court: —where one said, "I own 50%" and the other one said, "You own 37½%," from that you conclude that Mr. Marcus acknowledges that Miller, or Miller and Bierman together, own 37½%.

The Witness: It wasn't that easy. As I stated this morning in the direct examination, Miller's contention throughout the argument was that he owns 50% of the stock.

The Court: Yes.

The Witness: But for the purposes of this agreement, and thinking that there would be no default in this, he stated, as I said this morning, he said, "If he wants to put in 37½%, let him credit me with 37½%, if that is what he is arguing for, rather than waste

any more time, because eventually I will have the whole thing, anyway, as soon as it is paid—as soon as the agreement is paid." He wasn't worried so much about the credit. One was arguing 50%, the other was arguing 37½%, and they finally arrived at this figure for the purpose of deduction.

The Court: Well, didn't Mr. Marcus actually admit, in your presence—

The Witness: Yes. He said that he has 37½%, "I won't give him a cent more." That's correct. This, plus his discussion.

(157) The Court: All right.

Q. Now, you are sure about that? A. That's definite.

Q. There is no doubt in your mind about that? A. No doubt whatsoever.

Q. Let me see if I get it straight. Marcus acknowledged, in your presence, after much argument with Miller, that Miller was to have 37½—Miller and Bierman were to have 37½% of the stock of Milmar Estate, Inc.? A. No, they weren't to have anything. I disagree with you.

Q. Well, will you tell me— A. I don't know what you mean, they were to have. They were to be credited with 37½% of payments in the event of a default.

Q. Was there anything said about stock ownership? A. Yes.

Q. Of 37½— A. Marcus arrived at 37½% by virtue of the fact that he said the most Miller earned—owned was 37½%.

Q. I see. A. That's correct.

Q. Now, isn't it a fact, Judge Lieberman, that (158) this writing, Exhibit 221—

The Court: Just a minute. You keep referring to the deposition exhibit number and it is not going to help the case.

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Mr. Grosman: Judge, I am sorry. You are right.
The Witness: D-ME-5—D-ME-15, rather.

Q. Is that what the exhibit number is, D-ME-15? A. D-ME-15.

Q. D-ME-15? A. Correct.

Q. All right. Now, referring to D-ME-15. A. Yes.

Q. Now, don't you know that this writing resulted from a point raised by Mr. Miller on September 14, 1948, wherein he said to Marcus, "Now, look, Marcus, you are getting $30,000 from Kevelson. I don't know Kevelson. Suppose he defaults, are you going to walk away with the $30,000? Oh, no. You are going to give me my proportionate share of the $30,600 given to you by Kevelson in the event of a default." Isn't that what happened? A. As a matter of fact, I suggested it to Miller.

Q. All right. A. I suggested it to Miller, in the event of a default he should get credit on his $50,000 note.

(159) Q. Of 37½%? A. I suggested 50% because he told me he was a 50% owner. But they finally compromised on 37½%, much against the wishes of Miller.

Q. And isn't that exactly why this writing was prepared? A. Absolutely, to give him credit for any moneys paid.

Q. And it had nothing to do with the question of the ownership of stock by Miller? A. I don't quite understand what you mean by that.

Q. I will repeat the question. This writing, D-ME-15, had nothing whatever to do with the question of the ownership of stock by Miller. A. Well, that is why the 37½% was put in, Judge, because of the ownership of 37½%. That's what they had agreed upon for the purposes of this agreement.

Q. All right. A. It wasn't just a figure picked out of the air. It was stock. It was supposed to have represented Bill Miller's interest, that Marcus said it was.

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The Court: I suggest you don't pursue it today any longer, because we are getting nowhere fast on that particular answer, I will tell you right now. I am sure you are not satisfied with it. I am not, either.

(160) Mr. Grosman: No.

The Court: Gentlemen, we will have to adjourn.

* * *

(169) Newark, N. J., Wednesday, January 26, 1955.

(Hearing resumed pursuant to adjournment.)

(Appearances as previously noted.)

ABRAHAM LIEBERMAN, resumed the stand.

Cross examination by Mr. Grosman (continued):

Q. Judge Lieberman, at the last session when we had adjourned we were talking about that writing referring to a 37½ per cent interest that Mr. Miller was to have in the $30,000 paid by Mr. Kevelson on account of the purchase of an interest in Milmar Estates, Inc. Do you remember that? A. Well, I remember discussing the 37½ per cent, but I wouldn't say the way you tie it in. I didn't answer that part.

Q. Well, now, will you tell us again, please, what that 37½ per cent referred to that Miller was to have in the event of a default by Kevelson? A. It was to be credited to Bill Miller, in the event of a default, to the extent of 37½ per cent of any and all moneys. Subsequent to the signing of that agreement.

Q. Credited to what? A. Credit toward the note of $50,000.

Q. Thirty-seven and a half per cent of the money paid (170) by Kevelson, of the $30,000 paid by Kevelson, was

to be credited in the event of a default on account of Miller's obligation to Marcus on the $50,000 note, is that right? A. That's correct.

Q. Now, how was the balance to be paid, the balance of that note to be paid to Mr. Marcus? A. In the event of a default?

Q. Yes. A. The papers provide. I don't know just offhand, Judge. There are some papers in escrow, or that were put in evidence the other day. I don't remember really.

Q. Well, take your escrow file— A. You will have to have just a little patience until I find it.

Q. All right. A. I think I can pick them out without any trouble.

Q. We have lots of patience and lots of time.

Mr. Kesselhaut: Mr. Bremer, will you read the question, please?

Mr. Brigadier: Would it save any time if I indicated the Exhibit in which he will find the answer?

The Court: Sure.

Mr. Brigadier: It is the third paragraph of D-ME-15.

The Witness: Oh, I see, down here. I found it.

(171) A. Yes, it is in the same paper, Judge Grosman, that 37½ per cent is referred to, it is D-ME-15. Should I read it to you?

Q. Go ahead. A. Paragraph 3, "In the event of a default by the purchaser of a certain agreement dated September 14, 1948, and in the event that the lease of July 23, 1947, is reinstated, and after giving the credit to you provided for in Paragraph 2 above," which is the 37½ per cent which you just discussed, "then the balance remaining due on the said $50,000 promissory note shall again be reinstated with the understanding that payments of $500

weekly shall thereafter be due and payable commencing with two weeks after the opening of any season of the Riviera. The sum of $7,000, which is presently due, shall in addition be paid in five equal installments on the first day of June, July, August, September and October."

And Paragraph 4, "In the event that the contract of purchase dated September 14, 1948, is fulfilled the said note of $50,000 is to be returned to you and we agree to exchange mutual releases."

Does that answer your question?

Q. Now, that understanding, contained in D-ME-15, was the subject of considerable argument between Miller and Marcus on September 14, 1948? A. The 37½ part was, Judge.

(172) Q. Well, there was quite a to-do about that, wasn't there? A. That's right. Miller contended that he was 50 per cent owner. Marcus kept on saying, "You do not own 50 per cent." There was some argument between them, that he had advanced some money, and he took some stock away, and Miller kept on insisting, "I am entitled to 50 per cent credit, not 37½ per cent." And finally, as I testified the other day, Miller finally said, "If it's a question of 12½ per cent, I am not going to worry, because we are not going to default on the contract, anyway." He says, "This only happens if there is a default and I am sure we are not going to default."

But, as I said before, I was interested in one thing, in the event of a default, that Miller should get at least 625 shares that he is entitled to. And those are the shares that I had in my possession. Other than the ones in escrow. That I insisted on.

Q. Was that made clear, do you think, to Marcus, that in the event of a default on this contract, whatever it was, that Miller was to receive a credit of 37½ per cent on his $50,000 note and receive 625 shares of stock of Milmar

Estates, Inc.? A. Sam Marcus practically dictated the terms that were going on on September 14. He knew more than all of us put together, I will be candid to you, because it was his (173) manipulations, and his ideas, that had Schwartz crazy, too.

Q. You say now that Marcus understood that? A. He understood, he read, reread, took off his glasses, put on his glasses. He wanted instruments changed. He knew every comma and period in every paper that is prepared here. That is why it took so long. Miller left it to me. Marcus didn't leave it to his lawyer as much as Miller left it to me. And they kept on arguing about commas and periods and sentences.

Q. Well, now, I think you testified—if not here, on your deposition examination—that you considered Marcus a crook? A. I didn't quite say it that way.

Q. You called him a liar, I think you said? A. Definitely.

Q. A man whose word was worth nothing at all? A. Which I have learned since, of course. I mean, I wouldn't say that before I knew him.

Q. Yes, I— A. I went a step further and said the papers in this case should be sent to the Grand Jury, the man should be indicted for perjury. And I still feel that way about it, because I say this man is a liar. I read his affidavit that he wrote about me. There isn't a word of truth about it. The man is just lying, the man is just welshing, the man is just trying (174) to hold up somebody for money that he is not entitled to. That is my honest opinion, Judge. And I wouldn't sit here and say it if I didn't feel that way. Because this man sold out everything. He is now trying to come back and blackmail somebody for more money.

Q. That's your opinion? A. That's my opinion.

Q. Individually and as counsel for William Miller? A. Forget counsel for William Miller.

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Q. I don't want to forget counsel. A. I am not his counsel now.

Q. Well, you were his counsel at the time. A. Yes. And I therefore will put it in both categories, because I prepared these papers with Mr. Schwartz. There was no question in anybody's mind that this man was to step out—lock, stock and barrel—and get out.

Q. Yes. A. And now this man is trying to come back here because I think he saw a little success in the Riviera.

Q. You didn't consider that he was stepping out lock, stock and barrel on September 14, 1948, did you? A. Well, except that the money was still due him, that's all.

Q. There was a lot of money due him, then? A. Oh, yes. I am not arguing that point. No question (173) about it.

Q. There was $115,000 due him on that day? A. Plus the $15,000 note, yes, that's right.

Q. Yes. And he had an interest in this thing at least to that extent? A. That's right.

Q. Now, I take it that in your opinion $115,000 is a lot of money? A. I should say it is.

Q. So when you keep repeating that he was to step out lock, stock and barrel, you mean when and if he got paid the $115,000? A. Well, I must qualify that.

Q. All right. A. He stepped out, Judge—you see, he resigned as a director, Bob Schwartz resigned as a director. He stepped out from having anything to do with Milmar whatsoever. Up until that time he was in Milmar with Bill Miller to the extent of 50 per cent, which was the argument.

Now, when I say he stepped out lock, stock and barrel, I mean as far as running the place was concerned, as far as running Milmar was concerned. He still had an interest, as far as the money was concerned, but he stepped out completely, as far as an officer, as far as having anything to do with the Riviera. He never came around any

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more. I never saw Sam (176) Marcus there after September 14, 1948.

Q. Now, let me ask you this, Judge. If you consider that he stepped out and divorced himself completely from the affairs of Milmar Estate, Inc., on September 14, '48, what protection did he have, what security did he have which would assure him that he would receive the balance of his money? A. Well, he had the papers up with me in escrow, that in the event of a default—

Q. But you were Miller's counsel, weren't you? A. But they trusted me to hold the papers in escrow. Bob Schwartz and Marcus both trusted me to hold all the papers. And I held them, and I brought them here to court, and I still hold them, as far as my physical— May I answer your question? So that in the event of a default, Sam Marcus would have been put back status quo, as far as I was concerned. He would have gotten everything back that he was entitled to.

Q. How could he be put back in status quo if Miller would wind up with 625 shares of stock for which he hadn't been paid a dollar? A. He still would have had a $50,000 note outstanding against it. And we go back to an agreement of 1947 in which, in the event of a default, Miller would have lost the Riviera stock, Miller would have been dispossessed from Bill Miller's Riviera, he had the resignation of Bill Miller from Bill Miller's Riviera. He had him tied up, but good.

(177) Q. He had him tied up. A. Oh, terrific. Marcus misses nothing.

Q. When the smoke of battle cleared up on September 14, '48, you, as Miller's attorney, and as escrowee, had Marcus' stock, you had his note, you had his resignation, you considered him completely out of the picture, and all he had to look to for his $115,000 was your integrity, is that it? A. If you want to place it in that category.

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Q. I mean, is that the fact? A. The papers—he didn't have to look to my integrity, the papers were in my possession. There wasn't anything I could do to change it, unless I would have destroyed the papers.

Q. Now, at the same time, upon the payment of $30,000 on account of this $140,000 obligation, Miller— A. Excuse me, Judge. You refer to a hundred and forty thousand. May I just correct you for a minute? You refer to a hundred and forty thousand obligation. I am sorry. I didn't consider the $15,000 part of this deal. Maybe I misunderstand you or you misunderstand me.

The $15,000, in my opinion, had nothing to do with the actual sale of Milmar. This was a private thought that came along later on between Marcus and Miller, as we were just about to sign the papers. And I have said once before, (178) he shook him down personally. And I am saying shook him down, because that is just what happened, at the last moment, for an additional $15,000, separate and aside from the agreement. Otherwise, if it were part of the agreement, I would have insisted—we would have insisted on putting in that the consideration was a hundred and forty thousand instead of a hundred and twenty-five. My contention is that it is only $125,000 consideration.

Q. Your contention is that in your presence, as the attorney for William Miller, in the presence of Schwartz, the presence of Miller, this man, Marcus, baldly shook Miller down for another $15,000? A. Right.

Q. You permitted him to do that. A. Well, I will tell you what Miller said. I told Miller he was crazy. Miller said, "Let's get rid of this man. I can't take it any more. I am going off my mind here. If we don't sign this, he will ask for something else in another ten minutes. Let's give it to him." Because they had been arguing outside. I could hear them outside. They were shouting. I think in the library, next to the room we were in.

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He finally come in and told me the story. I said, "Bill, don't do it. Forget it." He wouldn't do it. He said, "I want to get rid of this man once and for all." He (179) said, "Just make sure you have got all the stock, and make sure you have got all the papers, and make sure you are going to get releases from this man."

I told him he wouldn't give us releases, only if and when the contract is finally consummated.

Q. So then I take it that Miller agreed to pay Marcus this additional $15,000 against your advice? A. Well, against my advice at the very beginning, but later on Miller wanted it, so that was it. He was the one that wanted to pay it.

Q. Now, Miller, of course, did not pay Marcus any cash on account of this $15,000? A. At the transaction?

Q. Yes. A. I don't think so, because it was a note due.

Q. Another one of these note propositions, was it? A. Oh, yes.

Q. Or a writing proposition? A. Yes, it was a note. It is in evidence, Exhibit D-ME-17.

Q. A note for what? A. $15,000.

Q. Yes. Do you suppose that Miller on signing that note may have said, "Thank God that's paid"? A. If he did, he didn't tell it to me.

Q. He didn't. Do you know how many notes Miller, (180) during the course of his association with Marcus, gave to Marcus? A. I wouldn't know, because they were interested in other enterprises. They were interested in the Embassy in New York, the Mocambo. That's before I got into the picture, Judge. And I don't know how many notes were exchanged between them. If you are asking me about the Riviera, I only know of three, the original $50,000 note, which was, I think, destroyed, and then subsequently I

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got this new one, which is marked in evidence, D-ME-16, plus this $15,000 note, which I just referred to.

Q. To your knowledge, did Miller ever pay any of those $50,000 notes he gave Marcus? A. If he did, I am sure I wouldn't have this note here. So I gather he didn't pay.

Q. Now, did you tell us, Judge, whether or not Marcus gave you—Marcus or anybody else—gave you any of the original certificates of stock of Milmar, Inc.? A. Never received any. I asked for them, but never received any.

Q. You told us, I think, that you had at least two previous meetings to that of September 14, 1948? A. That's right.

Q. One the latter part of August, '48? A. Right.

(181) Q. A second about the second or third of September, '48? A. That's right.

Q. And a third on September 14, '48? A. That's right.

Q. Now, at the first meeting you approached Marcus, you dealt with Marcus at arm's length, is that right? A. That's right.

Q. You knew then that he was a man who, in your opinion was a liar, he was a man whose word was absolutely worthless, and that he could not be relied on? A. That's right.

Q. That was in August of '48, right? A. That's right.

Q. Of course, you continued in that belief down to this very day? A. More so today.

Q. Now, will you tell us, please, when this very unreliable man told you that he did not have the stock, the original stock of Milmar Estates, Inc., which had been issued to him individually, and the other certificates that he claimed, why you didn't demand from him a lost instrument affidavit? A. Because the attorney and I agreed that we were going to consider all the stock outstanding cancelled, all the stock—(182) all the stubs in the book were

marked canceled by Bob Schwartz. And, as I explained it the first day, the agreement was that after canceling all the stock, and 1,250 shares were outstanding, we were going to issue 1,250 new shares of stock, so that it made no difference to me what happened to the other shares of stock, as long as Marcus and his attorney both stated we considered it all canceled. And we issued new 1,250 shares, all of which was endorsed in blank by Sam Marcus.

Q. Now, I think you testified on your deposition hearing something to the effect that it was pitiful to see how Marcus disregarded his attorney and took over the reins himself and insisted that things be done his way, is that so? A. Words to that effect. I can't—

Q. Words to that effect. A. That's right. He was—

The Court: All right. Don't repeat it again.

Q. Now, in view of the fact that Marcus had assumed this very contemptuous attitude toward his attorney, did you consider that you could rely upon his attorney? A. I wouldn't call it a contemptuous attitude, Judge. It was not a contemptuous attitude. It was an attitude where a client just doesn't let his lawyer run things the way he wants to run them. I wouldn't call that contemptuous. They were good friends. As a matter of fact, I didn't even (183) know then—I know now—that Schwartz had an interest in the transaction. They weren't arguing to any great extent. It was just that Marcus wouldn't let a paper go through unless he read it, saw it, suggested changes, and so forth. And, as I stated in my deposition, if I had a client of that kind, I'd say, "Run the show yourself. I don't want to represent you. Either you rely upon me or you don't."

Now, that was my personal reaction to what was going on. They weren't fighting. It's just that this fellow acted as if he knew more than anybody else.

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Q. Well, now, do you still retain your opinion of Marcus that you described here? A. Oh, yes.

Q. You knew that he was a dangerous man? A. I didn't say that he was dangerous.

Q. Well, you knew he couldn't be relied on. A. I said he is a liar.

Q. Well— A. I still say it, under oath.

Q. Yes, I know you said it.

The Court: Now that that is established, in your opinion, can we go to something else?

Mr. Grosman: May I ask him one more thing, Judge?

(184) Q. Why didn't you reduce all of these things to writing, this setup that you speak of, that the old stock was to be disregarded, new stock was to be issued, the old stock considered cancelled, and so on? Why didn't you put that in writing, in this agreement that you were then preparing? A. We didn't think it was necessary, I gather.

Q. All right. Now, do you know why the seal of the corporation was not placed on the new stock certificates? A. I didn't know that it hadn't been put on, Judge. They may not have had the seal there. I really don't know.

Q. Do you know why the revenue stamps were not attached to the certificates? A. I don't know at this date.

Q. Wasn't that part of your duty at the time, to supervise these legal details? A. It may have been, and we may have agreed to put it on, and it may have been just an oversight that it wasn't just put on. I don't think it is necessarily very important.

Q. Wasn't the seal of the corporation affixed to some of the papers that were signed on September 14, '48? A. I don't think so. I think they said they didn't have—

wait a minute. Excuse me just a minute. I think there is a seal here. I believe the seal is here. The seal is here. Here it is. I thought it wasn't. The seal of the corporation (185) is here, Milmar is on there. You evidently take a lot of things for granted, Judge, without looking. It is here. I am taking for granted that what you tell me is so.

The Court: Now, isn't that a serious thing, that the seal isn't on there?

The Witness: It happens to be there, too.

The Court: I wish I had a dollar for every time lawyers did that. I could retire from the bench.

Mr. Grosman: Your Honor, that is all very true.

The Court: There happens to be a seal on this one that I am looking at.

The Witness: They evidently had the seal and I didn't know it.

Mr. Grosman: But I am sure, your Honor, that if you were dealing with a man who is thoroughly unreliable, as the witness says Mr. Marcus was, you might have acted differently.

Q. You say the seal is on those certificates? A. I see a seal.

Q. What is the number of the certificate you are looking at? A. No. 19.

Q. I show you a photostatic copy of that stock certificate No. 19. Is there any seal on the photostat? A. I don't see it.

(186) Q. Can you explain how it is that the seal is on the original and not on the photostat? A. I can't understand that.

Mr. Grosman: I ask that this be marked for identification.

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A. (continuing) I certainly cannot. These papers never went out of my possession.

The Clerk: D-M-1, photostatic copy of stock certificate No. 19, Milmar Estates, for 125 shares.

(Marked Exhibit D-M-1 for identification.)

Q. I show you No. 17—

Mr. Abraham Chazin: May I see No. 17, Judge?
Mr. Grosman: Sure.

(Document handed to counsel.)

Mr. Abraham Chazin: May I state for the record that this is a photostat of a photostat, white and black.

Mr. Grosman: Do you contend that makes a difference? You gave me this, did you not?

Mr Abraham Chazin: Not being an expert in photostating, I can't, but I would assume that it might be lighter than the original.

Mr. Brigadier: If your Honor pleases, I hesitate to make an objection, because I am trying to stick to the policy of not making them unless they are absolutely necessary. I am making it because I don't see the slightest relevancy (187) to the present line of questioning. The question wouldn't make the slightest difference, what is on the photostat; the question should be, what is on the original?

Furthermore, your Honor is aware of the fact that at the depositions all of these originals were produced, were examined by Samuel Marcus, he was questioned about them, his attorneys examined them. So I don't want your Honor to think this is all coming as a complete surprise at this minute.

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The Court: Of course, that is the impression that one would get, hearing it for the first time.

Mr. Grosman: Mr. Brigadier, will you concede that you supplied me, or your associates supplied me with these photostats?

Mr. Brigadier: Absolutely. I will also state that the photostat of the sealed impression that I see here is just barely noticeable.

Mr. Abraham Chazin: May I point out to the Court that the seal is on the photostat of the photostat. It appears on the back of it.

The Court: Yes, it appears to be. So what are we all excited about?

The Witness: May I say one more thing, Judge? I am surprised. I didn't know—

The Court: Judge Lieberman, was the seal on the original?

(188) The Witness: Oh, yes.

The Court: And has it been in your custody ever since September 14, 1948?

The Witness: Constantly. Nobody ever touched it.

The Court: Does somebody in this case say Judge Lieberman faked it, faked the photostats? Does anybody make that charge?

Mr. Grosman: Judge, all I can say is this. We were given these photostats by the other side. As far as I can see, as far as the witness can see, there is no seal on that photostat.

The Court: There is one. I just looked at it.

Mr. Grosman: There is some sort of an impression on the back of that photostat. We have other photostats here, concerning which I would like to ask the witness, and as far as I am able to see, there is no impression of a seal on the face of it. I think there is some sort of impression on the back.

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The Court: On the reverse I think there is.
Mr. Grossman: Yes.

By Mr. Grosman:

Q. Now, will you look at No. 17, please? A. Yes.
(189) Q. Is there a seal on that? A. There is.

Mr. Grosman: It seems to me, Judge, that I am in error here, because on some of these there seems to be a seal—impression of a seal on the reverse side, but not on the face of it, except on No. 15.

Q. Do you have No. 15 there? A. Of Milmar or Riviera?
Q. Of Milmar—or Riviera. A. There is no such share of stock.
Q. Do you have Riviera, 15? A. Well, there is 16, 17. Just a minute, Judge, I will find it.

Mr. Brigadier: May I suggest that the certificate you are referring to is Bill Miller's Riviera.
Mr. Grosman: Yes.
The Witness: I know what we are looking for. I want to see if it is here.

(Document produced by witness.)

A. Yes.
Q. Is there a seal on that? A. There is.
Q. Let's see it, please.

(Document handed to counsel.)

A. As a matter of fact, I notice all these instruments (190) have the Milmar seal.
Q. You mean even the Riviera stock? A. No, those agreements that were made on the 14th. We did better than we thought we did. I didn't even think we had the seal, to be candid with you.

The Court: It sure would be tough if you forgot to cross a "t". Gentlemen don't seem to need anything in writing and get along very well, I have found on the bench. Other people try to get around even their written word by saying, "I didn't understand it that way." That settles it.

Mr. Grosman: Or, "I didn't consider it necessary."

The Court: That's right, they have all kinds of reasons why they don't.

By Mr. Grosman:

Q. Now, when did you start asking that the stock, the original stock certificates of Milmar Estate be produced? A. The first time I saw Marcus and Schwartz about this transaction, which was the 28th or 29th of August at Marcus' place.

Q. Now, what did Marcus say when you asked him for the stock? A. Didn't have any. Couldn't find it.

Q. Didn't he say that he had some of them, that he would produce what he had? A. I asked him. He said he didn't have any. I told him (191) this—he said he would look for it, I remember that. I said, "Well, then be sure to have whatever you can find at the closing."

It came to the closing, he didn't have any. And that's when we canceled all the Milmar stock and issued new stock.

Q. Do you recall testifying as follows on your deposition hearing page 7, "But I do know that I asked before we started to prepare any agreements, because Marcus had promised to turn over all the stock, I asked for the return of the stock so we would know how to begin to prepare the agreement. And Marcus said he didn't have any stock, he couldn't find any of the Milmar stock."

Abraham Lieberman—for Defendant Milmar Estate—
Cross

Now that was at your second meeting? A. No, that was at the first meeting, in August. I probably asked the same question on the 14th, too, Judge.

Q. Let's see what he said on the first meeting in August. On page 6, "I, of course, asked for the return of whatever outstanding stock there was, stock certificates."

Mr. Brigadier: Judge, will you please tell me where you are reading from?

Mr. Grosman: I am reading from the third paragraph, about the middle of the third paragraph, on page 6.

Mr. Brigadier: I have it, thank you.

Q. "I, of course, asked for the return of whatever outstanding stock there was, stock certificates. I was (192) advised at that time by Sam Marcus—now, this is the first time we met—I was advised by Sam Marcus that he didn't think he had all the certificates, but that he would produce as many as he could find."

Do you recall testifying to that? A. He probably said that. I so stated today, Judge. I remember testifying that way, sure.

Q. And your memory about that is correct? A. Oh, yes.

Q. Now, the second meeting, that would be September second or third? A. Marcus wasn't there just Bob Schwartz and I were there at the second meeting, Judge. That is when the papers were prepared, before the 14th. I didn't see Marcus again until the 14th.

Q. I see. You met with Robert Schwartz on August second or third? A. September second or third.

Q. September second or third. You say that Marcus was not there on that day? A. I don't believe Marcus or Miller were there, to the best of my recollection. I have been try-

ing to—since the trial started—think about it, and I still think they weren't here.

Q. You are not sure about that? (193) A. I am almost certain.

Q. Do you remember being asked about that, or your volunteering the information, page 7, just about the middle of the page, saying, "And then Bob and I met. We had some of the details. One of the big arguments that I remember—Marcus may have been there, Miller may have been there, I don't remember—but I do know that I asked before we started to prepare any agreements, because Marcus had promised to turn over all the stock, I asked for the return of the stock so we would know how to begin to prepare the agreement, and Marcus said he didn't have any stock. He couldn't find any of the Milmar stock." A. It may have been Bob Schwartz who said that, if Marcus wasn't there, Judge. I can't honestly remember. I still think that Judge Schwartz and I were there on the second or third. No doubt I asked for the stock and Bob probably said to me, "We don't have any."

Q. Then you go on as follows, "Well, I told Miller at the time that this sort of throws a hitch into the thing because we wanted the stock back, knowing the background that Miller had with Marcus—I must digress a minute, why I was so particular about some of these things—knowing the background that existed between Miller and Marcus, when I first started to represent Bill Miller and I asked him for different papers he started to tell me different things. He (194) never had a paper, he never got a paper from Marcus, never got any stock from Marcus. As far as Milmar was concerned, he never had anything."

Do you remember that? A. Oh, yes. Miller told me that. But I tell you, Judge, I think the date may be incorrect. This all took place—I insisted on the stock when Marcus

and Miller were there, and Schwartz and I, and that would be the latter part of August.

Mr. Brigadier: If your Honor please, I again didn't want to interrupt, but now that Judge Lieberman has answered, it can't be said I suggested the answer.

If you look at the deposition from which he is reading, you will find that is exactly what Judge Lieberman did. It is true the question is, "Pardon me, that was September 14? No, no, before that. It was around September second or third. In '48? This is all '48. It was also August, '48, that was first talked about."

That precedes his testimony he has just read. I didn't want to interrupt, because I didn't want it said that I am suggesting the answer to the witness. But that is actually what the deposition shows.

Mr. Grosman: All right. It shows that they discussed this subject on at least two separate occasions with Marcus. The first time he said he would produce what he had. (195) The second time he said that he couldn't find anything.

Q. Now, that is true, as far as you know, isn't it, Judge, that Miller never had any stock in Milmar, Inc.? A. Physical possession of the stock?

Q. Yes. A. I don't think he had physical possession of it, as I stated, but he always considered himself a 50 per cent owner of Milmar.

The Court: That is not the question.

Were there ever any certificates of stock issued in the name of Bill Miller?

The Witness: Oh, yes, there were shares of stock issued, I think to Bill Miller, but I don't think he ever had physical possession of it. Now, I really don't re-

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member. I would have to look at the book. I may be mistaken.

Q. Do you know why the stock was not turned over to Bill Miller? A. Beg pardon?

Q. Do you know why the shares of stock issued, or supposedly issued in the name of Bill Miller, were not turned over to Bill Miller? A. I wouldn't know. I didn't represent Muler at that time.

Q. Wasn't it because Bill Miller never paid for that stock? (196) A. I would be guessing, Judge. I didn't represent him.

Q. You never inquired of Bill Miller why he hadn't been given shares of stock in Milmar, Inc.? A. I may have.

Q. You don't recall his answer? A. I don't recall.

Q. Now, you say that in addition to believing Marcus to be a liar, that is all you are going to limit your statement to?

Mr. Brigadier: I don't understand that question.

A. You really don't want me to characterize what I think of him, do you, Judge? It is not necessary for the trial. I will tell you privately.

Q. No, I don't want you to tell me anything privately. A. I don't think it is necessary. I refuse to answer that.

The Court: That's lovely, to clutter up the record with all this useless chatter. Maybe your clients have got a lot of money to spend.

The Witness: Maybe the Judge wants to lay a foundation for a suit in slander, with truth as a defense, but I would rather not tell you.

Mr. Brigadier: Are you pressing the question? If you are, I would like to hear it.

(197) The Court: What is the question?

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(Question read.)

Mr. Brigadier: I object to the question. In the first place, it is a completely meaningless question. What does he mean?

The Court: Do you mean what else he thinks of Mr. Marcus, besides thinking he is a liar?

Mr. Grosman: Yes.

The Court: Well, he has said enough besides that already that I have heard in this case.

By Mr. Grosman:

Q. Now, in addition to considering him to be a liar, Judge, on these various occasions when you met with him in August, again in September, isn't it a fact that you absolutely distrusted this man? A. I wouldn't say that. I wouldn't say that.

Q. What would you say about that? A. I think the man, back in June, 1947, when the dispossess case went on, and he started to dispossess Bill Miller's Riviera, and we had had negotiations at that time—Marcus, Schwartz and I—he had made certain statements at that time that I know were not the truth. And that is what I based it on, those experiences.

Q. But outside of believing him to be a liar, you thought it was all right to trust him and to do business with (198) him? A. As long as I had things in writing from him.

Q. Now, let me ask you this. Do you recall giving this testimony in your deposition, on page 13, bottom of page 12, "So you were thoroughly convinced that Marcus was wholly unreliable, that he was a man of no principle—

"Answer: I wouldn't—

"Question: —that he was a liar?"

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Mr. Brigadier: Judge, I am sorry. Will you indicate where you are starting?

Mr. Grosman: I am starting at the bottom of page 12. That's what I told you.

Mr. Brigadier: You said 13.

Mr. Grosman: Then I told you 12. The fourth line from the bottom.

Mr. Brigadier: I have it.

Q. "So you were thoroughly convinced that Marcus was wholly unreliable, that he was a man of no principle—

"Answer: I wouldn't—

"Question: —that he was a liar.

"Answer: In my opinion a liar.

"Question: Well, a liar could be a man of—

"Answer: You can put whatever definition you want on it. I know some liars have principle.

"Question: You knew that he was a man that could not (199) be relied upon, that he was a liar?

"Answer: As far as I was concerned, I wouldn't trust him."

Do you remember saying that? A. That's right.

Q. So you go on, "And you knew that from the very beginning, did you, Judge, from the very beginning of your negotiating for this contract, P-4?

"Answer: That's right.

"Question: Now, you didn't trust Marcus at all during the course of these negotiations?

"Answer: That's right.

"Question: You were looking out for the interests of Mr. Miller and Mr. Bierman?

"Answer: Correct.

"Question: Now, when Marcus told you that he did not have the stock that you called for, did you believe him or didn't you believe him?

"Answer: The truth?

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"Question: Yes.

"Answer: I didn't believe him."

Q. Now, I am asking you now why, in view of that testimony, why you didn't insist that you get something in writing from Marcus showing that he didn't have this original stock? A. I felt it wasn't necessary, Judge. I thought I had made (200) myself clear on that, because all the outstanding stock, whether Marcus had it, whether his associates had it, whether has agents had it was canceled, considered invalid on the books, considered as having been turned back to the corporation, new shares of stock issued. I didn't think it was necessary.

Q. You didn't think it was necessary? A. I didn't think it was necessary.

Q. It didn't occur to you that this man, whom you believed to be untrustworthy and a liar, might have sold that stock to someone else? A. No.

Q. It didn't occur to you? A. No. I took Bob Schwartz' word for it, more so than his. And Bob is a very respectable attorney in New York.

Q. You took his word for what? A. Bob. Bob told me he just couldn't find the stock, he didn't have all the stock to return. And we considered it canceled.

Q. Who couldn't? A. Marcus evidently couldn't.

Q. Schwartz told you that— A. In front of Marcus, that's right.

Q. Schwartz told you that Marcus couldn't find the stock? (201) A. All the stock—that's right, couldn't return any stock.

Q. Who told you that, Schwartz or Marcus? A. Marcus, and Schwartz was there.

Q. Is that what you testified— A. And Schwartz was there.

Q. Is that what you testified to on your deposition, that Schwartz told you that? A. I say Schwartz and Marcus.

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I don't remember what I testified in my deposition. But I will tell you now it was Schwartz and Marcus. Marcus was there, and Marcus insisted—Bob may have said, and probably did say, "He can't find the stock, so let's cancel it on the books."

Q. Not "probably," what did he say to you? A. Oh, I don't remember, Judge. Seven years ago.

The Court: By the way, did that stock ever turn up?

The Witness: I never got it, Judge.

The Court: Did anybody ever see it?

The Witness: I never did.

Mr. Brigadier: I saw it, if your Honor please.

The Witness: I never saw it.

Mr. Brigadier: It turned up by Mr. Marcus saying that he has it in his possession, half of it, which he showed while we were taking the deposition. The other half I think (202) he said he delivered to Mr. Lieberman.

The Court: I was just wondering if anybody ever saw it.

The Witness: If I had seen it I would have insisted that it be marked "canceled" and stuck in the stock certificate book.

By Mr. Grosman:

Q. Let me ask you about that. Who marked the stock "canceled" on the stub of the stock book? A. Let me see it, please, Judge, and I will tell you.

Q. You have it A. Oh, I am sorry. I thought it was the Milmar book.

(Witness examines document.)

A. I would say it was Bob Schwartz.

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The Court: That's what you said before, three different times.

Q. Now, did you ask him to initial the cancellation in your book? A. No.

Q. Why not? A. I didn't see any reason for it.

Q. I think you told us no transfer stamps were put on the certificate? A. No. As a matter of fact, Bob Schwartz even wrote out the 1,250 shares of stock.

(203) The Court: You always keep volunteering information. Just answer the question, will you please?

Q. Now, I think you stated that both you and Bob Schwartz objected to the type of agreement, D-4, that was finally prepared? A. After it was prepared we didn't object to it. At the very beginning we objected to it. We didn't think it was the type of agreement that we ordinarily would prepare. Not once it was prepared and signed. It was a good agreement.

Q. You thought it was all right after it was signed? A. Oh, yes. It's all right now. No question about it. Otherwise I wouldn't have let my client sign it.

Q. Now, you did object to the form of the agreement that was prepared, did you not, D-4? A. To the various changes made, yes.

Q. Didn't you object to the form of the agreement, the whole agreement?

Mr. Kesselhaut: Object when, Judge Grosman?

Mr. Grosman: Any time.

A. Before it was prepared, when we discussed it in August, that's the time we discussed the general agreement, at that time both Bob and I didn't think it was the type of agree-

ment we should prepare, but Marcus insisted on it and we prepared it.

Q. Now, you prepared that agreement in spite of your (204) better judgment and that of Bob Schwartz? A. We would have liked to have a different type of an agreement, but we didn't fight about it. If we had fought about it, we wouldn't have prepared it.

The Court: I think we will take a short recess, because I know what is coming next. I can anticipate almost every question on the line so far.

(Short recess.)

The Court: Could I be bold enough to suggest that we move along a little faster, and then establish some facts that will help the Court decide the case. So far, in a day and a half, I could enumerate in about five sentences what has been established. The primary thing that has been established is that Judge Lieberman doesn't think too much of Mr. Marcus.

I am not interested in what he thinks of him. I will draw my own conclusion when he testifies.

By Mr. Grosman:

Q. I show you Exhibit marked D-ME-30 and call your attention to the fact that this notation appears on the top of it, "This lease placed in escrow with Abraham Lieberman, Esq., pursuant to agreement dated September , 1948."

Did you put that there? A. No, that must have been typed—withdraw it. Do you mean did I personally have this typed?

(205) Q. Or did you direct that it be placed there? I don't mean did you do the typing? A. Anything that was

placed with me in escrow, Sam Marcus and Bob Schwartz insisted that those papers be marked that way.

The Court: That's not what Judge Grosman asked you. Will you give him the question and see if we can get a yes or no answer to one question.

(Question read as follows: "I show you Exhibit D-ME-30 and call your attention to the fact that this notation appears on the top of it, 'This lease placed in escrow with Abraham Lieberman, Esq., pursuant to agreement dated September—, 1948.' Did you put that there?")

The Court: That's all, yes or no?

The Witness: I can't say yes or no, Judge, because we were all there, and it was agreed upon to put it there. If I say no, I am not telling the truth. The three of us—the four of us were there. It was agreed upon, to put it on all these papers.

The Court: Who typed it in?

The Witness: Somebody in Schwartz' office.

The Court: In the office?

The Witness: Yes.

By Mr. Grosman:

Q. Was that placed on there on September 14, 1948? (206) A. Oh, yes.

Q. And now can you tell me why that same statement was not affixed to the other papers that were trusteed with you, or escrowed with you? A. I don't know.

Q. Well, that must have been talked of at that time, because it was put on that one paper. A. I can't honestly give you an answer to that, Judge.

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Q. Now, you said that Miller at all times claimed that he was a 50 per cent owner of the stock of Milmar Estate, Inc.? A. Yes.

Q. No doubt in your mind about that? A. No doubt in my mind.

Q. I call your attention to a photostatic copy of a lease between Milmar Estates, Inc., a New Jersey corporation, and Bill Miller's Riveria—I think you have the original there: It is dated— A. That's July 23.

Q. —July 23, 1947. Do you have that lease?

Mr. Brigadier: Will you refer to its Exhibit number? It has been marked in evidence.

Mr. Grosman: Yes. It is marked D-ME-28, and it was marked D-M-209 on the deposition examination.

Q. May I ask you, Judge, did you prepare this lease? (207) A. I did not.

Q. You had nothing to do with the preparation of this lease? A. I did not.

Q. On July 23, 1947? A. I may have had some discussions with Bob Schwartz about it, but I did not prepare it.

Q. Well, do you know who did prepare it? A. I think Bob Schwartz did. He represented Milmar at that time.

Q. Yes. Who represented Riviera? A. I would say I did, because that's the time of the dispossess.

Q. Yes. A. But there was another lawyer in it. I think that Al Gross from Hackensack got into the case, because I thought I would be a witness, and I thought it best that I would not represent the Riviera in the dispossess.

Now, this was the outcome of the dispossess settlement, so I may have come back again in the category as lawyer of the Riviera.

Q. Well, do you think now that you— A. I may have.

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Q. —given the matter some thought that you may have had something to do with the preparation of this Exhibit? (208) A. I may have, Judge.

Q. If you looked at it, wouldn't it refresh your mind? A. I will look at it.

(Document handed to the witness.)

A. Yes, I did, because I see I have initialed it. I have initialed it with Bob Schwartz. That certainly would refresh my memory.

Q. You have refreshed your memory now? A. Yes.

Q. And you say that you did have something to do with the preparation of the lease? A. Yes. Well—

Q. The usual thing that a lawyer would have— A. That's right.

Q. —to do with the preparation of a lease? A. Suggestions of changes and so forth. I didn't prepare it.

Q. Well, you were familiar with it at the time that it was prepared? A. I evidently was, because I initialed it, and everything.

Q. Will you turn to page 10, please, and look at Paragraph 3, which reads as follows— A. You mean 47.

Q. Well, Paragraph 3 on that page. (209) A. Oh, yes. All right, go right ahead. I am sorry.

Q. I don't know what paragraph it is. "Commencing with January 1, 1949, and annually thereafter, the landlord herein shall have the right and the sole option that at any time during each of the said years to require the tenant herein to purchase from Samuel Marcus, or associates (a stockholder of the landlord) one-seventh of Marcus' original stock in Milmar Estates, Inc., (approximately 62 per cent of Milmar Estates, Inc.) for the sum of $30,000 for each one-seventh portion of Marcus' (or associates) original shares."

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Does that refresh your mind? A. It does.

Q. That Marcus was the owner of 62½ per cent of the stock of Milmar Estates? A. Not according to Bill Miller.

Q. Not according to Bill Miller? A. You want the answer? In spite of this, do you want the answer?

Q. I want whatever answer you have to give me. A. Okay. Bill Miller at the time that this was signed said, "I am a 50 per cent owner of the stock, but this man has got me by the throat. He is dispossessing me. I can't help myself. I will sign the paper." Because this man started an actual dispossess at the beginning of the season, (210) in June, was going to put him out of the place.

He said, "This man, with manipulations in the Embassy Club in New York and the Mocambo Club in New York—he says I don't own stock, I don't own stock." He said, "If it takes 62½ per cent, if I have to buy it, let me buy it. Put it down." The same as he did with the 37½ per cent here. And Bill Miller at that time considered himself 50 per cent owner of the Milmar stock. He had no choice.

He said, "This man is choking me. What can I do?"

The Court: It's an incredible situation, isn't it? Incredible.

The Witness: Absolutely, Judge.

The Court: In other words, if that man says, "I own 90 per cent of the stock," Bill Miller keeps saying, "No, I own 50, but you can put down 90, because he has got me here, by the throat," is that right?

The Witness: That's right. He had a $50,000 note of his tied up, he had the Riviera stock tied up. He tied him up—that's before I represented him.

The Court: All right. Now, after you represented him, did you explain to your client, Mr. Miller, what it means to put these things in written instruments?

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The Witness: Oh, I didn't let him do it any more after that.

The Court: Oh.

(211) The Witness: From then on Bill Miller didn't —I don't think he knows to this date what papers he had signed. I don't know what Marcus has, but he told me, "I kept on signing papers for this man." Bill Miller is strictly a night club man.

The Court: I know the type.

The Witness: If you knew these night club men, how they operate—I won't go into it.

By Mr. Grosman:

Q. Is Bill Miller the kind of man who signed any kind of a paper that was put in front of him, without regard to the truth of the statements contained therein? A. I wouldn't say as to the truth of the statements, but I would say that when Marcus gave him papers to sign, he evidently trusted Marcus and he signed.

The Court: Wait a minute. On this lease, you said you had something to do with it.

The Witness: That's right.

The Court: Did you explain to Mr. Miller what it meant to put that recital in there, the percentage of ownership?

The Witness: That was his answer to me.

The Court: So that is one he did without your advice, before or after a given time.

The Witness: It wasn't against my advice, Judge. (212) He said, "What can I do? The man has got me choked by the neck."

You see, the situation Bill took in these cases was this, he felt that all these agreements were going to be fulfilled.

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The Court: So it didn't make any difference what he signed.

The Witness: He didn't think there would be any default.

By Mr. Grosman:

Q. Had that been his attitude throughout all his dealings with Marcus, so far as you know? A. As far as these agreements were concerned, he expected them to be fulfilled, yes.

Q. He signed things whether they were true or not? A. Oh, I didn't say that.

Q. Well, it was untrue that he—you say now that it was untrue that Marcus was a 62½ per cent owner of Milmar Estates stock? A. I don't know whether it was true or not. Bill Miller told me that he felt he was a 50 per cent owner.

Mr. Abraham Chazin: May I object to that question, because the question skips from the instrument and improves on it, because the instrument says approximately 62 or 62½.

The Court: Well, as I get it so far, apparently (213) Mr. Miller signed—he would protest about it, but he would sign anyway, is that it?

The Witness: Yes, That's what was going on.

The Court: Let's not waste any more time on that.

By Mr. Grosman:

Q. Now, did Miller pledge his stock in Milmar Estate, whatever amount of stock there was, as security for the payment of that $50,000 note that he had given Marcus? A. When?

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Q. Any time. A. I wouldn't know, Judge. I wouldn't know what happened at the very beginning. I didn't represent him back in '46.

Q. Now, let me ask you this. You would know if it happened on July 23, 1947? A. I believe there were some instruments referring to that.

Q. Let me see if I can't refresh your mind. I show you an agreement—what purports to be an agreement dated July 23, 1947, between Samuel Marcus and William Miller. Do you recognize the signature of your client, William Miller, on that instrument? A. Yes, I do.

Q. Now, will you look at that, please? Did you prepare that instrument? A. No.

(214) Q. Did you have anything to do with the preparation of it? A. No doubt I did, with Bob Schwartz, at the time of the settlement of the dispossess suit.

Q. Can you tell me why this agreement isn't witnessed in the regular form by you and by Schwartz? A. I don't know. There may be one that is witnessed. I don't know.

Q. This one is not. A. No question about the signature, I am sure, but it is not witnessed.

Q. Now, this instrument pertains to a $50,000 note which Miller had executed to Marcus. Look at it while I am reading. A. Yes. Go ahead.

Q. Does it recite the following, "Whereas Miller has pledged his shares of stock of Milmar Estates, Inc., with Marcus as security for the payment of the said note of $50,000"? A. It does say that.

Q. And does it also refer, in the next paragraph to the right of Miller to purchase stock in Milmar Estate in the future— A. That's right.

Q. —in this language, "Whereas both Miller and (215) Marcus are desirous of entering into an agreement with respect to the said note and stock, and with respect to

future purchase rights in the stock of Milmar Estates, Inc.," is that correct? A. Yes, it is there.

Q. So this agreement had for its purpose giving Miller an option to purchase stock in Milmar Estates, Inc.? A. I don't think that is the agreeement that gives the option. It refers to another agreement, I gather. According to that, I don't see any agreement in there. It makes reference to it. There must be another agreement.

Q. All right, you look at it.

(Document handed to the witness.)

A. I will look at it. What is the question, Judge?

Q. What was the purpose of that agreement, as you understand it?

Mr. Brigadier: Judge, is that one we used in the deposition, so we can identify it in our papers?

Mr. Grosman: I don't think so. I don't see any mark on here. You may have done so, but I don't remember it.

A. Well, the purpose of this was the issuance of the second note of $50,000 and the cancellation of the first one that had been given back in 1946.

Q. I see. Does it refer to an option given to Miller to purchase stock of Milmar Estates, Inc., held by (216) Marcus? A. Yes, but it doesn't give any details.

Q. But it does refer to it? A. Yes, as you referred to it before. It says, "Whereas Miller and Marcus are desirous of entering into an agreement with respect to the said note and stock with respect to future purchase rights in the stock of Milmar Estates, Inc." That's correct.

Mr. Grosman: I ask that it be marked for identification.

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Mr. Brigadier: Are you offering that in evidence?

Mr. Grosman: No, I am merely marking it for identification.

The Clerk: DM-2 for identification, document dated July 23, 1947, between Marcus and Miller.

(Marked Exhibit DM-2 for identification.)

Q. Let me ask you, I think you have identified your client's signature on this writing? A. I did.

Mr. Grosman: I offer it in evidence.

Mr. Brigadier: Is that the same one you just marked?

Mr. Grosman: Yes.

The Court: I take it you gentlemen have never seen this instrument before?

(217) Mr. Brigadier: That's right. I want to say this, your Honor. I have no objection to it going in evidence, but I think the record should show that we made a demand during the taking of the depositions on Mr. Marcus for all the documents, and this was not given to us.

The Court: All right, sir.

Mr. Grosman: Let the record show—go ahead, mark it.

The Court: Mark it first.

Mr. Brigadier: Will you furnish us with a photostat? We have been furnishing you, as you know, with photostats.

Mr. Grosman: You have been very nice about it.

Mr. Brigadier: I would like to have a photostat of that.

Mr. Grosman: I will be glad to give it to you.

The Clerk: DM-2 for identification now marked in evidence.

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(Received and marked Exhibit DM-2.)

Mr. Grosman: May I state for the record, in order to supplement Mr. Brigadier's statement, that when he demanded of us that we produce whatever papers we had, we agreed to do so, and we told him repeatedly during the course of the testimony that there might be other papers in connection with these transactions that were not available (218) because Mr. Marcus had moved his business, and that a great many boxes were still in storage, and that he would look through his papers and produce them as and when he found them.

Mr. Brigadier: That statement is correct.

The Court: Now, the next question is, when did he find that particular document?

Mr. Grosman: All right.

Mr. Brigadier: That statement is correct, Judge, what you said. But I have never been informed about it.

Mr. Grosman: May I have that Bierman receipt?

Mr. Brigadier: DME-1.

(Document handed to counsel.)

By Mr. Grosman:

Q. Now, Judge, I show you Exhibit DME-1, dated August 27, 1948, and call your attention to the last three lines of Paragraph one. A. Yes.

Q. Could you tell us if Mr. Marcus, on September 14, 1948, had agreed to sell all of the stock of Milmar Estates, Inc., why that exception was placed in this receipt, which includes all outstanding stock excepting that stock owned by William Miller and Al Bierman? A. Well, first of all,

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Judge, I have got to go—I had nothing to do with the preparation of this receipt.

(219) Q. I know you didn't. That was prepared— A. That's right.

Q. —in the nightclub there late one night. A. That I don't even know. All I know is that in the contract—I can only state for the contract of September 14, of which I had anything to do with—and in that contract we made sure—that is, we hoped we made sure—that any and all outstanding stock, which was the 1,250 shares, and that is why we had the 1,250 shares issued—was going to belong to Bill Miller and Al Bierman after that contract was executed, and that is why we had inserted in there, in the contract of September 14—if you will notice, it was written in by Bob Schwartz after I found out what the exact shares of stock were outstanding, after the new shares of stock were issued, consisting of 1,250 shares, which reads, "The buyer is desirous of purchasing from the seller all of the issued and outstanding capital stock of the corporation," it refers to 1,250 shares. I don't know what that receipt stated, except if they explain it to me, I may have seen it, but I know what the September 14 contract refers to. That is what I was interested in.

Q. You, of course, saw that Exhibit, that receipt? A. I no doubt did.

Q. And you observe there that only Marcus' stock was to be sold—was to be included in the sale, not the (220) stock of Miller or Bierman.

Mr. Brigadier: I would like that corrected, because it says not the stock owned by William Miller and Al Bierman. It doesn't speak of stock in the name of William Miller or Al Bierman, or pledged, but speaks of the stock owned by William Miller and Al Bierman. So it seems to me the answer would be very obvious.

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Q. Now, you were aware of that fact when you prepared the agreement, D-4, of September 14, '48, that the only stock that was to be sold was that of Sam Marcus, and not of Al Bierman, and not that owned by Al Bierman or owned by William Miller? A. That's correct.

Q. In other words, they weren't going to sell their own stock to themselves. A. Yes.

Q. Now, why did you include in the agreement of September 14, '48, all of the stock, as you say? A. Because I wanted to make sure that Marcus was out of the picture completely, once and for all, and I put in 1,250 shares, all the outstanding stock that ever was issued. That is why I issued the new stock.

Q. Even though the initial agreement, as evidenced by the Exhibit— A. I wasn't interested in the agreement.

(221) The Court: DME-1.

Q. —DME-1, provided that the stock to be sold was that of Samuel Marcus, excepting that stock owned by William Miller and Al Bierman? A. Based upon that I prepared this agreement, and Miller and Marcus agreed a number of times, and Miller was insisting on one thing, "Bierman and I are going to be the sole owners of every share of stock." And that is what I thought was put in the agreement. This was prepared by a layman, I gather, so—this is the agreement I prepared.

Q. It is very clear, isn't it? A. Yes, pretty good. As a matter of fact, I congratulate whoever prepared it. But I think it shows the intention of the parties, that Marcus wanted to get rid of everything. If Bierman prepared it with Marcus, he did a good job.

Q. Judge, how many copies of the contract, D-4, of September 14, 1948, did you take with you when you left the meeting of September 14, '48?

Abraham Lieberman—for Defendant Milmar Estate—Cross

Mr. Bridgadier: Your number is wrong and I think it will confuse the record. The number is DME—

The Witness: DME-5, you mean.

Q. DME-5. A. You mean originals?

Q. Yes. A. This is the only original that I had.

(222) Q. Did you take any copies with you? A. I may have and I may not. I don't know.

Q. Did you find any copies in your escrow file? A. Oh, no.

Q. Who prepared this agreement? A. Bob Schwartz.

Q. Do you know how many copies were prepared? A. There were a lot of copies there, quite a few copies.

Q. How many, five, ten, 15? A. Oh, no. Probably four or five.

Q. And were they all executed? A. No, they were not.

Q. Do you know how many were executed? A. There may have been two or three copies executed.

Q. Now, let me ask you this. You say that on September 14, '48, Bill Miller took no active part in the negotiations for the contract made on that date? A. Oh, yes, he did.

Q. Or did he sit back and rely merely upon you to advise him? A. He insisted on one thing, Judge, and kept on insisting on one thing.

Q. Yes, I know—

The Court: Get Marcus out.

The Witness: That's right. That's all he was (223) interested in. That is all he kept repeating. And I will tell you—he also said, "Be sure to get the $50,000 note, or tie it up in such a way that he doesn't have it after the agreement is paid.

Q. Now, did he also insist on that date that an option to purchase be given by Marcus to Bierman of 12½ per

cent of the outstanding stock of Milmar Estates, Inc.? A. I don't know if he insisted on that. I may have brought that up, because there was some provision in the lease, as you saw, wherein there was going to be some more stock purchased, I don't know what it was. Or Miller may have told me that Bierman wants to get some more stock in the event of a default to cover him in some way, and I think that is why the agreement was prepared. I don't know who it came from.

Q. Well, did that suggestion come from you or from Miller? A. It may have come from me, it may have come from Miller. I don't remember.

Q. Have you anything in your escrow file, or in your personal files to substantiate that agreement, the offer to purchase 12½ per cent of all the outstanding stock of Milmar Estates by Bierman? A. It is there. The paper is there. I think you are (224) looking at it, are you not?

Q. No, this is a copy from my files. A. Is it in evidence, Judge?

Mr. Grosman: I don't know.

Mr. Brigadier: DME-25.

Mr. Grosman: I have 208 here.

The Witness: Is there a paper that was in escrow or was it among the other papers that I had?

Mr. Brigadier: I have given you the Exhibit number.

The Witness: What is it?

Mr. Brigadier: DME-25.

The Court: You know, if you have extra photostatic copies of those exhibits, it would be nice if I had them here, so I can read them and have them here.

Mr. Brigadier: I will make a complete set available for you.

The Witness: I have it.

Abraham Lieberman—for Defendant Milmar Estate—Cross

Mr. Grosman: What is your answer?
The Witness: I am sorry. What is the question?
The Court: Mr. Bremer, give it to him.

(Question read.)

A. Yes, the letter of September 14, which is in evidence, DME-25.

By Mr. Grosman:

(225) Q. Now, wasn't that the subject of long negotiation between Miller and Marcus on September 14, '48? A. It may have been. They did a lot of talking on the outside while we were preparing the various other papers that we had, changing the agreement, other papers that had to be prepared, stock certificates, canceilations, and so forth. I don't know when this went on. We were there a long time, Judge. I think we were there from—probably before noon—at least Bob and I were—until six, seven o'clock that night.

Q. How long were Marcus and Miller there? A. Oh, I think they came shortly after lunch. I think they may have come one o'clock, two o'clock.

Q. How long did Marcus stay? A. He stayed right through. As a matter of fact, Marcus, I think, came in before Miller, because Miller was a late riser, used to be up late nights, couldn't get him up.

Q. Let me ask you, were there a number of plans discussed whereby the transfer of Marcus' stock in Milmar might be effected? A. Well, as I stated, the last time, I thought the best plan would have been to have gotten the shares of stock and to have assigned them, sold the shares of stock. But that was out, that had to go out, because they had no shares of stock. Marcus said he didn't—

Abraham Lieberman—for Defendant Milmar Estate—Cross

(226) Q. Then you discarded that plan. A. We started that—

Q. You discarded that, is that it? A. We then discarded it, because then Marcus suddenly decided that he wants to have Milmar sell, the plan that we adopted here, to have the shares canceled and then reissued new shares, so we discarded that.

Q. Well, now, how many of these plans, during these many hours that you gentlemen were together on September 14, 1948, how many plans were discussed before the final plan was adopted? A. This was not discussed on September 14.

Q. Well— A. Plans, if any, were discussed in August, in Marcus' office.

Q. Yes. And how about the second or third of September? A. By that time we already had decided, because when I came to Bob Schwartz' office on September second or third, I believe this agreement was already prepared in rough draft.

Q. You are now referring to what? A. I am now referring to DME-5.

Q. Well, at the August, '48 meeting, how many different plans were discussed and discarded before the (227) final plan was adopted? A. I think only one other.

Q. Might there have been more? A. I don't think so. I wanted this done with the sale of stock, but he didn't have the stock. And as they were arguing about it, then Marcus came out with this idea and insisted on it.

Q. So you went along with it? A. I did. It was prepared.

Q. Well, now, in accordance with the terms of that agreement, DME-5, signed on September 14, '48, you say that Marcus was supposed to get out completely, turn over half of the stock to you, the other half of Milmar stock went to Miller, did it, and Bierman? A. Well, now, let's divide it. Half was in escrow, Judge.

Abraham Lieberman—for Defendant Milmar Estate—Cross

Q. Yes, Marcus' half was in escrow. A. That's correct.

Q. The remaining half went to Miller and Bierman? A. That's right, I kept it as their attorney.

Q. They were free to use it as they saw fit? A. That's right.

Q. And Miller, Bierman and Mr. Kevelson immediately took over the affairs of Milmar Estates, Inc.? A. About a week later they had the meeting.

(228) Q. And they were then free to do as they saw fit with the assets of Milmar Estates, Inc.? A. Absolutely that was the intention.

Q. Now, do you know what they did with the assets of Milmar Estates, Inc., do you, of your own knowledge? A. As of up to the present date?

Q. From September 14 on. A. Up to the present date?

Q. Yes. A. Well, yes, there was a condemnation started by the—this is all hearsay, of course—

Mr. Brigadier: Then I object, if it is hearsay. We will prove what happened with the proper witnesses.

The Witness: I didn't represent Mr. Miller in the Milmar—

The Court: Did you hear Mr. Brigadier say, "I object"? So you keep right on answering before I rule or don't rule.

The Witness: I am sorry.

The Court: Maybe we will swap places here. Do you object?

Mr. Brigadier: I do.

The Court: On the ground that you intend to prove formally to the assets?

Mr. Brigadier: That's right, and not through (229) hearsay.

The Court: Then why take it through hearsay from him?

Abraham Lieberman—for Defendant Milmar Estate—Cross

By Mr. Grosman:

Q. Do you know, Judge Lieberman, whether or not following September 14, '48, aside from the condemnation, whether or not Miller, Bierman, Kevelson, when they took over the affairs of Milmar Estates paid Mr. Marcus, whatever he was paid, out of the assets of Milmar Estates? A. I wouldn't know that, sir.

Q. You wouldn't know that. A. It would all be hearsay.

Q. Did you have anything to do with the making of the payments to Marcus after September 14, '48? A. No, sir.

Q. You don't know where the checks came from, how they were drawn? A. Just hearsay, I had nothing to do with them.

Q. I think you told us that there was a mortgage to be executed on the assets of Bill Miller's Riviera. I think that's been covered, hasn't it?

The Court: Yes, sir.

The Witness: Chattel mortgage?

Mr. Grosman: Yes, sir.

The Witness: Yes, I so testified.

(230) Q. Have you Exhibit DME-15 there, Judge? I want to make sure it is in evidence. A. Is it a letter?

Q. It is a letter dated September 14. A. Yes, I have it right here. Yes.

Mr. Brigadier: It is the one he testified to about an hour ago on your cross examination.

Mr. Grosman: No, no.

The Witness: I have it, Judge.

Mr. Grosman: That has an Exhibit mark on it, hasn't it?

The Witness: DME-15.

Mr. Grosman: Yes.

Abraham Lieberman—for Defendant Milmar Estate—Cross

Q. Did you represent Milmar Estates, Inc., on September 14, 1948? A. No.

Q. Who represented them? A. Bob Schwartz.

Q. Judge, may I ask you this. Why did you request that only 50 per cent of the stock of Milmar Estates be escrowed and not all of it? A. Because Bill Miller and Al Bierman owned the other 50 per cent, and they had agreed on that.

Q. How did they own it? A. Because that was—

(231) Q. Bierman paid for some of the stock. A. I beg your pardon?

Q. Bierman paid for his stock. A. Yes.

Q. How did Miller own any of that stock? A. He owned it. Marcus agreed to it when we signed this agreement, he agreed that Miller owned 50 per cent.

Q. You are now referring to DME-5? A. You mean the agreement. Go ahead.

Q. Is that what you are referring to, that Marcus agreed that Miller was to own any stock? A. I gather this, Judge, not only from the agreement, I gather it from the escrow agreement, I gather it from another paper here that indicates that only 50 per cent was to be placed in escrow. In the event of a default Marcus was only to get back 50 per cent that was in escrow.

Q. Is there anything in any of those writings to indicate that on September 14, '48, Miller was to be considered the owner of any of that stock of Milmar Estates, Inc.? A. As soon as the agreement was signed. That was my understanding.

Q. Is there anything in the agreement, DME-5, to that effect? A. Well, I would say—not exactly as you say, Judge, I mean in that phraseology. You asked me that the last time.

(232) But I would say, as a lawyer, that when you deposit 50 per cent of the stock in escrow, and upon the de-

fault the man was to receive back 50 per cent, and no more, according to this, what I had in escrow, I would say that, in essence, that is what it means.

Q. That Miller was to wind up— A. Otherwise the whole 1,250 would have been put in escrow with me, and upon default the whole twelve fifty would have gone back to Marcus. But there was nothing to that extent mentioned, nothing.

The Court: Haven't we been through that before?
The Witness: Yes.
The Court: I thought we were.
Mr. Grosman: I think that is all. Your witness.

Redirect examination by Mr. Brigadier:

Q. Judge Lieberman, Judge Grosman a few moments ago asked you to list briefly the various plans that were considered in August as to the method of carrying out this transaction, and, as I recall, you listed two, the original plan, a sale of the stock that Marcus himself had— A. That's right.

Q. —and then when that stock didn't become available, to cancel out stock and issue new stock, is that right? A. Which was the result of this agreement.

(233) Q. Yes. Now, what I am asking you is this. Will you look at Exhibit DME-12, the real property mortgage, and look at it, and does it in any way now refresh your recollection as to any other plan that was contemplated at the time?

Mr. Brigadier: May I withdraw the question as I worded it? I think I can make it more direct and to the point.

Q. Will you just turn to Exhibit DME-12, and turn to the second page of that exhibit. A. I have it.

Abraham Liberman—for Defendant Milmar Estate—Redirect

Q. Now, at the bottom of the second page there is a line that has been stricken out, "X'd" out, right? A. Yes.

Q. I showed you, did I not, this morning a blowup of the line that was "X'd" out? A. You did.

Q. Do you know now what was in that line? A. You'd have to refresh my recollection.

Mr. Brigadier: If there is no objection, I can read it to the Court. I have it here.

A. (Continuing) I can read a bit of it. "This is a purchase money mortgage given to secure part of the purchase price of" something.

Q. "—of the within described property from the (234) mortgagee to the mortgagor—" A. Just a minute. "—from the mortgagee to the mortgagor by" something "dated—"

Q. Isn't the word "deed"? A. "—deed dated—"

Q. "—this day—"

Mr. Grosman: You can show him that.

Mr. Brigadier: All right.

Q. "—and intended to be recorded simultaneously herewith." A. Yes. That's right.

Q. Now, does that now serve to refresh your recollection as to any other plan that was considered on that day as to how this transaction was to be carried out? A. Yes, it does.

Q. Will you tell us now what that was? A. There was going to be the sale of the stock, or there was going to be the property—Milmar would deed the property to Bierman and to Miller, and they were going to give back a purchase money mortgage to the extent, I think, of $95,000.

Q. And the terms of the ninety-five thousand mortgage are those which were recited in DME-12, the same terms as

the eventual contract, is that right? A. That's correct. That brings something else to my mind, (235) if you don't mind, Mr. Brigadier.

If you remember, I testified the first day that I told them at that time that it was a useless mortgage. Now it all comes back to me. I stated as long as Milmar was conveying, as it did under this agreement, that this was a useless mortgage. Evidently this was one of the plans considered. The mortgage had already been prepared, but yet Marcus insisted on the mortgage, in spite of the fact we didn't go through with this kind of a deal.

I said, "It is useless. You are getting nothing, because Bierman and Miller don't own the property." But they insisted on it.

Q. I am very anxious that you try to refresh your recollection as much as possible about this, because it was very obvious the other day to the Court, myself, and everybody in this room, that this instrument appeared completely inexplicable—I think that was the word used by the Court—and frankly, it was to me, too.

Now, you say that in August that was one of the plans considered, right? A. Evidently, yes.

Q. But by the time that conference was over, the August conference, you had received instructions, you and Mr. Schwartz, as to which plan was to be followed. A. Now, I don't know. Now, I am not getting confused, (236) but now I am trying to think, because if we had definitely settled in August that it was going to be that plan, probably the deed would not have been prepared, Mr. Brigadier.

Q. There isn't a deed. A. Rather, this mortgage wouldn't have been prepared.

Now I am beginning to think—did we decide in September, or did we actually decide the morning of the 14th as to the exact time, because, you see—I want to get my mind

Abraham Lieberman—for Defendant Milmar Estate—Redirect

clear—if we had definitely settled in August on this particular plan, then I am sure Bob Schwartz would not have prepared this mortgage, in spite of our agreeing on this type of an agreement. So now I am beginning to think maybe we didn't until, maybe, September 14 decide on this plan. I don't remember.

Q. Judge Lieberman, please. With lay witnesses we have this kind of difficulty. We shouldn't have it with you. A. You have got to have it with me, because I am trying to tell you the truth. I can't recollect—

Q. Please listen to what I am trying to say. When you pick up a document and say "this plan," the record does not show what you are picking up. A. I am sorry.

Q. That is what I am trying to ask you to do, to (237) please identify the exhibit number so that the record will show what you are talking about. A. I am sorry. When I refer to "this plan" I am referring to Exhibit DME-5, the final contract of September 14.

Q. Now, you do know that in August this other plan was discussed? A. Right.

Q. You do not recall what decision was arrived at at the end of that day as to what should be done to that plan? A. Now I don't know what was decided upon, whether we decided that at the end of the discussion in August or whether it was settled in September, the first part of September, or September 14.

Q. All right. But you do know that the plan that was finally carried out on September 14 was not the plan of conveying the legal title from Milmar to Al Bierman and William Miller and the taking back of a purchase money mortgage? A. That's right.

Q. Yet you do know that on September 14 this mortgage, which was originally described as "purchase money" in the line "X'd" out was executed, is that right? A. That's correct.

Abraham Lieberman—for Defendant Milmar Estate—Redirect

Q. Do you know when that line was "X'd" out, (238) referring to this as a "purchase money" mortgage and referring to the fact that this was given simultaneously with the execution and delivery of the deed? A. I would say that was done on the 14th.

Q. I see. Now, does that serve—and I think you said before it did—to refresh your recollection as to why you said on the 14th that this was a useless mortgage? A. I still say it now.

Q. Yes, I know you say it now. I want to take you back just to the 14th. A. I told them it was a useless mortgage at that time because the plan had been changed of conveyance.

Q. The conveyance was not made, is that right? A. It was not made, so Al Bierman and Bill Miller did not have title, and they were giving back a mortgage on something they didn't have title to, which was originally one of the plans originally anticipated.

Q. Just listen to my question. Nevertheless, this instrument was executed with that line stricken out? A. That's right.

Q. The fact that it was a purchase money mortgage. A. That's right.

Q. And that line referring to a conveyance stricken out. A. Correct.

(239) Q. Yet this mortgage was given? A. Correct.

Q. Why was it given? A. Sam Marcus insisted on it. I so stated before.

The Court: Didn't he tell you that before, in the direct testimony?

The Witness: I repeated it five times, that he insisted on it.

Mr. Grosman: May I ask, Mr. Brigadier, will you refer to the exhibit number on that?

Abraham Lieberman—for Defendant Milmar Estate—Recross

Mr. Brigadier: Sorry. I am guilty. I am referring to Exhibit No. DME-12, the real property mortgage.

Mr. Grosman: And by "the 14th," you mean September 14?

Mr. Brigadier: September 14.

Mr. Grosman: All right.

Mr. Brigadier: No further questions.

Recross examination by Mr. Grosman:

Q. Just one question, Judge. Now, you told Mr. Brigadier that you overlooked telling us about another plan that had been considered seriously and abandoned, right. A. Yes, he refreshed my memory on it, Judge.

Q. Now, is it possible that there were other plans that were considered at the several meetings— A. May have been.

(240) Q. —and abandoned after discussion? A. There may have been. There was so much discussion it is possible now.

Mr. Grosman: That is all.

Mr. Brigadier: That is all.

The Court: That is all, sir. Step down.

(Witness excused.)

Mr. Brigadier: I would like to put this in evidence. Do you have any objection, Judge? The blowup of that line.

Mr. Grosman: No, if you say you blew it up.

Mr. Brigadier: Yes.

The Court: That's in the mortgage?

Mr. Brigadier: That's in the mortgage.

The Court: Why don't you put it right on the mortgage? Why mark it as an Exhibit?

Mr. Brigadier: All right, suppose we do that.

The Court: Attach it to the mortgage. You are going to have enough exhibits by the time you get through.

Mr. Brigadier: That's DME-12. I want to make sure that you have got the right one. All right.

Mr. Miller, take the stand, please.

WILLIAM MILLER, a plaintiff herein, called as a witness in his own behalf, having been duly sworn, testified as follows:

(241) The Clerk: May we have your full name and address for the record, please?

The Witness: My name is William Miller. I live at 812 Bracken Street, Las Vegas, Nevada.

Direct examination by Mr. Brigadier:

Q. Mr. Miller, how would you describe your occupation? A. I would describe myself as a cafe owner, a man that's been in the theatrical business all my life. I have been through every end, I have been an actor, an agent, a producer, a restaurant owner, and every part of the theatrical business from the time I was a child.

Q. In July, 1948, were you connected with the project which has been referred to here as Bill Miller's Riviera? A. Yes, I was.

Q. Now, I am referring in particular to the night club that was operating under that name, is that right? A. That's right.

Q. And the Bill Miller in that name, is that yourself? A. That's myself. I am known as Bill Miller throughout the profession.

Q. Now, the night club itself was operated, however, by a corporation, was it not? A. That's correct.

(242) Q. And that corporation was known as whom? A. Bill Miller's Riviera, Inc.

Q. And in July, 1948, were you the sole beneficial owner of that corporation? A. Yes, except for one part in the stock, which was in my brother-in-law's name, Abe Vine.

Q. And Samuel Marcus at that time was not in Bill Miller's Riviera as a stockholder? A. No, he was not.

Q. Now, Bill Miller's Riviera, Inc., the corporation that operated the night club was a tenant, was it not? A. Yes, it was.

Q. Under a lease from Milmar Estate, Inc., dated July 23, 1947, is that right? A. That's correct.

Q. In evidence as DME-28. Now, the title to the real estate was in whose name at that time, in July, 1948? A. In a corporation by the name of Milmar Estates.

Q. And that was a New Jersey corporation? A. Yes, it was.

Q. And that is the lessor described in this lease that I have just shown to you, the land lease? A. That's correct.

Q. Now, were you in any way connected with the lessor corporation, with Milmar Estates? (243) A. Yes, I was.

Q. Let me take you back a step further. This property in question was originally acquired by whom from whom? A. It was acquired from Ben Marden by myself and Sam Marcus.

Q. When you say Ben Marden, you mean a corporation with which Mr. Marden was connected, is that so? A. That's correct, called Ben Marden's Riviera, Inc.

Q. But the corporation that sold it was the Michael Realty? A. Michael Realty. They owned the property.

Q. Now, just listen to my questions. In July of 1948—I am now skipping right to the beginning of this problem—were you a stockholder of Milmar Estate, Inc.? A. Yes, I was.

Q. And who else was a stockholder in that corporation? A. Well, actually, I didn't know. I considered only—the only one I had business dealings with of any kind was with Sam Marcus.

Q. But associated with you in your stock ownership was whom? A. Al Bierman.

Q. And did you know who was associated with Sam Marcus in his ownership of stock at that time? (244) A. No, I did not.

Q. You knew that there were others, but you didn't know who they were? A. That's correct.

Q. You had never been informed? A. No. I am sorry. I was informed that there were, but never told who it was, because in our dealings—he had so many dummies and different corporations we were with that I never felt that I was dealing with a corporation, I felt like I was dealing with him as my partner, because all our negotiations was as partnerships.

I said, "Sam, let's do this." He said, "Bill, let's do that." And that's the way we operated.

Q. Now, for some time prior to July, 1948, had you and Mr. Marcus had any discussion about the sale of that real estate? A. Yes, we did.

Q. Will you tell us what the discussion was? A. Mrs. Marcus first came to me and she said she had had so much trouble with her husband—I won't mention why, different things—however, would I please do something to get him into his own business, and get him back into his own business, so he could get whatever money he could out of it and forget about the night club business, or the real estate, or anything else.

(245) He wanted to concentrate on her own business. He said the business was falling out on the 42nd Street store, she never saw him, he wasn't home, and he stayed out late. And I said, "Listen. Who is going to buy this

corporation, Sara? You know the trouble we are in. I am up to my neck in debt. You know it. However, I will talk to Sam and see how he feels." That's Sam Marcus I am referring to.

Q. And did you have a conversation with Sam Marcus? A. I had a conversation with him and he said he was—this was before July. I am just leading up to July. This was all through our experiences.

Q. Well, beginning with what part of the year of 1948? A. Maybe once we went into bankruptcy, let's say, it started at that time, when Riviera went into bankruptcy, and we were terribly in debt, and it started along that time.

And finally he came to me—I talked to him, I said, "Sam, what are we going to do with this, what do you want to do?" And he said, "I'd like to get out."

The Court: What are you going to do with what?
The Witness: The property.
The Court: The real estate.
The Witness: The real estate and everything.

A. (Continuing) He said, "I'd like to get out." I said, (246) "Sam, so many people walk into this place. Maybe I can do something. I don't know. How much do you want to get out completely, so whoever—that I can say that I am clear, and I can sell it to someone else, or do whatever I want?"

He said, "$90,000."

Q. Now, can you fix the month of 1948 when he stated that he would take $90,000? A. It must have been in June—May, June. It's eight, nine years ago. I couldn't tell you. But it was before July, I know that.

Q. I see. A. Because there were so many deals that I started for him and fell through.

Q. Now, can you name any of the deals; was there any deal for $90,000? A. Yes, I had a deal with a fellow by the name of Maurice Euchatell—or something—I really

wouldn't know the correct spelling, but it was a fellow that was in the coat and apron business—

Mr. Grosman: Pardon me, would you spell that last name?

The Witness: U-C- something. I really don't know the spelling. I am not familiar with the way he spells the name.

The Court: Now, at the time you were discussing (247) the possible sale of the real estate, was it then in the name of Milmar Estates, Inc., or was it still in your name and Sam Marcus?

The Witness: No, it was transferred—Milmar comes from Miller and Marcus.

The Court: I know what it comes from.

The Witness: I am sorry, your Honor.

The Court: At the time the sale was being discussed, the property was already in the name of the corporation.

The Witness: It was; yes, your Honor.

The Court: And he said he wanted $90,000 for his share, is that right?

The Witness: No, he wanted $90,000 to get out completely, so that I owned the corporation, I could do with it as I saw fit. He wanted to take ninety thousand, and he says, "You take the corporations. You find partners. You do whatever you want. Get me out of this thing. Give me ninety thousand and I will be happy to get out. And you do whatever you want to do."

The Court: All right.

The Witness: Because I had a headache and he knew it.

By Mr. Brigadier:

Q. Now, did this deal with Euchatell develop into (248) a deal? A. Mr. Euchatell sent his accountants over to look at the books of Riviera, because Riviera—

Q. I think we will get through much faster if you just answer my questions. A. No, it didn't develop.

Q. It did not develop into a deal. A. Right.

Q. And after it failed to develop into a deal, did you have any discussion with Mr. Marcus about your buying him out, you or Bierman buying him out for $90,000? A. Yes, we did.

Q. And where did you go, or where did this discussion take place? A. It took place at the numerous occasions—he was there every night at the Riviera, so I can't tell you when. He was there every night, maybe miss one night a week, or something like that.

Q. Well, as a result of these discussions, did you at any particular time go with Mr. Bierman to Mr. Schwartz' office with Mr. Marcus in relation to a $90,000 deal? A. No. I am sorry, before that—I must tell you what happened. I told him that I thought I had another deal, I had talked to a fellow by the name of Mr. Kevelson, who had been in, and he was interested in buying him out.

(249) Q. I am not up to that, please. A. I am sorry.

Q. I am still in July of 1948. A. Right.

Q. In July of 1948 didn't you and Mr. Bierman go to Mr. Schwartz' office at one time with Marcus—to Marcus' office to discuss a $90,000 deal? A. Yes, we did.

Q. What happened when you got there? A. When we got there, he changed his mind, and he said he had talked to a man called Mr. E. M. Loew, who is part owner of the Latin Quarter with Mr. Lou Walters, and that E. M. Loew had made him an offer of $125,000 for the property.

Q. And that is what he wanted? A. That is what he wanted to step out.

Q. What did you say to him? A. I said to him, "You are talking ridiculous, Sam. How can you pay us a hundred and twenty-five? You don't own the property. How can you sell it to E. M. Loew? What about all the years I have put in here?"

So he says he wants to sell it, "I can make a deal. I am not going to worry about anything. I am going to sell it."

Q. What happened to the deal with E. M. Loew? (250) A. It fell through. He didn't buy it.

Q. Sam Marcus told you himself? A. Yes.

Q. Did he then propose to you that you should arrange for a deal for the same amount? A. He said to me, "Well, if you can do better, you go ahead. You sell it to somebody for a hundred and twenty-five and I will give you first call."

Q. I see. Now, when was that, that this conversation took place? A. That was right before we signed this paper where Al Bierman gave him $10,000. Whatever date that was.

The Court: On the letterhead?

The Witness: On the letterhead of the Riviera. Right before that.

(Document shown to the witness.)

Q. Prior to the date of DME-1. A. Prior to—excuse me.

Q. You'd better put your glasses on if you don't see without them. A. Yes, August 27, prior to that date.

Q. Prior to August 27. Do you know how long prior to August 27? A. Oh, I think it was possibly a week or so before.

The Court: I think, Mr. Brigadier, this would (251) be a good time to adjourn for lunch.

We will adjourn till 2 o'clock, gentlemen.

(Noon recess.)

AFTERNOON SESSION

Mr. Grosman: I omitted to ask Judge Lieberman one question about his escrow arrangement, and with your Honor's permission I would like to do that.

The Court: You may do that.

Abraham Lieberman—for Defendant Milmar Estate—Recalled—Recross

ABRAHAM LIEBERMAN, resumed the stand.

Recross examination by Mr. Grosman (continued):

Q. Judge, I show you Exhibit DME-14, dated September 14, 1948, signed by Bill Miller on behalf of Bill Miller's Riviera, addressed to Milmar Estates, and so on. This document provides that certain letters, papers, documents, and so forth, executed in connection with a lease for Bill Miller's Riviera, be turned over to you in escrow. Look at the first paragraph. A. Yes.

Q. Were they turned over to you? A. Oh, yes.

(252) Q. Pardon? A. Yes, that's the lease I had. That's the lease you referred to this morning, Judge. There were two leases.

Q. Yes. Now, all the other letters, papers, documents, stocks and other securities which are held in escrow in connection with certain agreements, in connection with the lease for Bill Miller's Riviera, dated various dates, on or about July 23, 1947, "shall all remain in escrow with Abraham Lieberman, Esq." Was that done? A. Yes.

Q. Now, can you tell us who turned those papers over to you; was it Robert Schwartz? A. Oh, yes; Schwartz, Marcus. I mean, that was the understanding. I don't know who gave them to me physically. But we were there, the four of us, and they were given to me.

Q. Can you tell us by looking at your folder what, if anything, in addition to that lease we spoke of this morning was turned over to you under this writing? A. In escrow?

Q. Yes. DME-14. A. If you let me have the escrow receipt, I will be very happy to tell you. There is an escrow receipt there.

Mr. Margulies: DME-7.

Abraham Lieberman—for Defendant Milmar Estate—Recalled—Recross

(Document handed to the witness.)

A. Shall I enumerate it for you?

(253) Q. If you don't mind. That's under this writing, DME-14. A. This is now DME-7. Exhibit No. DME-7 is the escrow receipt.

Q. Yes. A. And this is what I h[illegible] in escrow. No. 1 says, "Resignations of officers and directors of Bill Miller's Riviera, Inc." That is a typographical error, Judge. That should have been, and it was intended to be, Milmar Estates, because I had no resignations of Bill Miller's Riviera. That was strictly an error, a typographical error, that was overlooked by Bob and myself. We had a lot of notes to make corrections, and with all these papers, that was purely an error.

Mr. Brigadier: I just want to interrupt to suggest that as you go along may I call out the exhibit numbers so that we have them in the record, what you are referring to.

Mr. Grosman: He has nothing there.

Mr. Brigadier: He just referred to the resignation.

The Witness: There are two resignations. One of Samuel Marcus dated September 14. Do you have it?

Mr. Brigadier: I will call them off to the clerk and he will hand them up to you. DM-205 and 204.

Wait a minute. I am sorry. DME-23 and 24.

(Documents handed to the witness.)

(254) Q. What were those exhibits? A. DME-23, DME-24. Those are the resignations that I received. They are the resignations from Milmar—not the Riviera. There should have been the words "Milmar" in there.

Q. Now, Judge, under the wording of this receipt which you issued on September 14, '48, you did not receive any

Abraham Lieberman—for Defendant Milmar Estate—Recalled—Recross

resignations of the officers from Milmar? A. Oh, yes; I did.

Q. You don't say so in here. A. Under the receipt?

Q. Yes. A. Now, under this receipt, no. But I did receive the resignations of the officers of Milmar, which was intended to be in this receipt.

Q. All right. Now, what else did you receive under that Exhibit? A. I will just go on further, Judge, that it wasn't necessary to show it was in error—it wasn't necessary to get the resignation of Bill Miller's Riviera, because Marcus was out of that already as of June, 1947.

Q. Out of— A. Out of Bill Miller's Riviera. He stepped out at the time that we settled—

Q. All I want to know from you—I don't want to (255) impose upon the Court's good nature, or that of counsel; I should have asked you this this morning—all I want to know from you is what, if anything, did you receive in escrow under the writing, DME-14? A. All right. I must refer—

Q. You have the lease, you say? A. I must refer to the escrow agreement to tell you. No. 1 I explained. No. 2, I received 625 shares of Milmar Estates, Inc.

Q. You didn't receive it under this writing, did you, Judge? A. Why, you have to put the two of them together. You see, the one describes the other. This was a general description and then I gave him the escrow receipt to show what I kept in escrow. This was a general letter. You read it before. "This will confirm our understanding—"

Q. I don't think I made myself clear, Judge. A. Perhaps not. I am sorry.

Q. Under this writing, DME-14, given to Milmar Estates, Inc., by Bill Miller's Riviera, Inc., signed William Miller, president, it refers merely to certain documents and leases pertaining to Bill Miller's Riviera. A. I see what you mean.

Abraham Lieberman—for Defendant Milmar Estate—Recalled—Recross

Q. There is nothing in here about Milmar Estates. A. I am sorry. I see what you mean.

(256) Q. If you look at that writing you will see that is so. A. All right.

Q. Now, all I want to know is what did you receive under this particular writing, DME-14? A. All right. I am sorry.

The Court: This one he is talking about (indicating).

The Witness: Yes, this one. I know.

A. Now I know what you mean, Judge. I received a lease between Milmar Estates and Bill Miller's Riviera, dated July 23, 1947, and another lease between Milmar Estates and Bill Miller's Riviera.

Q. Where is the other lease referred to? A. Under No. 3.

Q. No. 3? A. Of the escrow, "and lease dated September 14, 1948," between the same parties.

Q. All right. A. Well, I don't know what four would be, a letter from Samuel Marcus to Bill Miller. I presume that does not refer to Bill Miller's Riviera. It may. I don't know just what letter that is, unless I would refer to the escrow file.

According to No. 5 under the escrow letter, there is a letter from Milmar Estates to Bill Miller's Riviera, Inc., (257) dated September 14, 1948.

According to No. 7 under the receipt, 50 shares of Bill Miller's Riviera, Inc.

Q. Did you receive that? A. Oh, yes. It is in the escrow file.

Q. Now, how about No. 6? A. Unless I have the letter, Judge, I can't tell you what was in the letter. I don't know what was in that letter.

Q. I want to know, did you receive that letter? A. Oh, if that's the question, anything that is on here I received, except one thing, and that is the resignations of the Bill

Abraham Lieberman—for Defendant Milmar Estate—Recalled—Recross

Miller's Riviera officers. That's a typographical error. Otherwise I have got everything on here.

Q. But there are resignations of officers of Bill Miller's Riviera? A. May have gotten that back in 1947. I don't know if they are available now, Judge. I may have gotten it back in '47 when we had the dispossess suit. I haven't even seen them. I haven't seen them. I looked through my file, as a matter of fact, and didn't find them.

Q. Wasn't there more than what is enumerated in your receipt, DM-203— A. DM what?

Q. The receipt you gave Samuel Marcus September 14, 1948. (258) A. You mean the escrow? DME-7. You are referring to the wrong number, Judge.

Q. Now, DM-203 I have. A. That's the deposition number.

Mr. Brigadier: DME-7.

Q. DME-7? A. That's right.

Q. All right. A. Oh, yes, there were other papers turned over to me, but not in escrow.

Q. I am talking about in escrow, under the letter, DME-14. A. That is all that was ever turned over to me.

Q. All that was ever turned over to you. A. Nothing else except what is in here, with the explanation about the stock of Milmar—rather, the resignations of Milmar instead of Riviera.

Q. Now, will you look at DME-14, please? A. Yes.

Q. Did you receive letters in escrow? A. Well, I gather I did, because it says here a letter from Milmar Estates to Bill Miller's Riviera.

Q. This says "letters"—plural. Did you receive more than one letter? A. I received, Judge, just what is in this receipt. That's (259) when I gave them the escrow receipt.

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Mr. Brigadier: Will you indicate the exhibit number?

The Witness: Yes.

A. (Continuing) Whatever is in the Exhibit, DME-7, that's what I received, and I gave a receipt. Irrespective of what may be in any other paper, because when the papers were given to me in escrow, we then sat down—they wanted a receipt, and I said, "Now I will give you a receipt for what I am holding in escrow," and this was prepared.

Q. Now, you say that you received a letter in escrow? A. Under No. 4, referring to DME-7, it refers to a letter under No. 4, it refers to another letter under No. 5, refers to another letter under No. 6. There are three letters referred to in this escrow receipt, 4, 5 and 6, not just one.

Q. Now, what other papers, if any, did you receive under DME-14? A. In escrow?

Q. Yes. A. Well, I thought I explained.

Q. That writing refers to papers being turned over to you in escrow? A. Yes. Well, I thought I answered that. I received (260) the resignations of the officers of Milmar, I received 625 shares of Milmar Estates, Inc., I received two leases—

Q. Not under DME-14. A. Now you are referring—you want me to limit myself to the Riviera again. I see.

Q. Yes. A. I thought I made that clear.

Mr. Brigadier: Wait a minute. I don't understand that, either. Are you asking what he received under this receipt or what he received under this receipt that is confined to the Riviera?

Mr. Grosman: DME-14.

Mr. Brigadier: I am confused myself.

The Witness: I understand the question, Mr. Brigadier.

Abraham Lieberman—for Defendant Milmar Estate—Recalled—Recross

Mr. Brigadier: I don't.

The Court: You said that before, that you understood the question. Here it is, chowdered up again.

The Witness: I thought he had changed his question.

Q. I am referring exclusively, Judge, to what you received under the escrow writing, DME-14. A. The two leases.

Q. Yes. (261) A. Under No. 5, a letter from Milmar Estates to Bill Miller's Riviera. And under No. 7, 50 shares of Bill Miller's Riviera stock.

Q. Now, did you receive any other papers, documents or other securities?

The Court: That are not listed in that receipt, is that it?

Mr. Grosman: Well, not under the terms of DME-14.

The Court: He has said about six times that everything that is in that receipt he received. And he explained an error that is made in reference to the corporation. How many times must he explain it? Didn't you say that, Judge Lieberman?

The Witness: That's right, I did.

The Court: I heard you six times, at least, answer that one.

Q. Judge, then I take it that whatever is not listed in your receipt, DME-7, you did not receive, is that right? A. I received other papers, but if you mean in escrow, no.

Q. In escrow. A. This is everything I received in escrow, Judge Grosman.

Mr. Brigadier: "This" meaning what?

The Witness: DME-7.

William Miller—for Defendant Milmar Estate—Recalled—Direct

A. (Continuing) I received every one of these papers, (262) except that one error I explained, and I brought them here to court and they are here in court now.

Mr. Grosman: That is all.

The Witness: I will still be available until 4 o'clock if you want me.

(Witness excused.)

WILLIAM MILLER, resumed the stand.

Direct examination by Mr. Brigadier (continued):

Q. Mr. Miller, you testified just before the noon recess that toward the end of July, 1948, Mr. Marcus made a proposal to you for the purchase of the subject matter—which I will not describe at the moment—for $125,000, is that right? A. Yes.

Q. Will you tell us just briefly just what the proposal was, where it was made, how it was made? A. The proposal was that I would get all the stock in the corporation, everything, lock, stock and barrel, to do with it as I saw fit. He knew I had a buyer, I had someone to come in, and take it, and divide it, and do everything, he would throw in the note, everything that I had ever signed in my life, because this man had me sign papers all through our thing from the Embassy days. And it was agreed that he would step out, he wouldn't bother me anymore, he would be very happy to get his money, and I could do whatever I saw fit (263) with the real estate, and with the Riviera. He didn't want to be bothered with it anymore. All he wanted to do was get his money out, with a little profit, and he would be very happy.

William Miller—for Defendant Milmar Estate—Recalled—Direct

Q. Now, after he had made this proposition to you, did you communicate with anyone, with any prospective investor? A. Yes, I did.

Q. And did you then report to Mr. Marcus that you had so communicated? A. Yes, I did.

Q. Now, who is the person with whom you had communicated? A. Mr. Kevelson.

Q. And where did this take place? A. At the Riviera.

Q. And can you fix the date, approximately, when it took place? A. Oh, I think I saw Mr. Kevelson some time—maybe late in July, or early in August. I wouldn't remember. Anything I would say at this time I would be—

Q. What is your best recollection? A. Some time early—late in July or early in August.

Mr. Grosman: The year.

Q. What year, Mr. Miller? (264) A. 1948.

Q. And did you report to Mr. Marcus the conversation that you had with Mr. Kevelson? A. Yes.

Q. Will you now tell us what you reported to Mr. Marcus was the conversation you had with Mr. Kevelson? A. I told him that I had a fellow that I thought would step in. And I told him that I would like to have something in writing to show him, because, after all, he has only got my word for what I am saying, would he give me something in writing to show him, the deal that we are proposing to him.

Q. I think you are ahead of my story. I would like to develop it in a different way.

You had a conversation with Keleson, right? A. Right.

Q. What was the conversation you had with Kevelson? A. That he could step into the Milmar Estates, and that he could get 40 per cent of the stock, and that he could—that Bierman, I and Kevelson would operate the Milmar completely, and that it would cost him $30,000 down—it would

cost $125,000, $30,000 down, three thousand a month when we are open, and $1,500 a month when we are closed.

Q. That was the proposal you had made to Kevelson? A. That's the proposal Marcus had given me.

Q. Well, but is that the proposal you had made to (265) Kevelson? A. That's correct.

Q. And from whom had you received that proposal? A. From Mr. Marcus.

Q. All right. Now, just answer my questions and we will get along much faster here.

Now, what did Mr. Kevelson say when you made that proposal to him? A. He says he was ready to close the deal.

Q. Did he say immediately? A. No, he said he would want to send his accountants over to look at the books.

Q. Now, Mr. Miller, you are the witness, I am only the lawyer. You are to tell what happened, not me.

Mr. Kevelson said he wanted to do what? A. Send his accountant over to look over the books of Bill Miller's Riviera.

Q. Did you report that to Mr. Marcus? A. Yes, I did.

Q. When, the same night? A. I don't know, the same night or the next night, but close around that time.

Q. Now, did Mr. Kevelson send accountants? A. Yes, he did.

Q. To examine the books? (266) A. Yes, he did.

Q. What books did they examine? A. Bill Miller's Riviera.

Q. Did they examine the Milmar books? A. No.

Q. Now, did you then receive any word from Mr. Kevelson as to whether he would invest in the transaction? A. He said he would. He was ready to close the deal.

Q. How long after the time that he sent the accountants? A. The next day.

Q. And did you report that to Mr. Marcus? A. Yes, I did.

William Miller—for Defendant Milman Estate—Recalled—Direct

Q. I see. Now, what was your next contact with Mr. Kevelson? A. The next contact with Mr. Keveison, I told him that the only way Marcus would listen—

Mr. Grosman: Now, please. May I object to this?

Mr. Brigadier: This is subject to my bringing in the fact that it was all brought to Mr. Marcus' attention.

Mr. Grosman: All right.

Mr. Brigadier: I tell you that—

A. (Continuing) I told Mr. Kevelson that the only way Marcus would listen to anything I said—I had so many dealings that he backed in and out—is if I showed him some money and he knew my people meant business.

(267) So he says, "What do you want?" I said, "Give me $5,000 for me to give Mr. Marcus."

Q. And what was the $5,000 to be? A. It was to be—

Q. What was its purpose? A. —a deposit.

Q. A deposit towards what? A. Towards the purchase of—of buying out Sam Marcus.

Q. And for the price and on the terms you already stated? A. On the terms that I discussed.

Q. I show you what purports to be a receipt dated August 8, 1948, and ask you whether that is signed by you? A. Yes, it is.

Q. And in whose handwriting is that receipt? A. It is in my handwriting.

Q. And by whom was that receipt given and to whom? A. It was given to Mr. Kevelson. I even spelled his name wrong.

Q. By whom? A. By me.

Q. For what? A. For $5,000 that he gave me to give to Marcus.

Q. And it was given to you on the date of that receipt? (268) A. Yes. I notice now it says August 8, 1948.

William Miller—for Defendant Milmar Estate—
Recalled—Direct

Mr. Grosman: I object to it. Self-serving declaration.

Mr. Brigadier: I wish to offer it in evidence, tying it in with other money, Marcus, and all the other papers. It is subject to my tying it in that I offer it.

Mr. Grosman: I object to it. It is not binding on Mr. Marcus.

The Court: Are you going to tie it up to Mr. Marcus?

Mr. Brigadier: Yes.

The Court: Did he get the five thousand? Did he give him a receipt for the five thousand?

Mr. Brigadier: I am going to tie it in even stronger than that.

The Court: All right, tie it up.

Q. Now, after you received the $5,000 from Mr. Kevelson, for which you say you gave him a receipt, did you then communicate—did you then speak to Mr. Marcus? A. Yes, he was there—

Q. When? A. That night.

Q. The same night as that receipt? A. The night before, or maybe a night before that.

Q. After you received the money from Mr. Kevelson did (269) you talk to Mr. Marcus? A. Yes, I did.

Q. I am not talking of before. Will you please listen to my question? Did you talk to Mr. Marcus after you received the $5,000 from Kevelson? A. Yes, I did.

Q. Did you tell Marcus you had received it? A. I told him I had received the money. I showed him the money.

Q. What did you then say to Marcus? A. "Now give me a piece of paper to show to Mr. Kevelson of what our deal is going to be, because he has got only my word of what he is going to do. He trusted me with $5,000. I gave

him a receipt for it. Now give me something to show to Mr. Kevelson so that he will know that this deal is on the level, what we are going to do with this deal."

Q. And your recollection is that it happened on the same date, or the date following the date of that receipt? A. After I had the money, because I showed him the money.

Mr. Grosman: You are testifying.

Mr. Brigadier: Who is?

The Court: You are leading him too much, he says.

Mr. Tepper: It's true, isn't it?

Mr. Brigadier: Am I?

The Court: Well, you are. There is no doubt about (270) it.

Mr. Brigadier: I thought I would shorten it.

The Clerk: DME-31 in evidence, receipt dated August 8, 1948, signed Bill Miller.

(Received and marked Exhibit DME-31.)

By Mr. Brigadier:

Q. Did you subsequently receive from Mr. Marcus any papers, memoranda, with respect to this transaction? A. I did.

Q. I show you what purports to be such memorandum, dated August 18, 1948, and ask you whether you received that? A. That's correct.

Q. Who delivered that to you? A. Mr. Marcus.

Q. Where? A. At the Riviera.

Q. When? A. On August 18—or a day after—about that time.

The Court: The date of the instrument?

The Witness: The date of the instrument.

Q. What did he say to you when he delivered it to you? A. He said, "Here is the deal that you can show Mr. Kevelson."

William Miller—for Defendant Milmar Estate—Recalled—Direct

(Document handed to the Court.)

The Court: Purchase price, $125,000; down payment five thousand. Then there are some blanks on it, incidentally.

(271) "First payment of $3,000 to be paid one month from the date the final document shall be signed and delivered; thereafter payments of $3,000 each month while the night club is in operation" I suppose; when it is closed one thousand five.

This was given to you by Mr. Marcus?

The Witness: By Mr. Marcus, yes.

The Court: And you turned over the $5,000 to him when you gave him this paper, did you?

The Witness: No, because then there was a question of how much down. He decided he didn't want five thousand. He said, "I am not going to turn anything over for five thousand. I want to know how much money he is going to give me down, because I have got $30,000 to meet with the mortgagee. We have only—"

Mr. Brigadier: Would you mind waiting? I am sorry.

The Witness: I am just telling my story.

Mr. Brigadier: Yes.

Q. Now, I direct your attention, first, to the first paragraph of this writing.

Mr. Grosman: Now, Mr. Brigadier, please. I must object to this. It is not in evidence.

Mr. Brigadier: I will be glad to offer it in evidence. I offer it in evidence.

Mr. Grosman: Wait a minute. Let me see it.

(272) (Document handed to counsel.)

William Miller—for Defendant Milmar Estate—Recalled—Direct

Mr. Grosman: Well, now, your Honor, I understood that this was signed by Mr. Marcus.

Mr. Brigadier: He didn't say it was signed by—

Mr. Grosman: From where I sat I thought—

The Witness: I did not.

Mr. Grosman: —it was signed by Marcus. This is signed by no one.

Mr. Brigadier: That's right. And it is being offered in evidence for the purpose of interpreting the main documents as they were finally resolved.

Mr. Grosman: All right.

Mr. Brigadier: Let me finish. For that purpose they are evidentiary.

The Court: He says Marcus gave it to him.

Mr. Brigadier: I propose to prove, if your Honor please, before the case is finished, by typewriting expert, on what typewriter it was typed.

The Court: Do you have to go that far?

Mr. Brigadier: Because it has been denied. I just heard the remark, "I never saw it in my life." And I will bring the typewriting expert into court. He has already made a study of this document. He will identify the typewriter from which it came.

Mr. Grosman: Yes. I object to it, your Honor, (273) because it is not signed by my client.

Mr. Brigadier: I offer it in evidence on the basis that I have already spoken of.

The Court: It may be marked on the basis you said. He says it was given to him by Marcus.

The Clerk: DME-3, formerly marked for identification, now marked in evidence.

(Received and marked Exhibit DME-3.)

By Mr. Brigadier:

Q. When this was delivered to you by Mr. Marcus, did you read it? A. Yes, I did.

William Miller—for Defendant Milmar Estate—Recalled—Direct

Q. Did you read the first paragraph of that? A. Yes, I did.

Q. And did the first paragraph contain the understanding that you had had, the oral understanding with Mr. Marcus? A. That's correct. This paper was drawn by Mr. Marcus.

Q. Now, I direct your attention to the third paragraph, where the purchase price is recited, and is that the purchase price that was agreed upon, the one hundred and twenty-five thousand? A. That's correct.

Mr. Grosman: Now, if your Honor please, this writing speaks for itself, and I don't think Mr. Brigadier ought to repeat it.

(274) Mr. Brigadier: You have just finished saying it doesn't speak at all. I want the witness to testify as to what was said in relation to it.

Mr. Grosman: The Judge has permitted it to go in evidence.

Q. I direct your attention to the third paragraph, which refers to the figure $5,000. Do you know that figure was arrived at? A. Yes, because I told Marcus that I had $5,000 ready to give him.

Q. Is that the $5,000 you have testified to before? A. That's correct.

Q. The five thousand from whom? A. From Al Kevelson.

The Court: From Kevelson.

Q. Now, I direct your attention to the next paragraph, and the one following that, in which there appear two blanks. You see those blanks now? A. Yes.

Q. Did you see them on August 18? A. Yes, I did.

Q. All right. Did you have any conversation with Mr. Marcus about those blank spaces?

William Miller—for Defendant Milmar Estate—Recalled—Direct

Mr. Grosman: Now, I object to the question as leading, your Honor. He may ask him if he had any conversation (275) about that document, let him say what it was. Pinpointing it down to two blank spaces—

The Court: It's a good thing I didn't ask him, because I was going to ask him about the blank spaces myself. It would be the first thing that would stand out to anyone who looked at the agreement.

Did you notice the blank spaces in there?

The Witness: Yes, I did, your Honor.

The Court: Well, did you discuss it with Mr. Marcus?

The Witness: Yes, I did, your Honor.

The Court: Tell us what he said and what you said to him, substantially.

The Witness: I said to him, "How much money more do you want down, so I can set and set this contract?"

He says, "Well, I have to have $30,000 down."

So I made arrangements—I told Mr. Kevelson that we needed $30,000 down, of which we would fill in, and then we would continue and close the deal the way I told him. This is the proof of it right here.

The Court: Did you accept the first figure he gave you as a down payment, as the one you would demand from Kevelson?

The Witness: We argued back and forth, but we finally settled at $30,000. And I told Kevelson about it and (276) he agreed to it, your Honor.

The Court: All right.

By Mr. Brigadier:

Q. Why wasn't that filled in on that document then, the thirty thousand? A. I wouldn't even know the reason right now, except to say that perhaps we wanted something more specific.

William Miller—for Defendant Milmar Estate—Recalled—Direct

Mr. Grosman: I object to what perhaps—

The Witness: I won't remember. I will just forget it. I don't remember.

Q. Was there eventually a second document in which the $30,000 was set forth? A. Yes, there was.

Q. From whom did you receive the next document? A. From Mr. Marcus.

Q. When did you receive it? A. I received it—I don't know—maybe a couple of days after that, right after this one.

Q. I show you DME-2 for identification and ask you if that is the document? A. That is correct. I notice now it shows—

Q. Just answer my questions, Mr. Miller.

From whom did you receive it? A. From Mr. Marcus.

Q. And when did you receive it? (277) A. On August 26, 1948.

Q. And was that the first time that you had anything in writing that set forth the sum of the $30,000 from Mr. Marcus? A. That's correct.

Q. Now, after you received that Exhibit—

Mr. Brigadier: I am sorry. I didn't offer that in evidence yet. That is only marked for identification.

(Document handed to counsel.)

The Court: Mr. Marcus gave you this copy of a letter here dated August 26, 1948?

The Witness: Yes, your Honor. He gave me this paper.

The Court: He gave you that?

The Witness: That's right.

The Court: Did you notice it was a copy of a letter allegedly written to him?

The Witness: Well, I have a lot of papers here—you will notice all the papers are made in the same

fashion. He always had letters written to himself, or back and forth, but I have other papers to prove that he had "Mr. Marcus," and then I signed it, and then on the side he said, "Accepted." These are all—I have another paper exactly like this.

Mr. Brigadier: I will also represent to your Honor, on this second paper, that the typewriting expert will identify (278) the typewriter as coming from Mr. Marcus' place of business, on which this letter was typed, his Fotoshop.

The Court: He doesn't know anything about that one, either?

Mr. Grosman: I don't know.

The Court: Or don't you know?

Mr. Brigadier: I understand, from the deposition, his position was that he didn't know, during the taking of the depositions, but we have got the photostats and the typewriting expert—

The Court: I heard you. You don't have repeat it.

Mr. Brigadier: I wish to offer this in evidence.

Mr. Grosman: I object to it for the same reason. It is not signed.

The Court: It is admitted for the same reason. He says your client gave it to him.

Mr. Grosman: All right.

The Court: And it contains terms that later were incorporated into a final document consummating the sale. Maybe it is an arch-conspiracy, but someone will have to prove it.

The Clerk: DME-2, formerly marked for identification, now marked in evidence.

(Received and marked Exhibit DME-2.)

Mr. Grosman: May I see it, please?

William Miller—for Defendant Milmar Estate—Recalled—Direct

(279) Mr. Brigadier: We have already furnished you with a photostat of that.

Mr. Grosman: Yes.

Mr. Brigadier: Offered during the depositions.

Q. Now, after receiving DME-2 from Mr. Marcus, did you communicate with Mr. Kevelson? A. Yes, I did.

Q. And what arrangements were made between you and Mr. Kevelson? A. I told him that I have the deal all set, all the details, and terms, etcetera, but instead of five I needed $19,000 to start—close this deal. So he says, "Well, come on over to Long Island," where his plant was, Ace Asbestos—one of his places, out on Long Island—and I made the trip over and he gave me $19,000 to close this deal.

Q. I see. Did you receive any other money from—

Mr. Grosman: Pardon me. Who is "he"?

The Court: Kevelson. His plant in Long Island.

Q. Did you receive any other money from anyone else for this deal? A. Yes.

Q. What and from whom? A. I received six thousand from Bierman, and five I had, and nineteen—nineteen five and six was $30,000 to close my deal.

Q. Now, on the following day, on August 27, 1948, was (280) any money paid over to Mr. Marcus? A. Yes.

Q. And how much was paid over to him? A. $10,000.

Q. And was there a receipt obtained? A. Yes.

Q. Now, who made the payment? A. Mr. Bierman. I said, "I can't take this man any more. Please, you negotiate and close this deal just the way he laid it out. Here is the money. You go ahead and close the deal."

Q. And Mr. Bierman reported to you what had happened? A. I was in the cafe. It happened at the Riviera that night.

William Miller—for Defendant Milmar Estate—Recalled—Direct

Q. And then after he reported to you, did you have a conversation with Mr. Marcus? A. Yes, I did.

Q. And did Mr. Marcus confirm the arrangement as reported to you by Mr. Bierman? A. Yes.

Q. And what were you told? A. Mr. Bierman went up and made a receipt for the $10,000. And I said, "Why didn't you give him the nineteen thousand?"

Mr. Grosman: I object to it, what he said to Bierman.

Mr. Brigadier: You listen to my question, Mr. Miller, and we will get along much better.

The Witness: I am sorry.

(281) Q. I want to know what conversation took place between you and Mr. Marcus as to what had happened between Marcus and Bierman. You were not there, so you can only testify to what Mr. Marcus may have told you happened. A. Well, Mr. Marcus told me he closed the deal with Mr. Bierman.

Q. At that time did you have this exhibit, the receipt, Exhibit DME-1 in your possession, when you had this conversation with Marcus? A. Oh, yes.

Q. Who had delivered that to you? A. Mr. Bierman.

Q. I see. So that you knew about the receipt, you had seen the receipt, and it was in your possession? A. He gave it to me that night, after Mr. Marcus had signed this. They both got together.

Q. All I want you to tell us now is what conversation, if any, you had with Mr. Marcus after that receipt was delivered to you on that night? A. That night I said to him, "Sam, when can we close this deal? I want to get started immediately."

Q. I see. And what was agreed? A. It was agreed that we meet in his office—

William Müler—for Defendant Milmar Estate—
Recalled—Direct

Q. When? A. —I told him to get Judge Lieberman—I'd get the Judge, (282) and he'd get Bob Schwartz, and we would—I don't know if it was the 28th, 29th, but right after this receipt was over we met in his office to close the deal, and set everything as we had discussed it.

Q. Now, did you meet at Mr. Marcus' office thereafter? A. Yes, I did.

Q. And what is your best recollection as to when you did meet? A. I think it was somewhere—maybe the 28th, 29th. I really don't know. I know it was after this receipt. I can't tell you the exact date.

Q. All right. The best of your recollection is all I want on any of this.

Who was present at that meeting? A. Mr. Marcus, myself, Bob Schwartz and Mr. Lieberman.

Q. And now, up to this time were exhibits—in whose possession, up to this time, were DME-1, 2 and 3? A. All these were in my possession.

Q. And what did you do with them? A. I gave them to Judge Lieberman and told him to go on up, and we'd go up and close this deal as proposed.

Q. Where did you deliver them to Judge Lieberman? A. At the Riviera, or maybe when I met him on our way over I gave him all the details and told him of exactly what we had discussed and of what we intended to do.

(283) Q. Now, at this conference that took place in Marcus' office, were those three documents actually present and exhibited? A. Yes, they were. We worked from this paper here, this last paper.

Q. It has a number on it.

The Court: Referring to DME-2.

Q. Now, will you tell us what took place at this conference? A. Well, we started to set the deal, and we discussed the entire thing. I said to Judge Lieberman, "Judge"—

in front of Marcus, he was sitting there—"I have been with this man quite some time. I have had a lot of grief with him. I have signed numerous papers, so many papers that I don't know which I signed. Please, when we close this deal, I want you to close this deal, and I want to leave here with the understanding—I am leaving it in your hands—that I never have to see this man again, that I have nothing to do with the place, that as long as I pay him the money due him, as long as I live up to these agreements, that I have nothing to do with him any more, because I have taken all the grief I can with this man, and finally I have a chance to get him out, and I have got someone to get him out that is going to give us a little more money, and help me, because if I don't get money I am through, the place is going to close. We are in debt up to our necks."

(284) So I said, "Please take care of this deal and see that he is out completely, that I get my note back, any papers that I may have signed, that he resigns, and that he does everything—that we have nothing to do with each other any more."

And I thought that's what happened, because I have never seen the man again, your Honor. I have never seen the man again.

Q. You are going way ahead again. A. I am sorry. I just ran away with myself.

Q. Just answer my question as to what happened that day. A. Yes.

Q. Now, were there any plan or plans discussed as to the method of effectuating this transfer? A. Yes, there were.

Q. Was there more than one plan? A. Well, there was a lot of plans discussed.

Q. Will you describe the various plans that came up for discussion? A. That was done between the lawyers, Mr.

William Miller—for Defendant Milmar Estate—
Recalled—Direct

Lieberman, Mr. Schwartz, Mr. Marcus—they were in discussion about these various things. All I said to the Judge is, "When I leave here today, and we close the deal, I want to know—because I am protecting a man called Mr. Kevelson, he is depending on me to handle his money, and to do everything, and I want to start right, I want to know when I leave here I can say to Kevelson, 'Here is the stocks, here is the papers, whatever we have to (285) do, and we can operate our business the way I have to without any interference from Mr. Marcus.'"

Q. I see. Now, by the time that conference was over had everybody agreed on what plan was to be followed? A. Yes.

Q. And what was the plan that was agreed upon? A. The plan was that anything that happened before, all papers, all instruments of any kind, we would cancel and destroy, issue new stock, take a whole new stock and feel that this is the corporation, turn the stock over to me, except the ones that had to be paid for—what I mean, the six hundred—

Q. What do you mean by that? A. There were 625. There were 1,250 scares in the corporation. He owned 625, because I didn't act as the corporation, your Honor.

The Court: You mean Marcus?

The Witness: Marcus.

A. (Continuing) We acted as partners. I don't know from corporation law—I said, "Here is my partner. He's got half. I am his partner. Let's close this deal today, and let him—whatever he is selling to Kevelson, let him sell him, let him get his money, free and clear, and I can walk out of here with a clean head." And that's exactly what we did.

Q. So you say How many shares were being sold? I didn't get that. (286) A. Six hundred and twenty-five shares.

William Miller—for Defendant Milmar Estate—Recalled—Direct

Q. What about the other 625? A. That belonged to me. They were my shares of stock. We had agreed to that in advance, because the note, and all the papers, and anything that happened were all to be forgotten about, and we were to start clean with 1,250 shares, clean, 625 belonged to me and Bierman—but they belonged to both of us, which we divided amongst ourselves—and 625 were to be left in escrow until we paid Marcus the balance of the money due, three thousand a month when we are open and fifteen hundred a month when we are closed. And we continually followed that plan right—

Q. You are going ahead again and I told you not to. A. I am sorry.

Q. Just answer the question.

So that at the end of this conference the lawyers received the instructions, both Mr. Schwartz and Mr. Lieberman, from the respective clients, in your presence, as to what papers they were to prepare and what plan they were to carry out, is that right? A. That's correct.

Q. When did you next meet with Mr. Marcus and the lawyers? A. On September 14, 1948. Because Lieberman said, "The papers are all ready. We are closing the deal today." And we (287) went to Bob Schwartzs' office.

Q. Now, do you know, if you do, the cause for any delay in this interval between—

Mr. Grosman: I object to that as calling for a conclusion and leading.

Mr. Brigadier: I said if he knows.

The Court: He said he doesn't know, so that settles it.

The Witness: I don't know.

Q. Did you meet at Mr. Schwartzs' office? A. Yes, we did.

Q. On what day? A. On September 14, 1948.

William Miller—for Defendant Milmar Estate—
Recalled—Direct

Q. Who was present? A. Mr. Marcus, myself, Judge Lieberman and Bob Schwartz.

Q. When did you first meet there on that day? A. Mr. Liberman, Mr. Schwartz were there ahead of time. When I got there Mr. Marcus was already—all of them were there, and I got in a little late, because I got up—

Q. About what time did you arrive? A. Maybe 12, one. I don't know.

Q. Till what time did you stay? A. Till late in the evening, very late in the evening.

Q. When the transaction was then concluded? A. Yes.

(288) Q. Will you tell us what took place in your presence at this office? A. I came in all ready to close the deal, everything had been agreed upon. All of a sudden Sam Marcus says, "I want to see you." I says, "What is it?" He said, "I want you to step out a little."

I said, "Yes, what is it?" He said, "Why can't we get some more money from Kevelson?" I said, "What for?" He says, "Try to get—I want a little more money out of this thing." He says, "I am stepping out, you are stepping in. You are going to have the whole thing yourself."

I says, "Listen, Sam. All I have got is one hundred and twenty-five thousand permission. I give you permission. I can't get any more. I am not changing the deal any more. I will tell you what I will do. You think you can get more money, you want to get a little more, here is Mr. Kevelson's number. Get on the telephone. Call Mr. Kevelson. If he agrees to give you more, I don't care, it is up to you. I'd like to see you get what you can. I am telling you that is all I am authorized to give you, one twenty-five."

So he says, "All right, get him on the phone." So I called Mr. Kevelson, and I said to Al Kevelson—so on and so on, "He decided he wants $140,000 now. He wants fifteen thousand more."

William Miller—for Defendant Milmag Estate—Recalled—Direct

Al Kevelson says, "Forget the deal. Forget it. I don't (289) want to go in at all. That's the end of it."

So he says, "Let me talk to Kevelson." So they got on the phone, and I heard them talk back and forth. I am not going to try to tell you what they said, but I know at the finish he said, "Here is back to Kevelson again."

So I went back to Kevelson, and Kevelson said, "Listen, Bill Miller. The deal I made and closed stands. If you can't close the deal, forget it. Come on home and forget the whole deal."

I didn't want to forget the deal, because I needed him badly. We had had conversations. He was going to give me money, he was going to put money in the Riviera, which we needed, the creditors were on our necks, we were up to our neck in debt, we didn't know which way to move.

I said to Sam Marcus, "Make up your mind, what do you want to do? Do you want to close the deal or do you want to open it? Do you want to lose this man? If we lose the man, you are going to lose every buck you have. I don't know what you think of money, but I know that my name is up there, Bill Miller's. This is my whole life. I've worked 50 years to do something with myself. You don't even give me a chance." I says, "What do you want to do?"

He says, "I want $140,000."

Then i got the Judge, and I talked to the Judge, and I said, "Judge, I can't afford to lose this deal any more. Kevelson (290) says he is not going to give him no more, I will tell you what I will do. I will give him $15,000. I will be responsible for the whole deal, if I get—whatever happens, I am never going to default on this, if I have to go out and borrow a thousand dollars from every friend I meet on the street, from everyone I know, I am never going to default on the deal. I know I can put this over, if I put in my plans and my schemes." Because he had

me tied up hand and foot. I couldn't move. He used to walk in on a day when a creditor would be standing there—and if it meant losing a foreclosure or losing the place, he didn't care, he wanted to take money first, from Milmar and everything else.

He said, "You are my partner. What the hell are you yelling about concerning Milmar?" So I said, "But Milmar is no good unless we have some income. And you can't put it up, and I can't. Where is it going to come from?"

The Court: Was he strapped at the time?

The Witness: No, he is in fine shape. This is a very, very wealth man. This man showed me more money than I ever seen in my life. But like all these fellows, they tie you up pretty good before you move. They say they don't, but they do. They tie you up real good.

The Court: Then did you finally agree to pay fifteen thousand?

The Witness: I agreed to pay fifteen thousand (291) more and we made a separate agreement on that.

The Court: Is that the note for fifteen thousand?

The Witness: Yes.

Mr. Brigadier: DME-17.

By Mr. Brigadier:

Q. I show you Exhibit DME-17 and ask you if that is the note you are referring to— A. That's correct.

Q. For the fifteen thousand? A. $15,000, that's right.

Q. Mr. Miller, I show you Exhibits 19A and B and 20A and B, totaling 1,250 shares, certificates dated September 14, 1948, and ask whether you saw these certificates signed? A. Yes, I did.

William Miller—for Defendant Milmar Estate—Recalled—Direct

Q. In your presence? A. Yes, sir.

Q. On what day? A. On September 14, 1948.

Q. And the signature above the printed word "president," is the signature of whom? A. Sam Marcus.

Q. You saw him sign that? A. Yes, I saw him sign that.

Q. And the signature of Robert Schwartz above the printed word "secretary-treasurer," is the signature of whom? (292) A. Of Robert Schwartz.

Q. Now, did you hear any of the conversation that took place with respect to the issuance of those certificates? A. Yes, I did.

Q. And what did you hear said and by whom? A. Well, there was all kinds of discussion—he didn't have the stock, he lost the stock, he couldn't find it.

The Court: Don't say "he."

The Witness: Marcus. I am sorry, your Honor.

A. (Continuing) Marcus had lost the stock, he said he had moved. I refresh my memory—when I heard him say he moved, when he found that piece of paper—he had moved and he couldn't find the stock. And I was very, very anxious to close the deal. I had Mr. Kevelson waiting. I had his money in my pocket, I was ready to go, and all of a sudden the stock can't come to light.

We all discussed it and we—finally he came up with the suggestion, he said, "What are you worrying about the stock? Let's cancel all the stock." Mr. Marcus himself.

The Court: Now, Marcus said this?

The Witness: Yes.

A. (Continuing) "Let's cancel all the stock. Let's cancel all the stock, issue new stock, we will sign all the stock 'canceled,' and everything else, and we will issue all the stock the way we have to, and then I will endorse it in blank, (293) the way I did, and you will have the corporation to do whatever you see fit."

William Miller—for Defendant Milmar Estate—
Recalled—Direct

I talked to the Judge. The Judge says, "Well—"

Q. When you say "the Judge," Judge Lieberman. A. Judge Lieberman. I am sorry.

The Judge says, "Well, we can do it that way if you want to. It's perfectly all right. I have got everything the way you want it. He has resigned as an officer. He is turning over the books of the corporation. He is doing everything. And if you want to close it—it is not the—if you want to close it, okay. I am sure it will stand up. You can do anything you want."

I don't know anything about law. I says, "Okay. Anyway, you close the deal, I want to leave here so when I meet Al Kevelson tonight at the Riviera I want to say, 'Al, congratulations. You are my partner. Let's go to work and put this place over.' " And that's the way it was done.

Q. Now, will you look at the signatures on the back of the stock certificates, all of them, the four certificates in front of you, and will you identify whose signature is signed on the back? A. All these things were signed by Sam Marcus on September 14, 1948, every paper here.

The Court: Just hold it a minute. Why do you keep asking that? Do you expect that Mr. Marcus is going to deny (294) his signature?

Mr. Brigadier: Yes, he did, sir. In the depositions he denied—

The Court: Excuse me.

Mr. Brigadier: —his signature on the back.

The Court: You should have had movie cameras there.

Mr. Brigadier: You will find every time I ask a question I am referring to something of the deposition.

The Court: I didn't know there was any dispute about that.

William Miller—for Defendant Milmar Estate—Recalled—Direct

The Witness: Oh, yes. He denied—

Mr. Brigadier: He admitted it on the face, but he did not admit it on the back.

The Court: You better prove it then, that's right.

Mr. Grosman: Now, if your Honor please, may I for the record state that Mr. Marcus did not deny his signatures.

The Court: He did not.

Mr. Grosman: No, sir.

Mr. Brigadier: I will offer book and page number, with the handwriting expert, because we have gone through all of it.

The Court: I just asked about the stock. Now Judge Grosman says he doesn't deny his signature, is that right?

Mr. Brigadier: I can only go by the deposition. I (295) am willing to drop it now, if they admit that is his signature on the back. At the deposition he admitted it only on the face.

Mr. Grosman: You said he denied his signature. Isn't that what you said?

Mr. Brigadier: I said that on the back of the certificates he did not admit that was his signature. He admitted only that it was his signature on the face. And that is one of the reasons we have gone to the trouble of having a handwriting expert study that signature on the back. And we are going to call him for that reason. And I will turn to the deposition and show you at that time what Mr. Marcus' testimony is.

Mr. Grosman: Now, I understood Mr. Brigadier to say that Mr. Marcus had denied his signature on those stock—

Mr. Brigadier: You heard just what I said, that he did not admit that was his signature on the back.

The Court: Now, I don't want to start refreshing your recollection on what you said. You know, I hap-

pen to have a very retentive memory. Too good in some criminal cases for the defendants.

I understood you to say before that Mr. Marcus denied his signature.

Mr. Brigadier: He did. But wait a minute. Let me finish, as long as you are putting it that way to me, sir. You are going to find when we get to these depositions that (296) Marcus does three or four different things.

He starts off by first saying, "I deny it is my signature." He then says, "I am not sure it's my signature." He then says, "I don't recollect whether it is or is not my signature."

He is asked, "Do you remember endorsing in blank certificate No. 17," which is exhibited to him, sir. His answer is, "I do not."

The Court: Let me see 17.

Mr. Brigadier: Did you hear my answer, sir? I just read it to you. Here is his testimony, "Do you remember endorsing in blank certificate No. 17? I do not. Do you remember endorsing in blank certificate No. 18? I do not."

The Court: Go ahead, prove it your own way. Let's assume nothing is going to be admitted. Go right ahead, prove it like a criminal trial.

Mr. Brigadier: I don't want to do this, but I can't help it. I am faced with so many different statements in the depositions.

The Court: It could all be cured now, right in the course of the trial, by showing Mr. Marcus the certificate, and if he says, "That is my signature," you don't need any handwriting expert.

Mr. Brigadier: If you admit it is his signature, I won't go through it any more.

Mr. Grosman: Do you want me—

(297) The Court: Just with these stock certificates, see if he says that is his signature, will you please?

(Document shown to defendant Marcus.)

Mr. Brigadier: Let's get this out of the way, too. He denies his handwriting on this receipt.

Mr. Grosman: Now, please.

The Court: One at a time. Don't all get excited. How about the backs of the stock certificates, Judge?

Mr. Grosman: That is his signature on the face and on the back of these stock certificates marked 9E, 9B—no, DME-19B, DME-20B, 20A and 19A.

The Court: All right. Show him something else.

Mr. Brigadier: The handwriting on Exhibit DME-1. In his deposition he says that it is not his handwriting, on the last line.

Mr. Grosman: I have no recollection that he said that.

Mr. Marcus: That is not my handwriting.

Mr. Brigadier: You still deny that is your handwriting?

Mr. Grosman: Wait a minute. We are talking about two different things. He referred to some writing on here which he said was not in his handwriting. You are not talking about the signature, are you?

(298) Mr. Brigadier: All right, I will bring the expert in.

The Court: How about the signature?

Mr. Brigadier: The signature he admitted, even in the depositions, was his.

The Court: All right.

Mr. Brigadier: He denied the line.

The Court: All right. But he admits his signature.

Mr. Brigadier: I thought we could avoid bringing the expert in, but we are not going to be able to.

William Miller—for Defendant Milmar Estate—Recalled—Direct

By Mr. Brigadier:

Q. Now, I show you stubs for certificates in stock book, certificates 17, 18, 19 and 20, and ask you whether you saw the person who wrote this in the stub? A. Yes, I did.

Q. And who wrote that? A. I believe it was Bob Schwartz.

Q. Now, I show you the word "canceled" as it appears written across the stub for certificates 16, 15, 14, 13, 12, 11, 10, 9, 8, 7 and 6, and I ask you whether you saw the word "canceled" written? A. I saw "canceled" written across the stubs.

Q. By whom was it written? A. By Bob Schwartz.

Q. Was that done in the presence of Samuel Marcus? (299) A. Yes, it was. It was done in the presence of all of us. We were sitting around the table.

Q. Was it done pursuant to this arrangement you have testified to before about the cancellation of stock and the issuance of new stock? A. Yes, it was.

May I further tell you, Judge, how it was signed, how we finally—at the finish we took papers from one to another, he signed it, I'd sign it, he'd sign it—

The Court: They were passed around.

A. (Continuing) Passed around. You know, one after another, I'd sign it, he'd sign it, he'd sign this, I'd sign his, another one would hand me another paper—I am with lawyers. If the lawyers say, "Sign this, sign that, sign that," what am I going to do? I am not a lawyer. He is. He writes every paper himself. I'm not a lawyer, I'm an actor, for God sake.

The Court: You sure are an actor. Five minute recess.

(Short recess.)

Colloquy

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(Document shown to defendant Marcus.)

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Q. Now, I show you stubs for certificates in stock book, certificates 17, 18, 19 and 20, and ask you whether you saw the person who wrote this in the stub? A. Yes, I did.

Q. And who wrote that? A. I believe it was Bob Schwartz.

Q. Now, I show you the word "canceled" as it appears written across the stub for certificates 16, 15, 14, 13, 12, 11, 10, 9, 8, 7 and 6, and I ask you whether you saw the word "canceled" written? A. I saw "canceled" written across the stubs.

Q. By whom was it written? A. By Bob Schwartz.

Q. Was that done in the presence of Samuel Marcus? (299) A. Yes, it was. It was done in the presence of all of us. We were sitting around the table.

Q. Was it done pursuant to this arrangement you have testified to before about the cancellation of stock and the issuance of new stock? A. Yes, it was.

May I further tell you, Judge, how it was signed, how we finally—at the finish we took papers from one to another, he signed it, I'd sign it, he'd sign it—

The Court: They were passed around.

A. (Continuing) Passed around. You know, one after another, I'd sign it, he'd sign it, he'd sign this, I'd sign this, another one would hand me another paper—I am with lawyers. If the lawyers say, "Sign this, sign that, sign that," what am I going to do? I am not a lawyer. He is. He writes every paper himself. I'm not a lawyer, I'm an actor, for God sake.

The Court: You sure are an actor. Five minute recess.

(Short recess.)

William Miller—for Defendant Milmar Estate—3
Recalled—Direct

The Court: The suggested adjournment time is agreeable to me, gentlemen.

By Mr. Brigadier:

Q. Mr. Miller, returning to the office of Robert Schwartz, and September 14, after you had agreed on the payment (300) of this additional sum of money, and the additional paper was prepared, will you then describe how all the papers were executed by the parties, what was done at that point? A. I just explained it.

The Court: He just went through it, how they passed them around the table.

A. I signed it, this one signed it, he signed it. It went around.

Q. Now, did Mr. Marcus deliver to you at that time any other books? A. At that time he delivered the books of Milmar.

Q. What books were they of Milmar that he delivered to you? A. Whatever he had. I know we slipped up a lot of papers. I don't know. I wouldn't really know exactly what they were. But I know Judge Lieberman picked up a lot of things from Marcus. The Judge handled it from then on. I had nothing to do with it. All I asked him was to make sure that he got me protected. What papers he took, where he got them, I don't know. I was happy to get out of the office.

Mr. Brigadier: I see.

I omitted, if your Honor please, to ask Mr. Lieberman a very important question. And since, as you know, he is leaving for Florida, this is my last chance to get him. Could I ask Mr. Miller to step down for a minute to ask him that question?

(301) (Witness temporarily excused.)

Abraham Lieberman—for Defendant Milmar Estate—Recalled—Redirect

ABRAHAM LIEBERMAN, resumed the stand.

Redirect examination by Mr. Brigadier (continued):

Q. Judge Lieberman, after this transaction was signed by the parties, and papers delivered, and the escrow established on September 14, who had possession at that time of the stock and transfer book and the minute Book of the corporation? A. I received it all.

Q. From whom did you receive it? A. Bob or Mr. Marcus, I don't remember.

Q. But up to that point those books were in whose possession, as far as you knew? A. Either Schwartz or Marcus, I don't know.

Q. Did you receive any books of account at that time? A. Books of what?

Q. Of account, account books of any kind. A. No. I don't know what you mean by account books.

Q. The books of account, the bookkeeping books. A. I didn't, no.

Q. At that time were you handed any such books— A. No.

Q. —ledgers, journals? A. No.

Q. Nothing of that kind? A. Nothing.

Q. Were you handed any bank accounts? (302) A. Nothing.

Q. Bank books? A. No.

Q. Checks, canceled checks? A. No.

Q. Bank statements? A. No.

Q. None of that was turned over to you at that time? A. No.

Mr. Brigadier: That is all.

Mr. Grosman: No questions.

(Witness excused.)

Mr. Brigadier: All right. Mr. Miller, will you please return to the stand?

William Miller—for Defendant Milmar Estate—Recalled—Direct

WILLIAM MILLER, resumed the stand.

Direct examination by Mr. Brigadier (continued):

Q. Now, after this transaction was closed, when did you next meet with Mr. Kevelson and Judge Lieberman with respect to taking over the property? A. Well, I met Kevelson that night, at the Riviera.

Q. Yes? A. And I told Mr. Kevelson that everything had been closed, and we are ready to go, we can sit down and make our deal, to get his lawyer over, because—the Judge would represent me, and for him to get his man over, whoever he wanted, so we (303) can set this whole thing up.

Q. And did you settle the deal as between Mr. Kevelson, yourself and Bierman? A. Yes, we did.

Q. When was that in relation to September 14, approximately? A. I think it was a couple of days later, maybe a week. Some time a little later we met upstairs at the Riviera.

Q. And what deal did you, Kevelson and Bierman make?

Mr. Grosman: I object to that.

The Court: How is that binding?

Mr. Brigadier: Only for the purpose—not binding on Mr. Marcus, but merely to show you the picture of what happened among these parties after September 14, in relation to the problem of laches, because we propose to demonstrate that from September 14 on Mr. Marcus never came near the place and allowed these three people to run it, and received checks with Kevelson's name on them, etcetera. So it is only in relation to that that I offer it.

Mr. Grosman: I still object.

The Court: Objection overruled.

William Miller—for Defendant Milmar Estate—Recalled—Direct

A. We went upstairs, as I said. We had a little informal meeting. We sat around, congratulated one another. And then I says, "Well, in Malmar, Al, you will be president, because I don't want to get confused any when I am president of Riviera, (304) which you have nothing to do with, so you be president of Milmar Estates," I believe Bierman will be secretary, or I will be treasurer, vice-president, or something. And we just talked about it casually. And we agreed that the amount—that Kevelson would have 40 per cent of the stock, I would have 40 per cent of the stock, and Bierman would have 20 per cent of the stock.

Q. And did Bierman agree with Kevelson's contribution that he was to make with respect to the payments that were to be made to Marcus? A. Yes.

Mr. Grosman: The same objection.

Q. What was that arrangement?

The Court: Just a minute. Didn't you hear the Judge object? He just objected again. What is the question?

(Question read.)

The Court: Oh, to Marcus. I will allow it.

A. Oh, yes, they would go in the same way as we started, Kevelson put in twenty-four thousand, the original thirty, and Bierman put in six, which was—

The Court: Four to one.

A. (Continuing) —four to one, you know, and that's the way they would pay off the stock, the same way, they would pay off the stock the exact same way.

Q. Now, under your agreement of September 14 you were required to pay $3,000 while open and $1,500 while closed, (305) is that right? A. That's correct.

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William Miller—for Defendant Milmar Estate—Recalled—Direct

Q. And the first payment would be then due when, the agreement having been made on September 14; it would be due in October, would it not? A. I believe so, yes.

Q. Now, I show you a check dated October 1, 1948, "Pay to the order of Sam Marcus, $3,000," signed, "Milmar Estate, Inc., Al Kevelson, president." A. That's correct.

Q. Was that the check given to Sam Marcus in payment of the first installment? A. That's correct.

Mr. Brigadier: Is it admitted that this check was received by Marcus?

The Court: Maybe if you show all of them to Judge Grosman, and he shows them to Marcus, we will save a little time.

Mr. Brigadier: I have given them photostats of every one of these checks in advance of the trial, and they are annexed to an affidavit that we served.

If your Honor please, these checks total $66,004.96, and perhaps we can save a lot of time if Judge Grosman gets his client to admit that of this amount $60,000 represents the principal, and $6,004.96 interest, so that would prove a total (306) of $90,000, including—

The Court: How much of it is interest?

Mr. Brigadier: $6,004.96.

Mr. Grosman: Is the interest?

Mr. Brigadier: Is the interest.

Mr. Grosman: On what?

Mr. Brigadier: Of these checks that were delivered, the checks total $66,004.96, of which you will find, by looking at them, that the principal, as represented on these checks, totals $60,000, and the interest $6,004.96.

The Court: Do you have any records, Mr. Marcus, to verify those figures?

Mr. Grosman: He says, your Honor, that he received the proceeds of these checks. He doesn't agree,

of course, that they were paid on account of his stock.

Mr. Brigadier: I want to add that each check has on it a statement of the amount of principal and interest, and I thought it would facilitate it if instead of sitting down and taking an adding machine—

The Court: I heard Mr. Marcus say that he thinks the figures are right, is that right?

Mr. Marcus: What is that?

The Court: I understood you to say that you think the figures are correct, the addition is correct.

Mr. Marcus: The total is correct, yes.

(307) Mr. Brigadier: I wish to offer these checks in evidence as one Exhibit.

The Court: Yes.

The Clerk: Series of checks marked DME-32 in evidence.

(Received and marked Exhibit DME-32.)

Mr. Grosman: Now, I don't know for what purpose they are being offered.

The Court: You better specify, Mr. Brigadier.

Mr. Brigadier: They are being offered for the purpose of showing that we fulfilled the agreement and that we kept making the payments called for in our agreement until the interpleader action arises, and from then on we will produce what happened in the interpleader. I want to show the total amount that he received, although I understand that he admits that, because he filed that in his answer.

Do you admit having received $90,000 besides the interest, as we state?

Mr. Grosman: Whatever the answer says. I don't know the figures.

Mr. Brigadier: The answer agrees that you received the $90,000 principal, thirty thousand at the time of closing—

The Court: Now, you answered the only question that Judge Grosman wanted to know, what these represent. That is all he asked.

(308) Mr. Brigadier: That's right.

Mr. Grosman: Now, I object, your Honor, to these checks being received for the purpose stated by Mr. Brigadier because in addition to the transfer, or the agreement to sell stock, Mr. Marcus had loaned Milmar Estates—I don't know—sixty or seventy thousand dollars, and some of these checks may have been paid to him on account of the indebtedness.

The Court: Then you will have to take them one at a time, I suppose.

Mr. Brigadier: No, if your Honor please, it will be up to him to prove whether or not he received checks on account of the indebtedness. I can take them each—each contains an endorsement of the amount that is still due on that balance of $90,000.

The Court: Let me see them.

Mr. Brigadier: I have got the wrong checks. Those are the ones there.

The Court: Let me see them.

Mr. Brigadier: All except the first one, which you will find covered in the second.

(Documents handed to the Court.)

The Court: Each one contains an endorsement. I am not going to go any further. I just found one that doesn't.

Mr. Brigadier: Well, they are each deposited—(309) you mean endorsement on the back?

The Court: You said each one contains an endorsement as to what the payment is for. Of course, most of them do; some don't.

Mr. Grosman: May I also point out, your Honor, that most of these checks are checks of Milmar Estate,

Inc., who were not paying for the stock. Kevelson and Miller and Bierman were supposed to be paying it.

The Court: Well, that follows the same course of action that has been pursued before, they didn't care whose names they used for anything. I didn't expect it would change afterwards, in view of how it was operated before.

Mr. Grosman: Except that apparently they were paying him with his own money.

Mr. Abraham Chazin: If your Honor please, I think I ought to say something about that. This was a sale, in effect, of real estate and in practically every sale of real estate a representation is made to the buyer, "You are going to make some money out of this; you are going to pay the installments out of the earnings."

I don't say the installments were paid out of the earnings. But if they were paid out of the earnings, it would make no difference at all, because that is the normal thing when somebody buys real estate. And if it does turn out that some money was paid by Milmar, that would be a private matter between (310) Milmar and these people for whom Milmar paid some money.

But this alleged statement that they were paying Marcus with his own money I submit is entirely specious and without any basis.

Mr. Grosman: Well, do you admit that he paid Marcus in that fashion?

Mr. Brigadier: If your Honor please, I object to this colloquy between counsel. It doesn't make any difference what Judge Grosman says or what Mr. Chazin says, it is what the evidence will show.

The Court: That is all I am interested in.

Mr. Grosman: May I state on the record, counsel made a statement, counsel for the plaintiff—do I un-

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derstand from Mr. Chazin that he admits that in this case, because of some representation as to possible profits that were made, that he admits that Marcus was paid out of the assets of Milmar Estate?

Mr. Abraham Chazin: The answer is no.

Mr. Brigadier: May I proceed now, gentlemen?

The Court: Then why did you bring it up at all?

Mr. Abraham Chazin: Well, Judge Grosman asked a very complicated question. The answer to that complicated question was no, because I felt that he was trying to confuse the issue by raising the story of paying him with his own money.

(311) The Court: He just asked a question. He didn't confuse. He just wanted to know if he was being paid with his own money. That's all I heard him say. And you attempted to explain that he wasn't.

Go ahead, Mr. Brigadier.

By Mr. Brigadier:

Q. I show you, Mr. Miller, a check dated October 1, 1948, to the order of Sam Marcus, for $3,000. Will you tell us what that check was for and to whom it was given? A. It was given to Sam Marcus on the $95,000 that was due him, three thousand a month when we are open and fifteen hundred a month when we are closed.

Q. All right. Now, that check did not include the interest, did it? A. That's right, didn't.

Q. I show you check dated November 4, 1948, to the order of Sam Marcus, made by whom? A. Made by Al Kevelson.

Q. Made by whom? A. You mean—

Q. Yes. A. Milmar Estates.

Q. And signed by whom? A. By Al Kevelson.

Q. All right. Now, to whom was that check given? (312) A. It was given to Sam Marcus.

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Q. And was the endorsement—or the legend, let's call it that—the legend that appears in handwriting in the left-hand corner of the check on that check at the time that this was given to Mr. Marcus? A. Yes, it was.

Q. Now, prior to the sending of that check, did you receive from Mr. Marcus a letter? A. Yes, I did.

Q. And is this the letter that you received? A. That's correct.

Mr. Brigadier: Judge Grosman, I am going to offer this in evidence. Does your client concede the authenticity of this letter?

Mr. Grosman: He admits the signature.

Mr. Margulies: it is not his signature.

Mr. Brigadier: I offer this in evidence.

Mr. Margulies: That is not his signature.

Mr. Brigadier: It is his secretary's.

Q. But he admits sending this letter, is that right? A. From his shop. That's his shop. Fotoshop is his place of business.

Mr. Brigadier: I offer it in evidence.

The Clerk: DME-33, document dated October 26, 1948.

(313) (Received and marked Exhibit DME-33.)

Mr. Tepper: Addressed to whom?

The Clerk: Bill Miller, care of Bill Miller's Riviera.

Q. You read this letter: "Dear Bill: In making out your last check for the monthly payment due me you neglected to include interest charges. The interest charge for October 1 came to $316.66, and for November 1, $306.66. Therefore, kindly include the above amounts in your next check to me. With best regards, Sam Marcus."

Now, in your next check of November 4, 1948, did you include those two interest amounts? A. Yes, it says, "Oc-

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tober 1 interest, $316.66; November 1 interest, $306.66; principal, $1,500; total, $2,123.32."

The Court: How is the salutation, "Dear Bill"?

The Witness: Yes.

The Court: And the closing is, "With best regards," too.

Who wrote on it, "Mr. Miller, what about his personal charges?"

The Witness: My secretary.

The Court: Your secreta.y.

The Witness: When she got the thing, he had some personal charges that we had canceled, and she didn't know about it, so I had to tell her.

(314) The Court: She was on the job all right.

By Mr. Brigadier:

Q. Mr. Miller, I show you check dated December 1, 1949, to the order of Sam Marcus, in the amount of $1,711.67, Milmar Estate, Inc., signed by whom? A. By Al Kevelson.

Q. And was this check sent to Mr. Marcus? A. That's correct.

Q. And I direct your attention to the legend that appears in the upper lefthand corner, "Four per cent interest on $63,500, amount, $211.67," underneath that, $1,500," totaling $1,711.67? A. That's correct.

Q. Now, in December was your place open? A. It was closed.

Q In other words, your obligation was $1,500 plus the interest? A. Fifteen hundred.

Mr. Grosman: In order to keep the record straight, Mr. Brigadier, the witness said that check was signed by Al Kevelson. It was signed by him as president of Milmar Estates.

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Mr. Brigadier: Yes. I am going to put all these in evidence, Judge.

Mr. Grosman: I don't want it to appear on the record that he personally sent him this check.

(315) Mr. Brigadier: I tried to put them in as one Exhibit and I understand that I have been asked to put them in separately. Is that so, sir?

The Court: That's what I understand.

Mr. Brigadier: Yes.

Judge Grosman, I took a check out of turn. Can I withdraw it so I can get them in chronological order?

Mr. Grosman: Go right ahead.

Mr. Brigadier: '49 instead of '48. So I would like to withdraw that at the moment and take the next one.

Q. All right. I direct your attention to a check dated December 1, 1948, to the order of Sam Marcus, $1,801.66, Milmar Estate, Inc., signed by whom? A. Al Kevelson.

Q. Was that check given to Sam Marcus? A. That's correct.

Q. And was the legend that appears thereon on the check at the time the check was given to him? A. Yes.

Q. And that reads what? A. "Principal, $1,500; December interest, $301.66; total, $1,801.66."

The Court: Are all these checks signed by officers of Milmar Estate, Inc.?

The Witness: Yes.

(316) The Court: None of them are personal?

The Witness: No. There may be—

Mr. Grosman: There is one personal check there.

The Witness: No. No. That's Milmar, too.

Mr. Brigadier: I don't recall a single one, Judge.

Mr. Grosman: Isn't that first one a personal check of Al Kevelson?

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The Witness: No, it's a blank, but it says Milmar on it.

Mr. Grosman: Oh, I'm sorry.

The Court: Somebody printed it on.

Put them in order over night. We will do it in the morning.

Mr. Brigadier: All right.

The Court: 10:15 tomorrow morning.

(Whereupon, the hearing was adjourned until 10:15 A. M., Thursday, January 27, 1955.)

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(317) Newark, N. J., Thursday, January 27, 1955.

(Hearing resumed pursuant to adjournment.)

(Appearances as previously noted.)

WILLIAM MILLER, resumed the stand.

Direct examination by Mr. Brigadier (continued):

Q. Mr. Miller, I show you a batch of checks, 27 in number, totaling $66,004.96, each of which is made payable to the order of Samuel Marcus by Milmar Estate, Inc., and ask you whether those checks were actually sent to Samuel Marcus? A. They were.

Q. Now, on all but two, I think, of these checks a legend appears in the upper lefthand corner of the check. I ask you whether the legend on these checks in these corners were on these checks at the time that they were sent to Mr. Marcus? A. They were.

Mr. Grosman: I assume, Mr. Brigadier, he prepared these checks and knows?

Mr. Brigadier: Well, he is testifying. You can cross examine him later.

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(318) Mr. Grosman: All right.

Mr. Brigadier: Actually, most of them are signed by him.

Q. And those checks in this batch which have your signature on them, was the legend on the check before you signed the check? A. Yes, it was.

Q. What were these checks delivered to Samuel Marcus for? A. This was to pay him off completely, out of Milmar, Riviera, and everything else.

Q. What was it for? A. For the $95,000 we owed him.

Q. The balance under the agreement of September 14? A. That's right.

Q. So that by the date of the last check—I want to total the amount you had given Sam Marcus—at the time of the closing of the agreement of September 14 you had given him a total of how much, on September 14? A. On September 14 I had given him $30,000.

Q. A total of thirty thousand? A. Right.

Q. Let's figure out how that thirty thousand came about. On August 27, the date of the receipt, you gave him—or Bierman gave him how much? (319) A. $10,000.

Q. Now, on September 14 you gave him how much? A. The balance of $20,000.

Q. Making a total of thirty thousand? A. Thirty thousand, yes.

Q. Then by these checks, and by the date of the last check, you had given him a total of how much? A. With the interest or without?

Q. Without the interest. A. Well, this is sixty and thirty, ninety.

Q. Ninety thousand? A. That's right.

Q. That left a balance, by the date of the last check, of how much? A. $35,000.

Q. And that thirty-five thousand, besides interest, has been deposited with this Court? A. With the Court, yes.

William Miller—for Defendant Milmar Estate—Recalled—Direct

Q. So that that would make the total of a hundred and twenty-five thousand? A. That's correct.

Mr. Brigadier: I wish to offer these checks in evidence as one Exhibit. There are 27 checks.

(Documents handed to counsel.)

Mr. Brigadier: I have already furnished him with (320) photostats of the checks.

The Clerk: DME-32, series of 27 checks, marked in evidence.

(Received and marked Exhibit DME-32.)

Mr. Brigadier: Will you let me have DME-17, sir?

(Document handed to counsel.)

Q. Mr. Miller, I direct your attention to Exhibit DME-17, which we have referred to as the note of $15,000. A. Yes.

Q. Now, did you make any payments to Samuel Marcus on account of that obligation? A. Yes, I did.

Q. And how did you make those payments, by check or by cash? A. By check.

Q. And whose check was it? A. I believe it was Milmar's.

Q. All of them? A. I don't know. I don't remember.

Q. All right. I show you a batch of checks totaling $9,200—

Mr. Brigadier: Judge Grosman, will you take my total? I did the totaling.

Mr. Grosman: Yes, I do.

Mr. Brigadier: By adding machine.

Q. —commencing June 6, 1949, and the last one of (321) which is October 11, 1950, all except one—no, I am sorry.

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Will you let me check that?—all except two being checks of Milmar Estate, Inc., and the two of them being checks of Bill Miller's Riviera, Inc., and ask you whether these represent the payments made by you to Samuel Marcus on account of the obligation, DME-17? A. Yes, they do.

Q. Now, these checks are all signed by you, William Miller, right? A. That's correct.

Q. Was the legend that appears on these checks on these checks before you signed them? A. Yes, they were.

Q. And were they on the checks when you sent them to Samuel Marcus? A. They were.

Mr. Brigadier: I offer these in evidence as one Exhibit.

The Court: What are the total payments on that note?

Mr. Brigadier: $9,200.

The Court: What was the amount of the note?

Mr. Brigadier: Fifteen thousand.

The Court: $15,000 note.

Mr. Brigadier: When I asked him whether he signed (322) them—they are signed as officers of the corporation.

Q. I meant was that your signature, the name William Miller? A. Yes, it is.

Mr. Grosman: As an officer of the respective corporations.

Mr. Brigadier: Yes.

Q. When you signed these, it was, as indicated here, as an officer of these corporations? A. Yes, that's correct.

Mr. Brigadier: I wanted to get across it was his signature.

Mr. Grosman: All right, as long as that appears in the record.

William Miller—for Defendant Milmar Estate—Recalled—Direct

Mr. Brigadier: I offer these in evidence as one Exhibit.

The Clerk: DME-34, series of 35 checks, marked in evidence.

(Received and marked Exhibit DME-34.)

Q. I show you, Mr. Miller, a letter dated May 4, 1949, from Robert Schwartz, addressed to you, and ask you whether you received that letter? A. Yes, I did.

(Document handed to counsel.)

Mr. Grosman: I have no objection to this letter, (323) except there appears to be some notations on here that I think should be explained.

Mr. Brigadier: Yes. I don't know who made them. And I agree that they not be part of the record.

Mr. Grosman: You can ask him. They may be connected with somebody in this case.

Mr. Brigadier: Yes.

Q. Do you know what this penciled writing in the top—Michael Schimmel, CHI 41330, has reference to? A. That's Ben Marden's partner in Michael Realty Corporation. That's the man we—

Q. Yes, but it has nothing to do with this? A. No, it has nothing to do with this.

Q. What about this, "Mailed 5-6-49 to 18 East 42nd, Fotoshop, New York"? A. I don't know, unless it means—I don't know what it means, unless it means that a copy of this was mailed to Marcus, or something. I don't know what it means.

The Court: You don't know what it means?

The Witness: No.

The Court: Anything in writing we will disregard, except his signature.

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Mr. Brigadier: I offer it without the writing appearing on it.

The Clerk: DME-35, letter dated May 4, 1949, from (324) Robert J. Schwartz to William Miller.

(Received and marked Exhibit DME-35.)

Q. I show you a letter dated June 7, 1949, from Robert Schwartz to William Miller, and ask you whether you received that letter?

Mr. Grosman: '49, you say?

Mr. Brigadier: Yes, June 7, 1949.

A. Yes, I did.

Q. And did you, on the following day, receive the letter dated June 8, 1949, from Mr. Schwartz? A. That's correct.

The Court: Let me see that letter, the one you just marked.

(Document handed to the Court.)

Mr. Brigadier: I wish to offer these in evidence. I guess we better mark them separately. First the letter of June 7, 1949.

The Clerk: It will be marked DME-36.

(Received and marked Exhibit DME-36.)

Mr. Brigadier: And letter of June 8, 1949.

The Clerk: It will be marked Exhibit DME-37 in evidence.

(Received and marked Exhibit DME-37.)

Q. Mr. Miller, I show you a letter dated March 7, 1949, from Robert Schwartz, addressed to Bill Miller's Riviera, Inc., (325) and Milmar Estate, Inc., and ask you whether you received that letter? A. Yes, I did.

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Q. Now, the handwriting that appears on it, at the bottom, in the lower lefthand corner, was that on the letter when you received it? A. No, that was added to this.

Q. Who put that on? A. That's signed by "N," Nicki. That's my secretary.

Q. Your secretary? A. Yes.

Q. And that's a note to you? A. To bring it to my attention, that I should take care of it.

Mr. Brigadier: I wish to offer in evidence the letter, minus the handwriting notation that appears on it.

(Document shown to counsel.)

The Court: Was Mr. Marcus represented by the firm of Alfange & Friedman?

The Witness: That's correct. Robert Schwartz, I believe is connected with Alfange & Friedman.

The Court: He is.

Mr. Brigadier: I offer in evidence letter of March 7, 1949.

The Clerk: It will be marked DME-38 in evidence.

(326) (Received and marked Exhibit DME-38.)

Q. Mr. Miller, I show you a letter dated June 7, 1950, on the stationery of Cinque Telefilm Laboratories, addressed to Milmar Estate, Inc., and signed J. Torrielli, printed underneath—or typewritten underneath, "J. Torrielli, bookkeeper." Did you receive that letter? A. Yes, we did.

Q. Now, I point out that there is handwriting appearing on the bottom of the letter, "Mail all Sam Marcus checks to this address," and also handwriting above the words, "Very truly yours," reading as follows, "Answered 6-9-50, complete statement mailed."

William Miller—for Defendant Milmar Estate—Recalled—Direct

Was this placed on the letter after it was received? A. I wouldn't know. I really wouldn't know.

Q. You don't know whether that was on that, before or after? A. I really wouldn't know. It's too far back. It says to mail all Sam Marcus to this address, so I imagine that must have been on there ahead of time.

Q. What about this part, "Answered 6-9-50, complete statement mailed"? A. I imagine that must have been done by Nicki, too, my secretary, because she took care of all those things.

Mr. Brigadier: Will your client agree that this was sent on his behalf? Because I don't know who Torrielli is.

(327) Mr. Grosman: We will make that stipulation.

Mr. Brigadier: Then I will offer in evidence this letter, minus this line, "Answered 6-9-50, complete statement mailed."

Mr. Grosman: All right.

The Clerk: DME-39, letter dated June 7, 1950.

(Received and marked Exhibit DME-39.)

Q. Mr. Miller, directing your attention to DME-17, which is the note for $15,000, there is a balance due at this moment, due and owing to Samuel Marcus, is there not? A. Yes, there is.

Q. Which you have not paid. A. No.

Q. Or, as I gather, you have not paid any more on account of this obligation than you have already testified to as $9,200? A. Right.

Q. You were obligated to pay interest on this note, were you not? A. Yes.

Q. You haven't paid that interest? A. I don't know. You mean on the note there?

Q. Yes. A. No, I haven't paid it.

Q. You haven't paid it? (328) A. No.

William Miller—for Defendant Milmar Estate—Recalled—Direct

Q. And you haven't paid the balance of that principal? A. That's correct. But I am ready to pay it.

Q. Why is it that you did not pay it? A. Well, by this time—I was paying steadily, according to my agreement, but by this time I realized this man had no intention of living up to his agreement that he had made there. And I said just as long as he gives me my releases, I am ready—I have the money and I am ready to pay him in full, just as soon as he gives me the things that he is supposed to.

Q. Now, after September 14, 1948, when this transaction was concluded in the office of Robert Schwartz, when did you next see Mr. Marcus? A. I don't think I ever saw him again for a couple of years. I didn't see him. I talked to him on the telephone once.

Q. All right. I didn't ask you about that.

I want to know, first, when you next first saw him again. A. At the examination before trial.

Q. The taking of the deposition? A. Deposition.

Q. In 1951? A. That's correct.

Q. When we commenced the taking of the depositions—A. That's correct.

Q. —of Samuel Marcus? (329) A. Of Marcus; yes, sir.

Q. That's the first time you saw him since September 14, 1948? A. That's correct.

Q. Now, since September 14, 1948, when you took over this project, did you appear at the Riviera yourself? A. Oh, yes, I was there.

Q. And how often were you there? A. During the season, when we were open, I was there every night.

Q. I see. Now, you were open from September 14, 1948, that season, until when? A. Well, I don't know the exact date, but we usually closed in October, some time in October.

Q. And from September 14, 1948, until some time in October, 1948, when you closed, did Samuel Marcus, as

far as you know—and you can only testify as to what you know—appear in person at the Riviera?

Mr. Grosman: I object to that as being wholly immaterial, whether he appeared at the Riviera or not.

Mr. Brigadier: May I be heard?

The Court: Yes, sir.

Mr. Brigadier: I want to show that this man, who has denied that he entered into this transaction, denied that he had resigned, denied that he was no longer the president, (330) that he was still the owner, etcetera, never showed up in all these years to assert any claim, to find out what was happening.

Here he was getting checks signed by other people. And I think it is very important on the question of the credibility of this whole transaction to establish that he never showed up in all that period of time, or made any claim.

The Court: Before that he was there every night?

The Witness: Every night.

The Court: I will allow it.

Did he?

The Witness: Yes, every night.

The Court: Before.

The Witness: Before that.

The Court: How about after September 14?

The Witness: After September 14 I never saw the man again until, as I said, we took depositions, or whatever they call it, before trial. I never saw him again from that day on. And I always felt that was the end of it. I never saw him, never heard from him.

Q. Now, between September 14, 1948, and the time that you met him at the taking of the deposition in 1951, did you ever receive any telephone call from Samuel Marcus? A. Yes, after I called him.

William Miller—for Defendant Milmar Estate—Recalled—Direct

Q. I see. Now, when is it that you called him? (331) A. Well, I don't know the date at this time, but it was at the time—

Q. Approximately. A. —we had to change our mortgage. We had entered into a mortgage of $60,000 a year with Ben Marden, that's Michael Realty.

Q. When you say you had entered into a mortgage of sixty thousand a year, will you please explain that; you mean the amortization? A. The amortization was—

Q. You didn't say that. A. Well—sixty thousand a year amortization, plus interest, plus taxes, plus all expenses, which was impossible. Of course, we did it at the time that we thought the Riviera was going to be the biggest thing that ever happened. Later we found out we were in very serious trouble. So the first thing that had to be done when I took over the corporation, September 14, was to try and get a new mortgage, to reduce the payment down to a part where we could afford to operate.

So I met a friend of mine in Florida called Harry Steinberger and I made a deal with him to buy the mortgage from Ben Marden at a discount, twenty-five thousand, I believe, or something like that, discount. That's how happy Marden was to get rid of it. And we made new terms, new agreements. And the new terms were $24,000 a year, to be paid, and we went into the (332) lawyers, naturally, to establish this fact, you know, of assigning the mortgage, or whichever way they handle it legally—I don't know—and finally one of the lawyers brought to our attention that there was a dower thing that—in Jersey there was a dower thing.

Q. The question that arose at this point was the dower right, the alleged dower right of Mrs. Samuel Marcus, is that right? A. That's correct.

Q. The property— A. I am sorry. Both Mrs. Marcus and Mrs. Miller, because she hadn't signed. Neither one

of us had signed. And I had been divorced from Mrs. Miller at the time.

Q. But you got the deed from Mrs. Miller at the time, didn't you? A. Yes. I called Mrs. Miller and told her what had happened—

Q. That isn't the problem. Let's talk about what became the problem.

When the property was originally acquired from Michael Realty, it was acquired in the individual names, was it not? A. Yes, it was.

Q. Of whom? A. Of Miller and Marcus.

Q. And then conveyed by you and Marcus individually to whom? (333) A. To the corporation, to Milmar Estates.

Q. I see. And in that conveyance the wives had not joined, is that right? A. That's correct.

The Court: That's because the New York lawyer drew the deed.

Mr. Brigadier: That's exactly why.

Mr. Grosman: Judge Lieberman wasn't a New York lawyer.

The Court: Was he in it?

The Witness: He had nothing to do with it, your Honor. They just throw these things in. He had nothing to do with it.

Mr. Grosman: That's right. I am sorry. It was —Mr. Winne.

The Witness: I'm sorry. Mr. Winne had nothing to do with it, your Honor. It was Mr. Marcus' lawyer that he had found in New York.

Mr. Grosman: Now, if your Honor please, I don't want this witness to start doing here what he did on depositions, run away with this thing.

Now, may I—

The Witness: I just wanted to tell the truth.

Mr. Grosman: —ask that you caution the witness to wait until he is asked a question?

William Miller—for Defendant Milmar Estate—Recalled—Direct

(334) The Witness: I am sorry, your Honor.

The Court: You just answer questions.

Mr. Brigadier: I think Judge Grosman ought to be cautioned not to testify to something that isn't true.

Mr. Grosman: All right, I made a mistake.

Mr. Brigadier: He had nothing to do with it.

Mr. Grosman: I admit that I made a mistake. It was Prosecutor Winne who did it.

Mr. Brigadier: It was not, it was the New York lawyer. If I have to establish it, I will. I have the papers and the lawyer who drew it is a New York lawyer.

Mr. Grosman: Now, it is not important, your Honor. I happened to make a slip. The corporation was organized by Mr. Winne. He had the deeds, he undoubtedly should have seen that the wives had not joined in the conveyance of New Jersey property.

Now, what is so terrible about that?

Mr. Brigadier: Mr. Winne did not. I think I owe it to Mr. Winne—

The Court: I am sure that if Mr. Winne had anything to do with the conveyance, he would have joined the wives. He is not that stupid. It is only New York lawyers who cause that trouble over here. I have seen it a half dozen times right in this courtroom.

Proceed.

(335) *By Mr. Brigadier:*

Q. Mr. Miller, at this point when the question of the dower right, or the alleged dower right of Mrs. Samuel Marcus arose, what did you do about it? A. I immediately called Mr. Marcus.

Q. On the telephone? A. On the telephone.

Q. And you spoke to Mr. Marcus? A. Yes, I did.

William Miller—for Defendant Milmar Estate—Recalled—Direct

Q. And tell us what happened, what the conversation was? A. I told him that I was very fortunate in obtaining a new mortgage from a friend of mine called Harry Steinberger and Tessie Schlesinger—it was Steinberger & Schlesinger. And I told him that in reducing this mortgage, and having all the terms set, so that we could live and exist, that there was a question of dower, and I said, "Will you please ask Mrs. Marcus to sign the papers, because, you know, we have this property free and clear, everything is clean, will you kindly get her to sign it and I will get Mrs. Miller to sign it, and we will go ahead and close the mortgage deal."

And he said that he would have it done. So I waited a couple of days and I didn't hear from Mr. Marcus. So I called him again, and I said to him, "Sam, I am still waiting for that paper. We are closing the deal here, and everything. (336) What happened?"

He said, "I am sorry, but I can't get Mrs. Marcus to sign it."

Q. Did he at that time make any statement to you, that you had no business conducting this on behalf of Milmar Estates? A. No, none whatsoever.

Q. Did he say at that time that you had no business doing it because he was the president of Milmar Estates? A. No, sir.

Mr. Grosman: I object to that as leading.

Mr. Brigadier: All right. It is leading. I withdraw it.

Q. Was there anything said at all by Samuel Marcus to you on this occasion with respect to the operation, management and control of Milmar Estates? A. Not one word.

Q. Now, eventually an action was instituted, was it not, by Milmar Estates? A. Yes, it was.

Q. Against Mrs. Marcus? A. That's right.

William Miller—for Defendant Milmar Estate—Recalled—Direct

Q. And I represented the corporation, is that right? A. That's right.

Q. An action to acquire title? (337) A. That's correct.

The Court: Wait a minute. Did he tell you why his wife wouldn't sign it?

The Witness: He said that he was having trouble with his wife—

The Court: That's enough. I don't want to hear about that.

Mr. Brigadier: Can it be stipulated for the record, Judge Grosman, that in that action—that action was brought by me as the attorney for Milmar, that Mr. Jules Tepper appeared as the attorney for the defendant, Mrs. Marcus, that at the pretrial conference Mr. Roth, who is sitting alongside of you now, appeared as the New York counsel for Mrs. Marcus?

Mr. Grosman: That is the fact.

Mr. Brigadier: Will it be further stipulated that the action terminated by a settlement of the payment by Milmar to Mrs. Marcus of the sum of $7,500. And that a deed was then given by Mrs. Samuel Marcus to Milmar Estate, quitclaiming her right of—

Mr. Grosman: I am told by counsel who represented Mrs. Marcus that at the time—I didn't represent her—there was a settlement.

Mr. Brigadier: I wanted to bring out that the settlement consisted of getting—

Mr. Grosman: They simply gave up the ghost and (338) settled, that was all.

Mr. Brigadier: No, we got something for that ghost. We paid out $7,500 of Milmar money and we got a deed. You have it right there, haven't you, a photostat of that deed? You know that we got a deed.

Mr. Tepper: I suppose I must make a statement.

Colloquy

I represented Mrs. Marcus. She was alienated from her husband at the time. The settlement was made by you. You instituted the action. In what fashion it was settled, I cannot recall. Mrs. Marcus received a settlement of $7,500. And in consideration of that payment she executed some documents. What they were, I do not recall at this time, nor do I intend to stipulate as to what those documents consisted of.

Mr. Brigadier: In lieu of my having to testify, will you stipulate to my making a statement that she executed and delivered a deed extinguishing her right of dower, or do I have to take the stand to testify to that?

Mr. Grosman: Now, you try your case in your own way.

Mr. Brigadier: I am asking whether you will stipulate to that.

The Court: How does that help us?

Mr. Grosman: It has nothing to do with this case.

The Court: Except that a $7,500 payment from (339) Milmar was involved.

Mr. Tepper: It was paid.

The Court: How it was settled, I don't care.

Mr. Brigadier: I won't press the point.

The Court: No. I don't think that it will help us at all.

Mr. Grosman: Before you go any further, may I call your attention, please, Mr. Brigadier—not that it has too much to do with this case, but a deed from the Michael Realty Company, conveying the original title to the property to William Miller and Samuel Marcus on April 5, 1946—the acknowledgement was taken by Walter Winne.

Mr. Brigadier: Yes, but that is not the deed we are talking of. We are talking of the deed from the two individuals to Milmar Estates, if your Honor please.

William Miller—for Defendant Milmar Estate—Recalled—Direct

The Court: I know what you are talking about.

Mr. Grosman: And the mortgage, too, was taken.

Mr. Brigadier: And that deed was drawn by the New York lawyer, the one that omitted the wives.

Mr. Grosman: All right.

By Mr. Brigadier:

Q. Now, this question with respect to the dower right, I want to see if I can't fix the time with you, Mr. Miller. The transaction, in relation to the date of the closing of this transaction. This transaction in question (340) closed on September 14, 1948? A. That's correct.

Q. What is your best recollection in relation to that date as to when this question first arose, about the dower? A. We have an assignment—if you show me the paper, it is on the assignment of the mortgage—I will give you the exact date, because it was right previous to that date, and it will refresh my memory exactly to dates.

Q. Well, the search shows the assignment is dated July 29, 1949. A. Oh, yes, about that time.

Q. That should be about the time that question first arose? A. That's right.

Q. Now, was it at that time, or about that time, that you had this conversation with Marcus? A. That's correct.

Q. Since that time have you had any conversation with Marcus up to the time of the taking of the deposition? A. None whatsoever.

Q. Have you had any since? A. No.

Q. I mean during the time of the taking of the deposition? (341) A. None. I haven't talked to him since.

Q. Did you ever receive from Samuel Marcus, prior to December, 1950, when this interpleader suit had been brought—have you ever received any kind of communication, oral or written, from Samuel Marcus, or his attorney, in which he asserted that he was still the president or any officer of Milmar Estates?

William Miller—for Defendant Milmar Estate—Recalled—Direct

Mr. Grosman: I object to that as leading.

Q. Did Mr. Marcus at any time make any claim, prior to December, 1950, in any shape, form or manner, with respect to the ownership, control or management of Milmar, between September 14, 1948, and December, 1950?

Mr. Grosman: I object to it as leading.

The Court: I will allow it.

A. No.

Q. Did his attorney, Robert Schwartz, during that interval, make any such claim on behalf of Samuel Marcus? A. No.

Mr. Grosman: The same objection.

The Court: I would assume that the question would include by Mr. Marcus or any authorized representative of Mr. Marcus, or anybody in the world for Mr. Marcus. How ridiculous can we get in this case?

Mr. Brigadier: I should have included that in the original question. I agree with you. May my question be (342) amended to include what you have just said, so we get it in the record?

The Court: Yes, sweep it all out of the way.

Q. Now, you understand the question. A. Yes, I do.

Q. Did you receive any such communication from Marcus, or, as the Judge said, from anyone? A. None whatsoever.

Mr. Grosman: The same objection.

The Court: The same ruling.

Q. Up until September 14, 1948, Mr. Miller, who had possession of the stock transfer and Minute Book of Milmar? A. Mr. Marcus.

Q. Were they ever in your possession up until that time? A. Never. He took the books. He had them over in New York at his office and he kept them there all the time.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. Who had possession of the books of account of Milmar up until that time? A. All papers concerning Milmar, all papers of any kind were always in his possession.

Q. But in particular, the books of account? A. That's correct.

Q. Who had charge of the books of account, and the entries made in the books of account, between the date of formation of your corporation and September 14, 1948? (343) A. Sam Marcus and Jack Hoffman, his accountant. He was also the accountant for the corporation, but he brought him in.

Q. When did you first receive the stock book, the transfer book and the Minute Book? A. All these things—on September 14, 1948, I believe we took all those papers right along with us. What other books there were to be gotten, we sent Jack Hoffman, our accountant, over to his office and he picked them up.

Q. Jack Hoffman, who was his accountant, became your accountant, is that it? A. That's right.

Mr. Brigadier: That is all.

The Court: You are through now with the direct of Miller. Suppose we take a five minute recess and you can get ready to cross examine, because I imagine it will be quite lengthy.

(Short recess.)

Cross examination by Mr. Grosman:

Q. Mr. Miller, when did you first meet Samuel Marcus? A. I met Mr. Marcus at a club I had in New York called The Embassy Club.

The Court: When was that, he says.

Q. When? A. I believe it was '45. I am not good on dates. Somewhere in '45—'44, '45, '46, you know, around that time.

William Miller—for Defendant Milmer Estate—Recalled—Cross

(344) The Court: That covers a lot of time, Mr. Miller.

The Witness: I'd say about '46. The latter part of '45, the early part of '46.

Q. And did you induce him to make an investment in The Embassy Club? A. Yes, I did.

Q. How much money did he invest at your suggestion in The Embassy Club? A. I think it must have been somewhere between thirty, forty thousand. Maybe a little more. I don't remember.

Q. He lost his investment in that club, did he, eventually? A. He lost it, yes.

Q. Did he also loan you, personally— A. But, please— may I go further? That sounds like— Can I answer that, Judge?

Q. We will get along faster if you just answer questions.

The Court: You answered it. He lost it.

The Witness: He lost it himself. He took the club over. That's what I meant.

The Court: Well, Mr. Brigadier will straighten it out if there are any unfair answers hanging in the air.

The Witness: Thank you.

Q. Now, did he also loan you money aside from his investment in The Embassy Club? (345) A. He may have.

Q. Well, don't you know whether he did? A. I don't remember. It's 1945, '46.

Q. Your memory doesn't go back that far? A. No.

Q. Isn't it a fact that he loaned you upwards of $40,000? A. I don't think he ever loaned me that kind of money at that time.

Q. But he did loan you money? A. He may have.

Q. And that ran into thousands? A. I wouldn't know the exact amount at this time.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. Well, it wasn't hundreds, was it? A. No, it was thousands.

Q. Did you ever repay him? A. Yes.

Q. How? A. I repaid him when I sold him The Embassy Club, and he bought me out.

Q. You gave him the club for his investment, is that it? A. A club that was worth $165,000.

Q. I am not asking you what it was worth. You gave him the club for his investment, or for his loan? (346) A. He wanted to take over the club.

Q. And then the club closed up? A. Yes, he closed it.

Q. Now, what is the next investment that you induced him to make? A. I didn't induce him, he induced me.

Q. Well, what was that? A. While we were operating the club, the club was very successful.

Q. Please. The next investment that either you induced him to make or he induced you to make. We are through with the Embassy. A. To buy the Riviera.

Q. Did you bring that proposal to him? A. Originally, yes.

Q. What did you tell him? A. I told him that I met Ben Marden and—that someone introduced me to Marden, and he told me—reminded me that the club was available, the Riviera was available, and I thought that, properly handled, this club could make a lot of money.

Q. And you suggested to Marcus that you and he buy this property? A. That's correct.

Q. And you went out and saw the property? A. Yes, we did.

(347) Q. And he told you then that he was interested only from the standpoint of the real estate? A. No, he did not.

Q. Were you and Marcus to run a nightclub there? A. That's correct.

Q. That was understood from the beginning? A. Absolutely.

William Miller—for Defendant Milmer Estate—Recalled—Cross

Q. And you went into this proposition with him on that basis? A. That's correct.

Q. Now, what were the terms upon which you and Marcus were to buy the Riviera property from Marden? A. The terms were $125,000 down, and a $300,000 mortgage, the total being $425,000.

Q. Now, was there a deposit made on account of this contract? A. There was, $125,000.

Q. Whose money was that? A. That was paid by a note that I gave Marcus for $50,000, that he loaned me, and $20,000 that I put in.

Q. You put in $20,000? A. That's correct.

Q. On account of the original deposit? A. Yes.

(348) Q. How did you put that money in, cash or check? A. I called Al Bierman and told him I needed $20,000, and would he send it to me. And he sent me a check made out to Bill Miller made out for $20,000.

Q. Did that represent his investment or your investment? A. When I called Al Bierman I told him I needed $20,000, and he sent it to me, and no questions asked.

The Court: Wait. Was that a loan to you for your purposes?

The Witness: Originally, yes.

Q. He sent you a check for $20,000? A. That's correct.

Q. Was that before the contract had been signed between you, Marcus and Marden? A. I believe it was.

Q. So you used that check to pay the deposit, or part of the deposit, to Marden? A. That's correct.

Q. Or to Michael Realty Company. A. That's correct.

Q. Now, what was the understanding between you and Marcus as to how your investment, your joint investment, was to be apportioned between you? A. We were to be 50-50 partners.

Q. How much money did Marcus put up originally? (349) A. Marcus put up $55,000.

William Miller—for Defendant Milmer Estate—
Recalled—Cross

Q. Yes? A. And I put up seventy thousand, twenty thousand that I had and fifty thousand that he loaned me on a note.

Q. Did he actually loan you the money, turn the money over to you on that note, or was the note given by you to him to cover your supposed investment? A. I don't know how it was done, but I know the way we talked about it. The fact was that we were 50-50 partners.

Q. Did he give you $50,000 for that note? A. No.

Q. You gave him the note to cover your share of the investment? A. That's correct.

Q. So actually all you put in originally was a $20,000 check, given to you by Bierman, for which he subsequently received stock, is that right? A. That's correct.

Q. None of your money went into this thing originally? A. No.

Q. Now, that covered the original deposit. A That's correct.

Q. On the taking of title, how much was to be paid to Marden, or to the Michael Realty Company? A. I don't know. I just said it was $125,000 all together.

(350) The Court: That included the deposit?

The Witness: Deposit.

The Court: And the cash—

The Witness: When he said deposit—

The Court: —at the time of closing.

The Witness: That's right. I was a little confused—

The Court: Just a minute. One at a time. He can't record two people talking at the same time.

The Witness: I'm sorry.

The Court: Just take it easy. This is very vital.

The Witness: Yes.

The Court: The total down payment, including the deposit and the cash paid at the taking of title, was $125,000?

William Miller—for Defendant Milmer Estate—Recalled—Cross

The Witness: That's correct.

The Court: And there was a mortgage of three hundred thousand, was there?

The Witness: That's correct.

By Mr. Grosman:

Q. Now, the title to the Marden property was conveyed by the Michael Realty Company to you and to Miller—A. Beg pardon?

Q. —to you and to Marcus, right? (351) A. That's correct.

Q. The title to that property was taken in the office of Walter Winne, was it? A. Yes.

Q. And the $125,000 payable on account of the purchase price was paid at the time? A. I believe it was.

Q. Well, you know it was, don't you? A. Yes. I said I believe it was.

Q. Had you put any more money into this venture up to this time? A. No, I did not.

Q. The only investment you made, the only contribution you made was the $20,000 Bierman check? A. Plus my stock of the Mocambo, Inc., stock of Bill Miller's Riviera, or any enterprise that we would go into, plus anything else, plus letters and agreements, and everything else that he had made me sign.

Q. You gave him everything but cash. A. And Mr. Marcus knew it, because he was my partner at The Embassy Club, so he knew my situation. It was not a secret.

The Court: You gave him everything but cash.

The Witness: That's right.

Q. Now, you say that he was your partner at the Mocambo Club? (352) A. That's right.

Q. The Mocambo and Embassy were interchangeable? A. It was Mocambo, Inc., operating as The Embassy Club.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. Did you ever testify differently with respect to that subject? A. I beg pardon?

Q. Did you ever testify that Marcus had no interest whatever in The Embassy Club? A. Yes, I did.

Q. Why did you do that? A. Because I didn't know at the time. He always used dummies, and I dealt with him as partners. The way he set up his corporations, no one ever knew. In fact, I am stuck $15,000 right now that I paid the United States Government on The Embassy Club, and I have a letter from him guaranteeing payment by one of his dummies.

Q. Well, now, let's— A. And I paid $15,000 last year to the United States Government, with a letter from Sam Marcus' dummy, with his okay and approval, which I can prove, of $15,000. He never operated on his own. He always had dummies.

Mr. Grosman: Your Honor, may I ask that the witness restrain himself?

The Witness: I can't help it, because I must tell the truth. And you are trying to avoid it. I am sorry. I don't (353) mean it.

Q. You say you must tell the truth. A. That's correct.

Q. And I agree with you.

Now, did you tell the truth when you testified before the Liquor Board over in New York that Marcus had nothing whatever to do with Mocambo or Embassy Club? A. Yes, I did.

Q. You did? A. Yes.

Q. You there testified that he had nothing to do with it. A. That was my impression at that time, that Mr. Marcus had nothing to do with it, because we were dealing with people that he told me had part of this corporation.

Q. Well, now, let's see what you did testify there, Mr. Miller.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Mr. Grosman: Your Honor, pardon me just a moment, while I get his testimony.

Q. Now, you had testified in a proceeding before the Liquor Board of the State of New York involving the license of the Mocambo Club, or The Embassy Club, and you say that you did not know at that time that Marcus himself had any interest in the Mocambo? A. I don't remember what it is. If you show me the date, (354) I will tell you.

Q. Yes. A. I don't know what time you are talking about.

Q. You were asked this question, with respect to Mr. Marcus, on page 31 of this transcript—

The Court: What was the date of the hearing, Judge?

Mr. Grosman: I am told by counsel that it was September 29, 1947, and October 3, 1947.

Mr. Brigadier: I think it would be a good idea, for the purposes of the record, that we have the particular proceeding identified, by title and cause.

The Court: He is trying to find out himself.

Q. Was this hearing that we are talking about, before the State Liquor Authority, Zone Office 1, in the matter of the proceedings to revoke the restaurant liquor license issued to Mocambo, Inc., Serial No. NY R. L. 12826, held at New York City September 29, 1947, and October 3, 1947; is that correct? A. I know the time now.

Q. Now, in those proceedings didn't you testify that Marcus had loaned substantial sums of money to the Mocambo? A. I can't remember what I testified, but if it is there, I—

Q. I will read to you the questions and your answers to them. Would that refresh your mind? A. Yes, it would.

William Miller—for Defendant Milmar Estate—Recalled—Cross

(355) Q. On page 26 of this transcript you were asked this question:

"Question: Now, the $11,000 which you say he received, was that paid by Marcus to Black?

"Answer: I don't remember whether he turned it over to me—whether he gave it to me and I gave it to Black."

Does that recall to your mind whether or not Marcus gave you $11,000? A. I don't know who Black is. I never heard of a man named Black.

Q. "Question: Was that by check or cash?

"Answer: I believe that was by check."

A. I don't know. It must be something before that, because I can't recall a man by the name of Black. There must be something leading to it.

Q. You were asked this question:

"Question: Was the $11,000 ever shown on your books as having been advanced by Marcus to the corporation?

"Answer: I believe my accountant would know better than I would. He handled the books. I didn't handle any books or anything like that."

Do you recall giving that answer? A. Whatever I testified there is the truth.

Q. But you don't—— A. At the time.

(356) Q. But you don't know who Black is? A. Right now I can't recall who Black is. But if I testified, it's the truth.

Q. "Question: You do recall that Mr. Marcus issued a check for $4,000 which was also given to Black?

"Answer: That is correct."

Do you remember that? A. If I testified, it's the truth.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. Does that refresh your mind as to whether or not Marcus gave you $11,000? A. I said he gave me some money.

Q. And then four thousand to give to Black? A. I said that my accountant handled those transactions and I had no part of them. When I say "my accountant," it's the same accountant that's in this case, Jacob Hoffman.

Q. And you were asked this question and gave the following answer:

"Question: And for that $4,000, you received a note? "Answer: That is correct.

"Question: And you received various sums during the course of the year from Mr. Marcus?

"Answer: That is right.

"Question: And these sums aggregated approximately, in all, about, in excess of $40,000, is that correct?

"Answer: That is correct."

(357) Now, do you still say that Marcus did not give you any substantial sums of money in connection with the Mocambo? A. I say that I was confused when I was testifying at the time. What I meant—that he put this money in through his dummies, through people, different people. And how he and his accountant handled it on the books, I didn't know. That should have been my answer. But this is the answer—what I mean, I was confused with the process of the answers.

Q. You are not confused now, are you, Mr. Miller? A. I may be. I don't know. This is something that happened in 1945 or '46, and I recall something about it, and I am trying to figure out right now whether I was even in The Embassy. I think I was bought out at that time. I don't think I was even an officer, or anything, at that time. I am not sure.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. Did you state that in this hearing before the Liquor Commission of New York? A. I must have stated that I was, or they wouldn't have cross examined me. I don't remember at the time, but if you let me read the testimony —but whatever I said there was the truth.

Q. When we get through here. A. All right. Thank you.

Q. It wasn't the truth that Marcus had no connection with The Embassy—or the Mocambo, that wasn't true, was it?

Mr. Brigadier: I object, if your Honor please, because he hasn't read anything from this deposition in which (358) he says that Marcus had nothing to do with the Mocambo. That was the question that he put to the witness before. He said he would turn to the transcript and would show where he said it. He has not yet turned to the transcript to show where he said it.

Maybe he said it, but I am pointing out that you haven't yet done what you said you are going to do

Mr. Grosman: If your Honor please, you will recall that this man distinctly tried to create the impression that Marcus had nothing to do with The Embassy Club. And if he loaned him money, it was so inconsequential he couldn't even remember it. That is what he said, in substance.

Mr. Brigadier: But didn't you say that Marcus had nothing to do with The Embassy? On the contrary, his first testimony was that Marcus was his partner in The Embassy. I think if you turn to the record you will find that, and that he sold out his share to Marcus. So it is not true.

Mr. Grosman: If Mr. Brigadier will wait until I get through with this witness before he becomes so upset about it, maybe we will get along better.

The Court: That goes for all lawyers.

William Miller—for Defendant Milmer Estate—Recalled—Cross

Mr. Brigadier: May I make a suggestion, off the record?

The Court: Yes.

(Discussion off the record.)

(359) *By Mr. Grosman:*

Q. Let me ask you, did Marcus put any money into the firm?

Mr. Brigadier: The firm?

Mr. Grosman: Well, that is the term that is used here.

Mr. Brigadier: I think you ought to identify what you mean.

Mr. Grosman: In the Mocambo.

Q. Now, the Mocambo is the corporation that operated The Embassy Club, is that right? A. That's right.

Q. Did Marcus put any money into that venture? A. I imagine he did.

Q. You don't remember? A. He was my partner. He must have.

Q. Yes. You admitted that he invested in excess of $40,000. A. I said I don't remember how much money at this time.

Q. Well, at the time that you testified before the New York Liquor Commission you did remember. A. If I said it, then it must have been so. But I explained how it was done, and why I was confused.

Q. All right, we will get to that. Mr. Brigadier will straighten it out.

(360) Now, that $40,000 did not include the $11,000 originally given by Mr. Marcus to pay off the capital of Black, is that correct; you were asked that and your answer to that was, "Actually, I don't remember," is that correct? A. That's correct, if I said it.

William Miller—for Defendant Milmer Estate—Recalled—Cross

Q. Do you remember the corporation, the Mocambo, giving Marcus a chattel mortgage for approximately $32,000? A. Yes, I do.

Q. And on your kitchen equipment and personal belongings, is that correct; do you remember that? A. Judge, I can tell you—I admit that I gave Marcus so many papers that it would take a book full to file all the papers. Because he did nothing, not one thing did he ever do without having a piece of paper. He never did a thing in his life with me—and I will tell you what I will do, I will give my share of the money to charity if you can give me one piece of paper that I ever typed to give to him to sign.

The Court: That is where you made a mistake, Mr. Miller.

The Witness: Yes, I know.

Mr. Grosman: You may live to regret that.

The Court: That's right.

The Witness: Well, that's the truth, because he gave me all those papers.

Mr. Grosman: I wouldn't hold him to it, Judge. (361) I know he is excited.

By Mr. Grosman:

Q. Now, he gave you money and you gave him your signature on papers, is that correct? A. Yes, sir.

Q. Now, admitting that you gave Marcus a chattel mortgage for $32,000 on the kitchen equipment and personal belongings of the Mocambo—

Mr. Brigadier: I object. He didn't admit that he gave it. It was Mocambo that gave it. We are going to get it all twisted up if he doesn't identify each time the party that did a particular thing.

The Court: That's right. The trouble with Mr. Miller is that he pays no attention to corporate entities

at all. He always talks as though he owns everything in his own name.

Who gave the chattel mortgage, the Mocambo or you, personally?

The Witness: The Mocambo Club.

The Court: All right. Please listen to the questions.

The Witness: Thank you.

By Mr. Grosman:

Q. Well, you were the corporation—you were the Mocambo Club, weren't you? A. No, I was not. I was an officer of the Mocambo Club.

(362) Q. You had the majority stock of that corporation? A. Oh, no, I didn't have the majority stock. Mr. Marcus had the majority stock, or his—

Q. You had the money? A. Yes, I put in an awful lot of money in the Mocambo Club. I put in a tremendous amount of money, in building it and everything else.

Q. Now, you still say that Marcus was never interested personally in the Mocambo Club? A. I am sorry. I want to say that he was interested personally in it. I said he was.

The Court: Wait, let me get it straight. Do you mean that he was interested through dummies?

The Witness: Through dummies, yes. He had dummies did everything for him, but he personally—

Q. And you didn't know that it was Marcus that was interested? A. At the beginning he told me he was just their agent. He had a way of saying he was everybody's agent. He was helping everybody. This is a very kind man. He goes along and helps everybody. He was an agent for the Mocambo—for these people.

Q. Well, isn't it a fact that he gave you good hard cash—when I say "you," the Mocambo Club? A. Yes, he did.

William Miller—for Defendant Milmer Estate—Recalled—Cross

Q. And that he said that he was investing that money (363) for others, and he took stock in the name of several persons; isn't that what happened? A. That's correct.

Q. You knew that, didn't you? A. Not at the time.

Q. Didn't you know, when the Mocambo gave him a chattel mortgage for $32,000, that he, Marcus, was interested in the Mocambo, personally? A. How it happened, I don't know.

Q. You testified to that before the Liquor Commission. A. If I testified to it it's the truth. If I didn't know.

Q. Do you recall whether you were asked this question and gave this answer:

> "Question: Do you recall whether in that agreement he specified that he was interested in the license financially?"

And you answered, "He was never interested."

Do you recall being asked that question and giving that answer? A. Yes.

Q. "Question: Do you know whether he stated so in that agreement?

"Answer: I don't know. I never saw the agreement."

Right?

> The Court: Do you know what agreement?
>
> The Witness: I don't know what he is talking about.
>
> (364) The Court: Hold it a minute. Do you know what agreement is being referred to in that testimony?
>
> The Witness: No, I do not, your Honor.
>
> The Court: A very brilliant way to answer questions.

By Mr. Grosman:

Q. "Question: How long have you known Marcus?

William Miller—for Defendant Milmer Estate—Recalled—Cross

"Answer: I have known Marcus about two or three years.

"Question: Are you presently connected with him in any other enterprise?

"Answer: None whatsoever."

Do you remember being asked that question and giving that answer?

The Court: What is the answer to that, if it is in the record, you said so?

The Witness: If it is in the record, I said so.

Q. That was on September 29, 1947, that you were asked that question? A. Yes.

Q. Well, was your answer true? A. Yes, it was.

Q. Wasn't Marcus then interested with you in the Riviera? A. It didn't refer—they didn't refer that way. It was referred to—any other enterprises where the liquor was sold. (365) And I believe at that time Mr. Marcus—

Q. Go ahead. Go right ahead. A. Mr. Marcus at the same time, at the Riviera, originally went in and then put in the dummies, the same process that he has always used. So actually on the liquor license he was not interested, but his dummies were.

Q. Well, now, Mr. Miller, you do remember being asked this question on the date that I have stated, on September 29, 1947, "Are you presently connected with him in other enterprises?" And you said, "None whatsoever.

"Question: I am referring to Marcus.

"Answer: In no enterprises."

A. I will say on that particular question I must have been mistaken and gave an answer like I do every once in a while when I get confused.

Q. Now, he was connected with you at that time in Bill Miller's Riviera, New Jersey? A. I don't remember. I

William Miller—for Defendant Milmer Estate—Recalled—Cross

would have to look at the records to see whether he was still connected in '47 in the Riviera. I don't remember. I would have to look at the records.

Q. Didn't he become associated with you in Bill Miller's Riviera and in Milmar Estates in 1946? A. Yes, he did.

Q. Now, you were asked this question:

"Question: In connection with Bill Miller's Riviera in (366) New Jersey, are you an officer?

"Answer: Yes."

Do you remember being questioned about that, "You are the president?

"Answer: That's correct.

"Question: Parris is secretary-treasurer?

"Answer: No, he is not. He is not connected with the corporation."

Do you remember being asked that question and giving that answer? A. Evidently, I must have given that answer.

Q. Now, you were asked this and gave the following answer:

"Question: Marcus never had any financial interest in the place?"

And your answer, "Never," right? A. If I said it, it is so, yes.

Q. Was that true? A. At that time it was my understanding, that he was working—that he was an agent.

Q. Even though the Mocambo Club had given him a mortgage for $32,000?

Mr. Brigadier: May I have this clear, because I am not clear now. You went to the Riviera and then used the word "place." Now, is the place you are referring to Riviera, or are (367) you referring to Mocambo. If you are skipping around, I think the Court and I at

least are entitled to know what part you are referring to.

Mr. Grosman: I am glad to enlighten you. We are talking about the Mocambo.

Mr. Brigadier: But the last thing you read was Riviera, and I thought you were back at the Riviera.

The Court: Mr. Miller, when you don't understand, just say so. When you are not clear, the question will be clarified for you.

Mr. Grosman: Now may I repeat the question?

The Court: Yes, repeat the question and answer.

By Mr. Grosman:

Q. You were asked this question, "Marcus never had any financial interest in the place?" And you answered, "Never." Do you remember that? A. Evidently, if I said it.

Q. "Question: At no time?
"Answer: No, none whatsoever.
"Question: Up to the present time?
"Answer: None.
"By Mr. Roberts:—"

Who is he, the Examiner? A. I imagine he must have been. I don't know who Roberts is.

Q. "Question: Do you understand then that although Marcus bought out Black—Marcus loaned the money—(368) "Answer: Loaned me the money."

Do you remember that question and answer? A. No, I do not.

Q. Well, there are only a few more lines. I might as well go through with it.

"Question: That Black was supposed to get 25 per cent of the profits of the business for several years. Marcus did not get that."

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Your answer was, "None whatsoever." Is that correct? A. Evidently.

Q. "Question: And despite the fact that he received nothing but these notes—

"Commissioner Fischer: And a mortgage.

"Answer: And mortgages—

"Question: The mortgages he got subsequently, after he put in $32,000.

"Answer: That is right, but I knew we will give him a mortgage, but it was never executed for months because that is the way we did things over there."

Do you remember that question and answer? A. Yes.

Q. "Question: The $32,000 was also subject to a first mortgage on your property, in favor of Planetary—

"Answer: That is right.

"Question: The first mortgage was approximately $11,000?

(369) "Answer: That is right, out we paid off quite a bit of it. I believe it was down to $6,000 by that time."

Do you remember that? A. I don't remember any of this. I am just saying yes.

The Court: If it is there—

The Witness: If it is there—I say again, if it is there, I think I said it. I don't remember any of this, but if it is there, I said it.

Q. You say you might have been confused when you said it? A. That's correct, at that time.

Q. "Question: So that Mr. Marcus in all advanced approximately $50,000 or $60,000 to the corporation or to you and in addition to getting these mortgages and

leases and security, he had nothing to show for his money?

"Answer: Nothing except interest, I believe, which was on the notes.

"Question: And you never paid him any moneys?

"Answer: Never did."

Now, you say that you turned over to him this Mocambo Club, which was a wonderful club, is that right?

Mr. Brigadier: I think Judge Grosman should not testify in the putting of his question. He can ask him whether he turned over the club.

Mr. Grosman: No, he tried very hard to get into the (370) record—

Mr. Brigadier: I withdraw my objection.

The Court: He did say something—that it was a good club, or something.

By Mr. Grosman:

Q. Is that correct? It was earning how much a week? A. Mr. Grosman—

The Court: Only one question at a time.

Mr. Grosman: All right.

Q. Now, did you testify that you turned over to Mr. Marcus this club that was earning a great deal of money each week? A. I never testified to that.

Q. Pardon? A. I never said that, or testified to that, anywhere, like that.

Q. Didn't you answer, in response to one of my questions—didn't you volunteer the information that you turned over to Marcus, as part of a consideration for the money that he put up to buy the Milmar property, your stock in the Mocambo? A. I did.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. And turned the club over to him; didn't you say that, he took it over? A. I didn't say anything of the kind.

Q. All right. (371) A. What I said was that I was operating the club and later I turned it over to him. I have a paper there which will refresh my memory, if I can look at it. And I will tell you when I turned the club over to him.

Q. Now, do you recall the year when you turned over the Mocambo Corporation to him? A. No, but I have a record of it.

Q. All right. Will you get your record and let me see it? I have no objection to you refreshing your mind.

Mr. Margulies: Is this the paper you want?

(Document shown to the witness.)

The Witness: No, that's later. I want the paper where he gave me a release on the Mocambo and took over the entire club for $1,500. He gave me fifteen hundred, and gave me a release, and everything, and took over the entire club, all the assets, everything connected with the club.

Mr. Grosman: I have no objection, Mr. Brigadier, if Mr. Miller, with the Court's permission, steps down and finds whatever he wants.

The Court: Do you think you can find it quickly?

The Witness: No, it will take quite some time. Maybe at the recess later I will pick it up. Hold this in abeyance until I give you the date, because this has nothing to do with it.

The Court: Wait a minute. Off the record.

(372) Discussion off the record.)

Mr. Brigadier: I am prepared to try our case, not Mocambo, sir. I have been raising no objection, because I thought—

Colloquy

The Court: Who brought in the Mocambo Club? Let's get that straight.

Mr. Grosman: He brought it in.

Mr. Brigadier: All I brought in was this fact, that at the time that he interested him in the Riviera, that he brought it to him, that they were in Mocambo. That was the only thing that was said about the Mocambo.

The Court: By whom?

Mr. Brigadier: By me.

The Court: What did your witness say on the stand?

Mr. Brigadier: This was when he started the cross, sir.

The Court: Yes.

Mr. Brigadier: But I am saying that I didn't raise any objection, because I said if this is what they want to bring out, let them bring it out. But you are now saying that I should be prepared—

The Court: Not you, somebody on your side should have all these catalogued.

Mr. Brigadier: It is something purely collateral, sir, I didn't prepare the case to try it on the Mocambo. I prepared (373) this case to try it on what happened on this transaction in relation to the Riviera. But I am willing to go to the papers and try to locate the document.

The Court: Well, you brought it in yourself.

Mr. Brigadier: I am not prepared to produce a document that has nothing to do with the issues in this case. I am prepared, if you will give me time for it. I prepared documents which have to do with the issues in this case. Mocambo is not an issue in this case.

The Court: If it is going to take time, I suggest that you hold that question. During the lunch hour you will find it and then you can resume on it.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Mr. Grosman: All right.

The Court: If you can do it that way. I don't know.

By Mr. Grosman:

Q. Mr. Miller let me ask you this. Do I understand you to say that when you turned over the Embassy Club, which was owned by the Mocambo, to Marcus, it was a going concern, earning money?

Mr. Brigadier: Your Honor, I think I have the document here.

The Court: Show it to him.

(Document handed to the witness.)

The Court: Look at it carefully.

(374) The Witness: According to this record—I think this is the one. It says the eighth day of February, 1947.

The Court: Is that the one?

The Witness: Fifteen hundred dollars. Yet, it looks like the paper.

Q. Is that when you say you turned the Mocambo Corporation over to Marcus? A. That's correct.

Q. It was then a going concern? A. We had at the time—it was very, very successful. That is how Mr. Marcus got interested in the Riviera. We had a Frenchman there called Charlie Trenet, and he was doing a tremendous business.

Q. These reminiscences are very interesting, but will you please answer my question. A. I am just trying to tell you what time this happened. At the time of this we bought the Riviera.

The Court: You know, if you wouldn't be so voluble you would save yourself an awful lot of trouble. You

bring a lot of it on yourself, just like your lawyer did before.

The Witness: I am sorry.

The Court: Don't keep talking. You get in trouble.

Q. Now, when do you say you turned over the Mocambo to Marcus? A. On February 8, 1947.

(375) Q. And you say at that time it was successful.

(Discussion off the record.)

Q. You say that was in February, 1947? A. That's correct.

Q. It was then that you turned over the Mocambo, the affairs of the Mocambo Corporation to Marcus, is that correct? A. That's right.

Q. Now, do you stand by that answer? A. I didn't hear you.

Q. Do you stand by that answer; you are certain of that, of the date? A. According to this piece of paper, I stepped out--

The Court: Wait a minute. Do you mind if I show him something? We want to get finished.

Mr. Grosman: I don't mind anything you do.

The Court: Do you see Marcus' name on that paper?

The Witness: No, that was Dave Parris.

The Court: All right. That is what he is leading up to. You are going to get hung with that one in a minute.

The Witness: Well, I am not looking for tricks, your Honor.

The Court: I know. But look at the paper. You see Dave Parris' name there. You don't see Sam Marcus' name there.

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By Mr. Grosman:

Q. Well, now, you say that was in February?

(376) The Witness: I know there is a lot of ways about scheming people, but I am not looking for tricks. That's his racket.

The Court: You volunteer a lot of conclusions.

Mr. Grosman: Look what you have got me into. You have got me in the rackets.

The Witness: Not you. I don't mean you. I am sorry. I mean Mr. Marcus.

Q. Now, Mr. Miller, I don't want to trick you into anything. I want you to take all the time you require. Look at anything you want to look at and tell me the date when you turned over the affairs, the assets of the Mocambo to Marcus. A. February 8, 1947.

Q. And you say that at that time the Mocambo was a successful enterprise, right? A. I say that before that time—before that time it was a successful enterprise.

Q. How long before that time? A. In April—when we bought the Riviera—April, 1946.

The Court: You are right about that date.

The Witness: That was 1946, when we bought the Riviera.

A. (Continuing) It was a very successful club. I was the biggest man in New York. It was very successful.

Q. There is no doubt in your mind about that? (377) A. Oh, no.

Q. Let me read to you a question that was asked of you before the New York Liquor Board, and your answer to it.

"Question: Mocambo made no money in 1946?"

A. That's correct.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. "Answer: None whatsoever."

A. That's correct.

Q. "Question: Nobody got any money out of the business?

"Answer: No, nobody got any profits, just aggravation, and plenty of it."

A. That's correct.

Q. Is that what you mean by a highly successful business that made you the biggest figure in this type of work in New York? A. At that time the club had just opened, at the beginning of '46. It had just opened. And at the opening there is a big, tremendous expense you go into. But I brought a fellow over called Charles Trenet—he just refreshed my memory when he brings these things out—and he was very hot, we were doing good business, excellent business.

• • •

(399) Q. Now, let's go back to the original deal between you and Samuel Marcus wherein you were supposed to be equal partners, were you? A. Not supposed to be, we were.

Q. Yes. And were you supposed to put in an equal amount of money, into the Milmar venture with Marcus? A. No, I was supposed to put in a little more.

Q. How much more were you supposed to put in? A. I think it came to about $15,000, or something like that.

Q. All together how much? A. All together I put in seventy, he put in fifty-five.

Q. You put in seventy, and you are counting in the note which you gave him? A. That's correct.

The Court: You don't have to repeat that any more. It is well established in my mind.

• • •

William Miller—for Defendant Milmar Estate—Recalled—Cross

(commencing at 405-17)

Q. Now, isn't it a fact that you interested a man named Hartman in the Embassy Club and that he became an associate of yours in the Embassy Club the latter part of '46? A. I don't think so.

Q. Do you know a man named Hartman? A. Yes, I do.

Q. Did he become interested in the Embassy Club? A. No, he did not.

(406) Q. Didn't he put in money, into the Embassy Club, at your request? A. I don't remember.

Q. And didn't he, after being in there a very short time, perhaps a week or two, didn't he sue you for the return of his money? A. I was never sued by anyone by the name of Hartman, or anyone else. I was never sued.

Q. Didn't he make a claim against you that you had misrepresented to him the status of the Embassy Club when you induced him to invest money in that? A. No.

Q. Are you sure about that? A. Positive.

Q. And didn't Sam Marcus put up $2,500 to pay off Mr. Hartman? A. Not that I know of.

Q. You wouldn't know anything about it? A. Not a thing about it.

Q. You say you were never sued by a man named Hartman? A. That's correct.

Q. All right. Now, when did Bierman send you the $20,000 you told us about? A. We have a canceled check of Bierman's and I can tell (407) you by looking at the date of the check.

Q. Will you look at it, please, and tell us. A. Yes, sir.

Mr. Brigadier: We have a photostat of the check.

(Document shown to witness.)

A. 4-4-1946.

Q. April what? A. Fourth.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. 1946? A. April 4, 1946.

Q. When did you receive it? A. Oh, I think this was sent—I don't know when I received it. It must have been the next day or so. I don't know when I received it.

Q. Did you have it with you at the time that title was closed, title to the Milmar property was closed? A. I wouldn't remember.

Q. You wouldn't remember? A. No.

Q. Do you remember when title to the Milmar property was taken? A. No, I wouldn't know offhand. But if you showed me the record, I could tell you.

Mr. Brigadier: We have the deed. Do you want the deed?

(408) Mr. Grosman: Yes, show him the deed, if you will.

(Document shown to the witness.)

Q. Let me ask you, Mr. Miller, did you use the $20,000 that you received from Bierman to pay the deposit to Ben Marden, or was that used on the closing of the title? A. I wouldn't know. I know it was used. I know that I gave the check, the minute I received it, to Sam Marcus.

The Court: There has been proof in this case that title was closed April 5, 1946, from Michael Realty to Miller and Marcus. Is that the date?

The Witness: That's the date. If that's the date.

Q. Now, isn't it a fact, Mr. Miller, that you were supposed to put up $100,000 and Marcus was supposed to put up $100,000? A. That is not right.

Q. And that you induced Marcus to put up a deposit of $25,000, telling him that you would equal his investment at a date then in the near future when you sold out your interest in Luna Park? A. No.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. Did you have an interest in Luna Park, or did you tell him that you had an interest in Luna Park? A. I didn't tell him anything about Luna Park. Everyone knew that I operated Luna Park at one time. That was no (409) secret to anyone.

The Court: Is that the one at Coney Island?
The Witness: Coney Island, yes.

Q. You had no interest in that? A. I had an interest in Luna Park.

Q. What was your interest in Luna Park? A. I thought that I had a 50 per cent interest in Luna Park. And I did have a 50 per cent interest in the Park.

The Court: Can we find out when this is dated? When did you have this?
The Witness: This was in 1944.
The Court: Now we are going to '44. That's fine.

Q. And didn't you tell Marcus that you were going to receive a substantial sum of money from the liquidation of your interests in Luna Park and that you would use that money for the purpose of making your investment— A. No, I did not.

Q. —in the Milmar properties? A. No, I did not.

Q. Do you recall what you testified in relation to that subject on your deposition hearing? A. No, I can't remember.

Q. Did you make the same statement then that you are making now, namely, that you never told Marcus that you (410) had an interest in Luna Park? A. Now you are changing it, Judge.

Q. I am not changing it. A. You didn't ask me that. You said to me, "Did you have," and then, "Did you make the statement?" That's two different things.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. All right. Now you are acting like a lawyer, not like an actor. A. Well, I don't care what I am acting, but—

Mr. Brigadier: I object to that characterization.

The Witness: You told me to pay attention.

The Court: There is no jury here. What are you worrying about? Those wisecracks don't bother me.

Q. Whether you had an interest in Luna Park or not, did you tell Mr. Marcus that you had an interest in Luna Park? A. Oh, sure. I must have. I did have an interest. I may have told him.

The Court: But you deny that you told him that you would receive proceeds from that that you would apply to Milmar, is that right?

The Witness: That's correct, your Honor.

The Court: All right.

Q. In what connection did you tell Mr. Marcus about your interest in Luna Park, if not for the purpose of assuring him that you would raise the money equal to his investment (411) in the Milmar property? A. I never told Mr. Marcus that I would raise $100,000. He knew I didn't have any money at the time. He had been loaning me money. You just told me that. So how could I raise $100,000, if I haven't got enough—if I am borrowing money from Marcus? He knew my financial things. You just said he was loaning me money to go into the Embassy.

Q. How did you expect, if you had no money, to make an investment in the purchase of the Milmar property? A. I expected to make the investment in the Milmar property and pay off my investment with the profit of the Riviera, and out of profit that he would receive, as I got the money, or any money that I would receive, I would repay my investment. That was our understanding.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. Then you were not to put up any money at all? A. I didn't say that.

Q. What were you supposed to put up, except this hope that you speak of? A. I just told you. I was to put up my stock in Riviera, my stock in Milmar, my stock in Mocambo, as collateral for the $50,000.

Q. And did you do that? A. Yes, I did.

Q. But you never paid the note? (412) A. The note was wiped out on September 14, 1948.

Q. Prior to that time you had never paid it? A. Prior to that time I just couldn't pay it.

Q. There were a number of notes given by you, each in the sum of $50,000, to Marcus, were there not? A. To my recollection, there was only two notes given, the original note and then the change at the time of the new lease. And one was to take part—it was the same transaction, except they exchanged notes. And the third note, I believe, was the $15,000 note.

Q. We are not talking about that $15,000 note now.

The Court: Let's stick to the fifty.

Q. We are talking about the $50,000 note which you gave Marcus on or about the time of the taking of title. A. Yes.

Q. Do you remember the terms of that note? A. Not now. But if you show me the note, I will tell you.

Q. I show you a photostatic copy of a note—

The Court: I have a $50,000 note here of June 1, 1947.

Mr. Grosman: That's another one, Judge.

Q. I show you a photostatic copy of a note for $50,000, dated April 1, 1946, signed William Miller, with the name William Miller printed underneath. Did you give (413) that note to Sam Marcus? A. Yes.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. Was that the first note or a subsequent note? A. I believe this is the first note—this is the note that I signed before we took title to the property of Riviera. This is on April 1.

Q. Now, this note was a demand note. Did Marcus ask you to pay it? A. No, he did not.

Q. Notice the due date on here is May 20, 1947. You permitted that note to go to protest?

Mr. Brigadier: May I interrupt a moment? I misled you. I am looking at something else.

(Discussion between counsel.)

Mr. Brigadier: Wait a minute. Even I as a lawyer can't answer that. I don't know how he is. It says, "On demand, after date, I promise to pay to the order of Sam Marcus $50,000."

Then at the bottom where it says, "Number due," somebody has put in—and it may have been anybody else—a date. That's a very serious question as to whether that converts that into a due date instrument.

The Court: Indeed it is. There has been plenty of litigation over that, just what the significance is.

Mr. Brigadier: I suggest, Judge, that you just (414) call it to his attention.

The Witness: I don't ever remember a due date.

The Court: Who filled the note in, do you know?

The Witness: No, I do not. But I never remember a due date, because I couldn't possibly have promised this man, the position that I was in, that I could meet a note in '47, or any other date. It was an "on demand" note, you know.

Mr. Brigadier: Do you have the original of that, Judge Grosman?

Mr. Grosman: We may have it in our Exhibits. I think you said it was marked in evidence.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Mr. Brigadier: You had produced it, but you had only produced a photostat for us. It came out of your file.

Mr. Grosman: It must have been in my file, then.

Mr. Brigadier: P-62 for identification.

By Mr. Grosman:

Q. Well, was any demand made on you for the payment of that note? A. No, there wasn't.

Q. Did you receive notice of protest from the bank? A. That was when he started his—that was later I received—much later, when we made this new note, when he tried to dispossess me.

(415) Q. You received notice of protest from the bank? A. That's right. He tried to dispossess me and he demanded the money at that time.

Q. This note was never paid, was it? A. No, it wasn't. It was wiped out and replaced by this note. (Indicating.) This was the same note.

The Court: He refers to a note dated June 1, 1947, for $50,000, Exhibit DME-16.

Mr. Grosman: May I have this marked, please. Mark it in evidence.

Mr. Brigadier: Do you have the original, Judge? I would much rather you offered it.

Mr. Grosman: I don't want to stop now to go through it. If I find the original, I will substitute it.

The Court: Mark it.

The Clerk: DM-5, photostatic copy of note dated April 1, 1946, marked in evidence.

(Received and marked Exhibit DM-5.)

Mr. Brigadier: On that note, did you have a photostate of the back, too, Judge?

Mr. Grosman: Yes.

William Miller—for Defendant Milmar Estate—Recalled—Cross

By Mr. Grosman:

Q. Now, Mr. Miller, did you then give Mr. Marcus a new note for $50,000 in substitution of this note marked DM-5? (416) A. Yes, I did.

Q. This note is in evidence, marked DME-16. Now, this new note is dated June 1, 1947, payable $500 weekly, commencing June 1, 1948; in the event of a default of any one payment the entire unpaid balance will fall due subject to agreement dated July 23, 1947, is that correct? A. That's correct.

Q. Now, did you ever pay that note? A. This is the note that was wiped out on September 14.

Q. I am not asking you that. I am asking you, did you pay that note? A. I don't know. I don't remember. The records will show.

Q. Now, did you give any other notes to Sam Marcus? A. As I said, at numerous times I gave him so many papers that I wouldn't remember, and so many instruments, that unless you show them to me I can't tell you whether I did or not, of any more notes. If you have any more papers, just show them to me and I will tell you, if my name is on it, that I gave it to him. I will not—

Q. Mr. Miller, didn't you keep a record of these documents and the obligations that you assumed? A. I am sorry, Judge Grosman. I never kept a record. Unfortunately, that is one of my bad habits.

Q. Was it because you didn't consider them to be of (417) any importance, and that you didn't intend to pay them, anyway, so you kept no record of them? A. I'm sorry, I didn't keep a record because I knew—my obligations were not that numerous. I knew what I owed. And everyone that knows me knows that I paid my obligations.

Q. But you kept no record. A. I didn't need a record. I didn't owe that much. I believe this was the only money

outstanding that I owed. I owed no one else. So I didn't need a record.

Q. Didn't I understand you to say before the recess that you were desperately in need of money and that Marcus knew it and loaned you the money? A. I was in need of money to operate. Not me. When I used the term "I" again I always figure myself as the operator in charge. When I say "I" I meant the Mocambo, or the place that we were operating needed the money; not me, personally. It didn't go to me. I didn't get a quarter. It went into the business.

Q. You are sure about that? A. I am positive about that.

Q. There can't be any doubt in your mind about that? A. There could be a doubt. There may have been. I just said before I made that statement that I may have signed some other papers, and if you show me the papers, I will tell (418) you what they mean and what I signed. But I don't remember offhand. This is 1945—this is ten years ago.

Q. Would the books of Bill Miller's Riviera show the money that you received from Sam Marcus? A. The books of Bill Miller's Riviera was in the capable hands of Mr. Sam Marcus. In our lease he had the right to examine the books, to examine the records, to examine the checks, to examine the slips, to okay any expenditure over $100, to do anything that he wanted. And up to 1948, the time that he got out, he knew everything better than I knew what was going on with the books. In fact he fixed the books the way he wanted them to read.

Q. Now, all I asked you, Mr. Miller, was whether or not the books of Bill Miller's Riviera would show the money that was given to you for the Riviera— A. I wouldn't know.

Q. —by Samuel Marcus. A. I wouldn't know.

Q. You have no idea? A. I have no idea. I never han-

dled the books. But Mr. Hoffman would know, he is the accountant, and he is here in court. Ask him.

Q. Whatever money was given by Sam Marcus, for use by Bill Miller's Riviera, was handled through you, was it not? A. I'm sorry, it was not handed to me.

(419) Q. Who was it handed to? A. Probably Jack Hoffman, or probably the cashier, or probably he put it in himself. I had nothing to do with this money. I was just operating the place.

Q. Would entries be made in the books? A. I imagine there were.

Q. How about the money that was due from Bill Miller's Riviera to Sam Marcus? A. There was no money due Sam Marcus from Bill Miller's Riviera.

Q. At no time? A. At no time. We didn't know—there were so many things going on, that's why I insisted that when we made the new deal that any papers would be wiped out and we would start fresh.

Q. Didn't Sam Marcus, in addition to whatever investment he made in Bill Miller's Riviera, didn't he loan Bill Miller's Riviera thousands upon thousands of dollars? A. I would say offhand, no.

Q. You would say no. A. But I really wouldn't know, because, as I said before, this was not handled by me. It was handled by Jack Hoffman and Sam Marcus, they handled the finances. Of all the time I was at the Riviera till 1948 I never, never handled the finances of the Riviera books. It was run through cashiers, (420) secretaries, and things of that kind.

Q. I see. You didn't concern yourself with the moneys? A. No, I had enough trouble trying to pay off creditors and everyone else.

Q. Now, let's go back to the taking of title by William Miller and Samuel Marcus to the Milmar properties. That title was taken in the office of Winne & Banta, was it not? A. That's correct.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. In Hackensack? A. That's correct.

Q. On April 5, 1946? A. That's correct.

Q. Now, at that time Marden had been paid $25,000 as a deposit, had he not? A. Yes.

Q. And a hundred thousand dollars in cash was paid at the closing of the title? A. When you say in cash, do you mean by check?

Q. Yes, by check. He pays by check. A. Yes, that's correct. I don't know whether he did or not.

Q. In all his dealings with you he paid by check? A. Oh, no.

(421) Q. He didn't? A. No.

Q. There were times when he paid by cash? A. Oh, yes.

Q. When? A. He didn't give it to me, but he did it in a way—I don't know whether he put in—

Q. You just said that he paid by cash. A. I am sorry. I want to change that. I don't know how he paid it in, whether it was by check or cash.

Q. I see. Now, at the time of taking of title to the Milmar property by you and Marcus $125,000 was paid on account of the purchase price of $425,000, correct? A. Correct.

Q. Did that figure include the original $25,000 deposit paid to Marden, or was the $125,000 paid in addition? A. The total amount paid to Marden was $125,000.

Q. You say that you put up $20,000, representing the check sent to you by Bierman? A. I say that I put up $70,000.

Q. I am talking about cash now, I am not talking about notes. A. I don't know how you talk about this. I know that I owed Sam Marcus fifty thousand.

The Court: Are we going to go through that again, a $50,000 note from Sam Marcus to you, a $20,000 check from Bierman to you—how many times do we have to hear that?

William Miller—for Defendant Milmar Estate—Recalled—Cross

Mr. Grosman: He insists on putting it that way, your Honor.

Mr. Brigadier: You insist on questioning him about it.

Mr. Grosman: I am trying to get a responsive answer out of him.

Q. Wasn't a hundred thousand dollars by check paid on April 5, 1946, to the Michael Realty Company in the office of Winne & Banta? A. I don't think it was paid by one check, I thought it was paid by numerous checks, and a lot of money. I went around and collected money with Marcus. I don't know whether he gave me the fifty, or I gave it to him. It wasn't done that way. You know how we did it. We said, "I owe you fifty thousand dollars—"

The Court: At the time title was closed.

The Witness: Oh, yes. There were numerous checks, your Honor. It wasn't just one check. I don't know how it was paid. He is leading me to say that one check for a hundred thousand—I don't think it was done that way.

The Court: All right. So you don't know.

Q. You say there were a number of checks? A. I think so. I'm not sure. I don't remember.

(423) Q. You are not sure about that, either? A. No.

Q. It might have been one check or it might have been a dozen checks? A. That's right.

Q. Did any of those checks, outside of the Bierman check for twenty thousand, come from you? A. No.

Q. Who did they come from? A. From Marcus, or his dummies. Again I must put in the dummies.

Q. Were there dummies in there, too? A. Oh, yes. Sure there was.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. Who was the dummy in that transaction, outside of Marcus? A. In Milmar?

Q. Yes. A. I don't know who the dummies were. I don't know who he got the checks from. He always had checks. That's what I am trying to say, I don't know whether it was one check or whether it was numerous checks.

Q. Weren't you supposed to put up a sum equal to that put up by Marcus on April 5, 1946, when title to this property was taken over? A. I was.

(424) Q. And you didn't do it? A. I did.

Q. By giving him a note for fifty thousand? A. (Witness nods.)

The Court: Answer, don't shake your head.

A. Yes.

Q. Now, did you ever give him any money—cash I am talking about, not notes—thereafter; Sam Marcus, did you ever give him any cash thereafter on account of the purchase price of this property? A. I don't know whether I did or not, to tell the truth. The records would show whether I did or not.

Q. Take a look at your records, and after looking at them, tell me whether you gave him any more money subsequent to that initial $25,000.

The Court: Do you have any record you can consult?

The Witness: I think Hoffman—could I talk to Hoffman? He would tell me, because he handled the whole thing. If I could talk to him, he would tell me whether we gave him any money towards this or not. Can I do that, your Honor, can I talk to Hoffman?

The Court: I don't know. He wants to refresh his recollection. He doesn't know, he says. He would have to talk to Hoffman, the accountant.

William Miller—for Defendant Milmar Estate—Recalled—Cross

(425) The Witness: I don't know.

The Court: Maybe you can put Hoffman on.

(Discussion between counsel.)

Mr. Grosman: No, I want to know whether he paid any money to Marcus on account of this purchase price.

Mr. Brigadier: I thought he testified at least a half a dozen times that the only money that was contributed toward the purchase price was the $20,000 from Bierman.

The Court: That's what I have heard over, and over, and over, till it's running through my brain.

Mr. Brigadier: And that the obligation of fifty thousand remained unpaid until September 14, 1948.

The Court: Apparently everybody understands but one or two people.

By Mr. Grosman:

Q. Is your lawyer's statement correct? A. That's correct. That's what I have been saying all along.

Q. All right. Now, are the books of Bill Miller's Riviera in court? A. I wouldn't know.

Q. Who would know? A. I imagine Jack Hoffman would know, or my attorneys would know, whether they picked up the books or not, whether they brought them to court with them. I don't know.

(426) Mr. Brigadier: I don't think there should be any mystery.

The Court: If anybody knows, will they please answer?

Mr. Hoffman: They are not in court.

The Court: But they are available.

Mr. Hoffman: Yes, sir.

The Court: All right.

Mr. Grosman: All right.

May I ask, your Honor, that they be produced tomorrow morning when we meet here?

The Court: Well, they have been examined, haven't they?

Mr. Grosman: Not those books.

The Court: Never?

Mr. Grosman: Not of Bill Miller's Riviera.

The Court: Only Milmar?

Mr. Grosman: Milmar.

The Court: Any objection to producing the Riviera books here tomorrow?

Mr. Brigadier: As far as I am concerned, no. But I suppose we better speak to counsel for the Riviera. I am not in that other suit.

Mr. Abraham Chazin: There is an application pending in another suit for examination of those books. There (427) is a motion pending which has never been argued in which I asked for certain records, in which there is opposition, and in which Judge Grosman asked for the Bill Miller's Riviera books, which we say that at this time he is not entitled to examine.

If the Court will remember, there were also some Milmar applications. And on those applications the Court ruled that as to those particular books, involved in this particular corporation, they had a right to examine up to a certain day, and after that date they had no right to examine.

The Court: Yes, up to the date he allegedly sold out his full interest.

Mr. Abraham Chazin: We take the position that they have no right to examine—at this point they have no right to examine the Bill Miller's Riviera books, they have not shown cause for examination of those books,

and that there are other applications pending in a separate suit which they brought against Riviera for examination of those books, which have never been determined.

Mr. Grosman: Now, if your Honor please, I am not talking about the other suit which is pending in this court. As Mr. Chazin insists, there are two applications, one by me for examination of his records, one by him for the examination of our records. We have offered to give (428) him our records, providing he will give us his. That wasn't satisfactory.

Now, I want the books of Bill Miller's Riviera, not in connection with the other suit, in connection with this suit, so that I can examine Mr. Miller on the contents of those books.

Mr. Abraham Chazin: If your Honor please, there was very extensive pretrial procedures in this case. The defendant Marcus' examination went into volumes. If they wanted to examine the books of Bill Miller's Riviera, they should have at that time made an application to examine those books, just as they examined exhaustively a number of witnesses whom they wanted to examine.

Now, having failed to do that, this is not time for them to come up with an attempt to have a pretrial examination.

Mr. Grosman: I am not asking for a pretrial examination. I didn't know what this man was going to say. I don't know from minute to minute what he is going to say.

I want those books, not in connection with the other suit pending, I want them for the purpose of cross examining Miller.

Mr. Brigadier: That is what I want to be heard on.

If your Honor please, I have tried to be as patient as I could and not interpose objections, and I didn't raise

any, (429) as you remember, even during the Mocambo —when I think at one time you wondered why I was sitting by and saying nothing.

I offered to take the first part of this case, as your Honor will recall, and said, "I will establish the transaction of September 14." That is what I understood was the first part of the case that is being tried.

Now he has gone back to Mocambo. At one point, if your Honor hadn't stopped him, he would have gone back to Luna Park.

The issue that is now being tried is the first issue: What was the transaction of September 14? He has his counterclaims. When we get to them—and one is that they loaned money, that Marcus loaned money to Bill Miller's Riviera—let's try that issue. But let's not becloud this issue with a lot of collateral stuff.

And it seems to me that we are going to be here three weeks and never really try the first issue we have agreed should be tried, namely, what was the transaction of September 14? All the rest of this stuff we have been hearing—he has been on cross examination since 11 o'clock this morning—we haven't had a word yet about the transaction of September 14.

The Court: Just hold it and I will tell you when he started to be cross examined. Eleven twenty-six. I wrote (430) it down because I was going to see how long this was going to last, and when we were going to get to the contract and what happened leading up to the contract. And that is all I want to hear now.

I don't want to hear about Luna Park, I don't want to hear about anything else until the right time comes.

The motion for the Riviera books will be denied at this time.

Mr. Tepper: May I be heard, please?

The Court: Yes, sir.

Mr. Tepper: I realize that these proceedings are getting to the point where a lot of people are becoming vexed. And I know the Court is being, perhaps, imposed upon a little bit. But your Honor must remember what transpired at the last session before you, when certain motions were made, when we said it was material for us to have the Riviera books.

The Court: Well, it may be that you will get them at the right time.

Mr. Tepper: All right. Now, your Honor said "When the time comes I will afford you that opportunity, irrespective of what posture the case is in."

The Court: That's right.

Mr. Tepper: Now, here is what I have to say in connection with that. The heart of this case is whether or (431) not, in addition to some other things, there was fraud in the inception, fraud perpetrated upon Mr. Marcus, whether Mr. Marcus was imposed upon by Mr. Miller, who, in his testimony, all through the morning in his cross examination, added to the confusion by not remembering many things.

Now, insofar as the Riviera is concerned, Mr. Miller has testified that up to a certain date Mr. Marcus and Mr. Hoffman had control of the Riviera books. It has been admitted that they have the books, and the books are available. It now becomes very material for this side—and I haven't opened my mouth since the commencement of this action, and I know your Honor will bear with me.

The Court: That's true.

Mr. Tepper: And I hope to continue to conduct myself just this way.

I am saying to your Honor that we are on the equity side of this court. Your Honor has said time and time again, "We are here without a jury." What is said,

perhaps a little bit on the immaterial side, if it is harmless in materiality, will not affect your judgment or anybody else's judgment, providing basically it should go in in some fashion or another.

Now, I say to your Honor, instead of wasting a lot of time, and being here for an additional seven or eight days, if these books are produced in this courtroom, and while the (432) examination goes forward with perhaps Mr. Miller, and perhaps some other witness, I would have an opportunity, while I am putting a shine on my trousers sitting on the chair there alongside of Judge Grosman, to look into these books. There isn't anything there to conceal, according to these gentlemen. And if there isn't, what harm is there in producing these books? Let's put the searchlight on everything. Produce everything and let's have it here. And I think we can shorten this trial by several days, because we will have documentary proof, as we had in the testimony in New York.

So I respectfully urge your Honor that if your Honor doesn't believe that this is the right time for us to have the books, let them be produced in the courtroom tomorrow morning so that, in some adjacent room, I can aid the Court, as an officer of this Court, in bringing this case to a very, very quick conclusion. It is very material.

The Court: Well, of course, we all want to see the case disposed of as rapidly as possible.

Mr. Brigadier: May I make a brief reply, if your Honor please? I think Mr. Tepper unwittingly gave the best reason why his application should be denied when he said that he needs it in order to establish his fraud charge. What we have agreed is that I try first the transaction of September 14. The second thing to be tried was whether or (433) not they are entitled to

recission on the ground of fraud. What he is trying to do is take this case as an excuse for reversing the order of proof. There is no proof in my case, and there will be none, of fraud. When we are through with the transaction of September 14, we will then turn to the two charges of fraud that they have made, one with respect to the mortgage and the second that we misrepresented the business of Bill Miller's Riviera.

Mr. Tepper: I didn't say, and didn't suggest, and didn't intend to say that I required these books in order to prove the fraud. I said this is a fraud case. It was a factual statement I made. And since it is, and we are at equity, and since I say it is very material to our case to have these books available here, what harm can there be if the books are in this courtroom?

The Court: Wait. Assuming the books come in, who is going to go over them, and how long is it going to take?

Mr. Tepper: I will say to your Honor, as an officer of this Court, that I will sit in an anteroom with some other person, and one of their representatives, while this case goes forward, and examine these books and records.

Mr. Abraham Chazin: If your Honor please, throughout all these years that this case has been pending they have never made an application to this Court in this (434) case for an examination of Bill Miller's Riviera, Inc., books.

The Court: Not until the other suit was instituted.

Mr. Abraham Chazin: Yes. Now, I just want to recall one further incident to your Honor.

At one of the recent motions there was a great deal of to-do made about the desire to examine the Milmar books up to September 14. We made arrangements for them to see them again, although we had given them

photostats, and on the date that we made the arrangements, nobody showed up to see them.

Now, they seem to keep making these applications, at a late date, when it will tie up the trial, when they had all these years to make application to see Bill Miller's Riviera books and never made such an application.

Mr. Grosman: If your Honor please, may I just say this. I will make it as brief as I can.

We are in equity. It should impress yourself greatly —the fact that these people are battling so hard against having us see these books.

Now, Miller said that he didn't personally profit one iota by the money that was turned over by Mr. Marcus for Bill Miller's Riviera. It is in connection with those statements, made by this man today, not in connection with (435) the suit that we have against Bill Miller's Riviera, that we want to examine these books.

Mr. Tepper: If they have nothing to hide, why don't they produce the books?

The Court: That's the same thing they say when a man invokes the Fifth Amendment, if he is innocent, why does he invoke the Fifth Amendment? Because he has a right to.

Mr. Chazin: If your Honor please, I offered to consolidate both of these suits and have them tried together. They didn't want to do that. They wanted to keep that other suit open. Now they are trying to get the discovery they asked for in the other suit, where I have the first motion pending for their discovery, which has never yet been disposed of.

Mr. Brigadier: If your Honor please, may I ask for a conference with counsel for a moment?

The Court: You know, I am sure if I would sit here and listen, you will argue this point till 4 o'clock and start tomorrow morning again, because that has been

the course of action through this entire case. And I tell all the lawyers in this case that I feel sorry for the clients. I might as well tell you now. They are certainly not getting rapid justice. And you know now whose fault it is now. That's definite.

(436) Mr. Brigadier: Judge, you understood my objection is not to the books being brought in, I simply don't want them brought into this case, at this posture of the case.

The Court: Because I don't want to complicate it now myself. I want to get a picture of what happened up to and including the day that they signed this contract, because upon that depends much in this case.

Mr. Brigadier: What I wanted to suggest—and that is why I asked for a recess for a moment—is, at least can't we agree that the books be here? This seems to be one of the things that they want, that they should be in the courtroom. I am in favor of having them here. Let's have them here.

The Court: Sit down and have a huddle for five minutes, in the interest of your client and everybody else.

(Short recess.)

Mr. Abraham Chazin: If your Honor please, we will produce the books that we have of Bill Miller's Riviera, to be here subject to the order of the Court.

But I would like to ask, at the same time, that Mr. Marcus' counsel agree to produce his records, which we have never been able to get.

Now, Judge Grosman made a statement that he offered to (437) give me the information which I sought, if I would produce Bill Miller's Riviera books. The reason I did not take up that offer was that getting books from Marcus has been in the past turned out to

be something very unsuccessful, because of the different warehouses in which things are stored, and finally turn up.

Now, I want to read a few sentences from his deposition in the Riviera case, in which they made the application to examine our books, as to how he got a total and what he says about records. He says that he asked his secretary—called his secretary and—

The Court: Do I have to have that in order to—

Mr. Abraham Chazin: Except for this, your Honor. We have been trying to get—

The Court: Wait. Why don't you make it short? You agree to bring in the Riviera books, is that right?

Mr. Abraham Chazin: Correct.

The Court: And have them here subject to the order of Court, is that correct?

Mr. Abraham Chazin: Correct.

The Court: Did you mention to Judge Grosman about Mr. Marcus' records?

Mr. Abraham Chazin: I would like to ask Judge Grosman to produce Mr. Marcus' records.

(438) The Court: Not now. Didn't you ask him while the other discussion was going on?

Mr. Abraham Chazin: No.

The Court: Why not? He made the offer to bring Mr. Marcus' books, if you would bring the Riviera books.

Mr. Abraham Chazin: I think he will now say that he doesn't have books.

Mr. Brigadier: Oh, stop that.

Judge, I think you haven't been informed what happened. We didn't have a conference with Judge Grosman. We had a conference amongst ourselves.

The Court: Oh, just your team had a conference.

Mr. Brigadier: It was decided to bring the books in, and this is now being brought up, and I am sure Judge

No. 839

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IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12073

AL BIERMAN and WILLIAM MILLER,
Plaintiffs-Appellees,

vs.

SAMUEL MARCUS,
Defendant-Appellant and Cross Claimant-Appellant,

and

MILMAR ESTATE, INC., a corporation organized under the rules of the State of New Jersey,
Defendant-Appellee.

AL KEVELSON,
Defendant on Cross Claim-Appellee.

Civil Action (No. 1026-50)

On Appeal from Final Judgment of the United States District Court for the District of New Jersey

Sat Below: Modarelli, U.S.D.J.

APPENDIX TO APPELLANT'S BRIEF

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William Miller—for Defendant Milmar Estate—Recalled—Cross

Grosman will go along with it. He said a few minutes ago he will do it.

Mr. Grosman: If he is referring to the records upon which we started this new suit, we will be glad to produce it. We offered to produce it. The record will show we did.

Mr. Brigadier: Bring those in tomorrow.

The Court: Bring them in.

Mr. Brigadier: Okay.

(Discussion off the record.)

(439) *By Mr. Grosman:*

Q. Now, Mr. Miller, you say that you and Marcus were partners in the purchase of this Marden property? A. I said we acted as partners.

Q. Are you sure about that? A. Yes, sir.

Q. Did you ever make a contrary statement? A. Not to my knowledge, I don't, no.

The Court: Well, here it comes.

Q. I direct your attention to page 30 of your deposition taken in this case, commencing Friday, September 10, 1954, and direct your attention to the following statement made by you, "Of course, it wasn't necessary to have a dower, because we never bought this as partners, we bought it with the intention of turning it over to a corporation."

Does that refresh your mind? A. Yes.

Q. And still say that you bought this property as partners? A. That's correct.

Q. Well, Mr. Miller, I direct your attention to the 14th day of September, 1948, is it my understanding that all of the papers were to be turned over to Judge Lieberman to be held by him—all of the papers signed that (440) day? A. I believe I heard Judge Lieberman testify—

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. You were there; you know, don't you, what happened? A. And I know what happened. And I told him, I testified that I didn't know any of the transactions that were going on, I had come with an attorney, and I said so in this deposition, I had arrived with an attorney, who I had confidence in, who had handled a few things for me before, and I was positive, and I made a statement to my attorney, in front of Mr. Marcus, in front of Mr. Marcus' attorney, Mr. Schwartz, and I told them, plain words, the only way I speak, that when we get through with this transaction, when we close this deal, that Marcus—make sure that Marcus is out of this thing lock, stock and barrel, that I never see him again, that he has nothing to do with me.

The Court: All right. You don't have to say that any more, because—

The Witness: I am sorry, your Honor.

The Court: —it's been said about 50 times now. Now, the question is, that was put to you—

The Witness: Yes, I am sorry.

The Court: And give it to him again. And just answer that question.

(Question read as follows: "Well, Mr. Miller, I (441) direct your attention to the 14th day of September, 1948, is it my understanding that all of the papers were to be turned over to Judge Lieberman to be held by him—all of the papers to be signed that day?")

The Court: Can you answer that?

The Witness: No, I can't answer that.

The Court: If you would pay attention to the questions, you would do much better.

The Witness: I am sorry, your Honor.

William Miller—for Defendant Milmar Estate—Recalled—Cross

By Mr. Grosman:

Q. Even though you were there, you can't answer that question? A. No, I know that there were certain papers turned over to Judge Lieberman.

The Court: Why are you explaining when you can't?

The Witness: I am sorry, your Honor.

The Court: What's unusual about that? I have represented clients—I tell them to sign and they sign. They relied on my integrity as a lawyer. They couldn't tell you at the end of the deal what they had signed. That goes for millionaires and college men that I have represented. Why do you have a lawyer?

And when you don't know, say you don't know, and answer when you do know.

(442) The Witness: I am sorry.

The Court: He only wants to know what you know,

By Mr. Grosman:

Q. Now, were you supposed to turn over to Judge Lieberman, in escrow, the stock—your stock in Milmar Estates, Inc.? A. Judge Lieberman handled—

The Court: Yes or no.

A. No.

The Court: If you don't know, you don't know.

Q. Were you supposed to turn over your stock in Bill Miller's Riviera, Inc.? A. Only 50 per cent of my stock in Bill Miller's Riviera.

Q. Did you do that? A. Yes, I did.

Q. How many shares? A. I don't know. The Judge took care of it.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. You don't know how many shares of stock you had in Bill Miller's Riviera, Inc.? A. I believe we had a hundred.

The Court: Who is "we" now? He asked you what you had, not "we." How many shares did you have?

The Witness: I had 99. I answered that, your Honor, ten times to him.

The Court: You say "we."

(443) The Witness: Ninety-nine and one share was my brother-in-law. I answered that before. That's what I meant, "we."

Mr. Grosman: If you did, I didn't hear you. It's the first time I heard about your brother-in-law.

The Witness: Abe Vine. I testified to it.

The Court: Yes, a man by the name of Vine.

The Witness: Abe Vine. I mentioned his name.

Q. What else pertaining to Bill Miller's Riviera, Inc., was supposed to be turned over to Judge Lieberman in escrow on September 14, 1948, besides the 50 per cent of the stock in the Riviera? A. Only the papers that were listed on a long thing. I don't know. Judge Lieberman took care of that.

Q. Did you understand the purpose of putting these various documents in escrow with Judge Lieberman? A. Yes, I did.

Q. What was the purpose? A. The purpose was that Samuel Marcus had $95,000 still due him and that they were putting in these papers—part of these papers—whatever he was to get back in case of a default, only, so that he could turn these papers back to him if there was a default. That's from what I understood, from what the Judge told me. In the event there was a default, it was a certain part of the papers.

William Miller—for Defendant Milmar Estate—Recalled—Cross

(444) Q. Was he supposed to get back only a part—when I said "he," Sam Marcus—only a part of the papers that were escrowed with Judge Lieberman in the case of a default? A. No, he was supposed to get all the papers that were in escrow. But all the papers that were in escrow were not—that were signed, were not put in escrow.

Q. Why not? A. Because he had no part of them. He only had part of a certain part of the papers. Whatever the Judge thought was necessary, that's the way he handled it.

Q. Were you given any stock in Milmar Estates, Inc., that day? A. Yes, I was.

Q. How many shares of stock did you receive that day? A. I received all the stock of Milmar Estates. My understanding was that I am in complete control, to handle this company as I see fit, and do with it as I see fit. That's what we talked about. That's what we said.

Q. Even though there was still $95,000 due to Marcus— A. That's correct.

Q. —you were to be placed in complete control of Milmar Estates? A. Correct, unless there was a default, then Judge Lieberman (445) had certain papers that we had all talked about, that he had agreed with Mr. Marcus' attorney, and Mr. Marcus, that would be returned to him. But from that day on, when I left, the Judge says, "Good luck. You are now in complete charge of Riviera."

Q. Even though Marcus still had $95,000 coming to him? A. That's right.

Q. Did you proceed to take complete charge, you and your associate? A. Yes, we did.

Q. Of Milmar Estates, Inc.? A. We did.

Q. You took over the bank account, took over the books, took over the assets? A. We took over everything that the Judge told me to do. Whatever he told me was necessary to take, we took it.

William Miller—for Defendant Milmar Estate—
Recalled—Cross

Q. I am not asking you what the Judge told you to do, I am asking you what you did. A. I did nothing.

The Court: If you know.

A. (continuing) I went home.

Q. Well, when you came out of your home—I assume you eventually came out— A. I went to the Riviera. I am sorry.

(446) Q. When did you have anything further to do, after September 14, 1938, with the affairs of Milmar Estates? A. A few days later Mr. Kevelson, myself—

The Court: Mr. Bierman.

The Witness: No, Mr. Bierman wasn't there, your Honor.

A. (continuing) Mr. Kevelson and myself, Judge Lieberman and Mr. Kevelson's accountant, who is in court—it shows you how I know names; I can't even think of his name—and we were all upstairs—

Q. What are you trying to do, make yourself out to be a perfect fool, is that it? A. No, maybe you may think so, but I don't think—

Mr. Brigadier: I object to that characterization.

The Court: That was said to a senator while he was being investigated. He didn't mind it. He was re-elected the next time by a bigger majority than he ever had before. The people thought more of him than the lawyer did who questioned him.

Try to be as responsive as possible.

He just wants to show us that he doesn't know Mr. Bierman's accountant's name now.

The Witness: No, it wasn't his accountant. It was Kevelson's. Sometimes I can't think of names. You meet so many people that you just can't think of them.

William Miller—for Defendant Milmar Estate—Recalled—Cross

(447) The Court: I think you do meet an awful lot, more than we ever do, that's sure, in your line of endeavor.

By Mr. Grosman:

Q. Now, what was to happen in the event of a default? A. In the event of a default?

Q. Yes. A. My attorney, Judge Lieberman, had certain papers in escrow. All would speak for themselves, that he was to give them to Marcus.

Q. What was to happen to the assets of Milmar Estates, Inc., in case of default, who was to own the stock of Milmar, who was to own the assets?

The Court: As you understood it.

A. As I understood it, your Honor—

The Court: That's all you can tell us.

A. As I understood it, in the event of a default, here is what was supposed to happen. Marcus was to get back 625 shares of stock. I was to get whatever money Mr. Kevelson—he had collected from Mr. Kevelson, I was to get 37½ per cent. Then there was a note that I was—he was supposed to get back the note of fifty thousand, which I was supposed to pay $500 a week until the entire fifty thousand was paid. And when that money was paid, I still—when I say "I" I am talking about Bierman and (448) myself—owned 50 per cent of the stock and the other 50 per cent reverted back to Marcus.

Q. That is what is supposed to happen? A. That's correct.

Q. In the event of a default? A. Yes.

Q. Are you sure about that? A. I am positive—well, I am not sure—as far as I understand. That's what I thought.

William Miller—for Defendant Milmar Estate—Recalled—Cross

But my lawyer, Judge Lieberman, who I had all the confidence in the world in, took care of that, I am sure.

Q. I see. Now, how about the Riviera stock that was placed in escrow, what was to happen to that in case of a default? A. I imagine that that was supposed to be security on the note, in the event that I didn't pay the note. That's what I imagine.

Q. What note?

The Court: You mean that's what you think, not imagine.

A. That's what I think. I am sorry. I used the word "imagine" when I say "think." When I use the word "think," I say, instead of "think," imagine.

Q. What note are you referring to, the $50,000 note? A. $50,000 note.

(449) Q. As I understand it— A. I am sorry. I don't know offhand whether it was the $50,000 note or the $15,000 note. But I know there was some payments due of $500 a week. The Judge explained it to me. At this particular time I don't remember what particular note it was. It was one of the notes.

Q. Was that agreement reduced to writing, in any of these writings? A. Yes. All the agreements—

Q. You were to pay $500 a week on account of some note? A. I'm sorry. Everything that happened on September 14, we have papers, and if you check the papers, or let my attorney check the papers, they will tell you what was supposed to happen.

Q. Don't you know that the agreement of September 14, 1948, was that in the event of a default Marcus would own all of the stock of Milmar— A. No, never own it all—

Q. —and all of the stock of the Riviera? A. No, he never owned all the stock of anything.

The Court: That's not the question.

William Miller—for Defendant Milmar Estate—Recalled—Cross

The Witness: I'm sorry.

The Court: You are not paying attention to the question. He didn't ask you whether he ever owned—

(450) The Witness: I didn't say that. He said wasn't he supposed to own?

The Court: In the event of a default, Judge Grosman said, then he asked the question.

The Witness: Yes.

Q. Well, now, is that your answer? A. Beg pardon?

Q. Is that your answer? A. What is the question?

Q. In the event of a default— A. I didn't hear the question.

The Court: Now pay attention to it.

Mr. Grosman: Will you repeat the question?

(Record read.)

The Court: You keep putting it in the past tense. That question doesn't call for the answer that he never owned anything. What Judge Grosman is trying to find out, do you know, if you do know—you have to assume the question he puts is based on fact—that under that agreement it provides that if you were to default that Mr. Marcus would then become the owner of all the stock, one, in Milmar Estates, Inc., and the other in Bill Miller's Riviera. Now, that's a simple question. Did you know that?

The Witness: I know, your Honor, but that isn't the truth.

(451) The Court: All right.

The Witness: It's not the truth.

The Court: You answered, "He never owned—"

The Witness: I'm sorry. It's not the truth.

By Mr. Grosman:

Q. All right. Now, you understood very clearly the ques-

William Miller—for Defendant Milmar Estate—Recalled—Cross

tion as repeated to you by His Honor? A. That's correct.

Q. And you say that it was never the intention of yourself, Bierman, or anybody else that Marcus was—in the event of a default under the agreement of September 14, 1948, Marcus was to become the owner of all of the stock of Milmar and all the stock of the Riviera. A. That's not so.

Then, as I take it, in the event of a default, you were to retain—you and Bierman were to retain 625 shares of stock of Milmar? A. Judge Grosman, I can better answer that question by saying that the papers speak for themselves.

Q. Well, don't you know? A. Yes, I know that we acted as partners—

The Court: You said that already, that you were supposed to get 625 between you and Bierman.

The Witness: Right.

The Court: Is that so?

(452) The Witness: Yes.

The Court: How about the Riviera stock, what was supposed to happen to that?

The Witness: The Riviera stock, he was supposed to hold that in escrow, according to my understanding, until the note was paid. But I don't remember whether it was the $15,000 note or the old note. I don't remember which note it was.

The Court: Collateral security, they call it.

The Witness: That's right. Whatever it was. For security, because everything—all he has to do is read the papers, your Honor.

The Court: He can read them, but he wants to ask you.

The Witness: Oh.

The Court: To see what you understood. That's very important, by the way.

William Miller—for Defendant Milmar Estate—Recalled—Cross

By Mr. Grosman:

Q. In the event of a default—

The Witness: Well, I didn't intend to default, your Honor.

Mr. Brigadier: Why don't you wait until the question is put?

The Witness: I'm sorry. I am just talking to the Judge, because I want to explain myself.

(453) The Court: I don't think you did. Nor am I concerned with what you intended to do about defaults.

The Witness: No, I didn't.

Q. In the event of a default, under the contract of September 14, 1948, wasn't Marcus to become the owner of the Riviera? A. No.

Q. Now, will you listen carefully to the next question? A. I will.

Q. I direct your attention to the question propounded to you in the deposition examination in this case on page 95—

The Court: We will take a little recess now.

(Short recess, after which an adjournment was had until 11 o'clock a. m., Friday, January 28, 1955.)

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(454) Newark, N. J., Friday, January 28, 1955.

(Hearing resumed pursuant to adjournment.)

(Appearances as previously noted.)

Mr. Tepper: May it please the Court, I have a suggestion to make which I think may be of assistance to the Court in expediting this case.

Colloquy

My suggestion is this, inasmuch as we only have one and a half hours before recess time, and since I understand counsel did bring the books of the Riviera into this courtroom this morning, that it may be well to utilize that hour and a half in the examination of the books insofar as they would assist counsel in cross examining Mr. Miller, and for no other purpose.

I am mindful of your Honor's ruling, and I am mindful of the argument of opposing counsel in this matter, namely, that at this stage of the game they feel that perhaps we are not entitled to look at the Riviera books.

Your Honor will recall my argument of yesterday that anything and everything which they have and which will assist the Court should be produced, because as you have put it time and time again, we are on the equity side of the Court and we are sitting here without a jury, and you are entitled and (455) should have the benefit of any and all information which could in any way have bearing upon this case.

And so I apply to your Honor for leave to examine the Riviera books for the purposes I outlined and thus consume this hour and twenty minutes before going into further examination of Mr. Miller.

The Court: Well, do you really feel that you need the information from the books in order to properly cross examine Mr. Miller?

Mr. Tepper: Yes, sir.

Mr. Grosman: I think so. Considering the fact—

The Court: You will be heard. I never saw such eagerness to jump up. Do you think I would foreclose you without hearing you?

Mr. Tepper: Your Honor will recall Mr. Miller's testimony. In his testimony he referred to Bill Mil-

ler's Riviera, to the Embassy Club in New York, and other statements which at this point would require us to examine the records of the Riviera, perhaps only up to a certain date as of now. It may be that your Honor will determine that as of now we are not entitled to go beyond a certain date, and in that connection I will not press the point too vigorously, although I believe we should examine the records right down to date, and there could be no harm come to the plaintiff or to the defendants, or to anybody.

(456) But surely we are entitled to examine the records of the Riviera operating company, that is, the company operating the restaurant, surely down to the date of September 14, 1948, at this time.

And so I say to your Honor, as I represented yesterday, that this is important to our examination. I know your Honor has given counsel on both sides great latitude. Your Honor has been very generous with the time of the Court. And I say that if you would afford us this opportunity, it is in the interest of justice and it is in the interest of bringing all of these facts to the attention of the Court.

The Court: Is there any objection to their examining the books to September 14?

Mr. Grosman: May I say this, if the Court please, I feel, in cross examination of Mr. Miller, particularly in view of the fact that he seems to be a man completely without memory as to most of these details, unless we can show him something concrete—

The Court: That certainly is patent, by this time.

Mr. Grosman: —and I think we ought to be permitted to examine the books of this company, both prior to and after September 14, 1948, for this reason. The testimony, I think, is very clear that his contention was (457) that this company was on the verge

of bankruptcy. As a matter of fact, I think they filed a petition for reorganization.

The Court: You mean the Riviera Corporation?

Mr. Grosman: Yes. Now, the Milmar Corporation, the owner of the realty, was wholly dependent upon the tenant corporation with which to pay their amortization charges.

Now, we have a right to examine the books for the purpose of verifying this man's statements, both before and after, because if this company was broke on the books, prior to September 14, and immediately after, as he says, he got Marcus out of his hair, it certainly boomed. There ought to be some inference drawable from that situation. So I ask your Honor to permit us to examine the books.

The Court: Now, Mr. Brigadier, you have heard both applicants.

Mr. Brigadier: If your Honor please, I do not speak for Bill Miller's Riviera. As your Honor knows, it is represented by Mr. Chazin.

I speak for Milmar and therefore I do not speak to the point as to whether or not they should examine the books, or look at the books. I speak to only one thing, that there is no reason whatsoever why the cross examination of Mr. Miller should halt at this particular point.

(458) Mr. Tepper says that this is a case in equity and great latitude should be allowed, and everything should be looked into. I agree. At the proper time and the proper place. There is order and logic even in the trial of the case. We are trying one issue right at this moment, and that simply is: What was the transaction of September 14, 1948?

From 11:26, which was noted by your Honor yesterday, until 3:15 yesterday afternoon not a singl-

question was put to this witness which had anything to do with the testimony covered by him on direct examination. I stated then, and I state now, I didn't object because I sensed that it was your Honor's feeling that a broad latitude should be afforded. But there comes a time when you finally have to get down to cross examining on the issue in the case. I thought we had arrived at that at 3:15 yesterday afternoon.

The issue that we are trying is: What happened in August and September, 1948? And that is all I am addressing myself to. And I say for that purpose there is no reason why the cross examination should be interrupted.

Mr. Grosman: If it doesn't do anything else, it goes to this man's credibility. While I understand that your Honor takes a very generous view of this man's apparent lack of memory, I do not agree with you, with all due respect. This man, if anything, should have a better memory than the (459) average man, because he is a professional handshaker. He is supposed to know thousands of people who walk into his place. And he doesn't remember a friend of many years' standing, who loaned him money. That's the kind of stuff he is trying to sell us.

The Court: Well, do you see what evil motive he might have in denying his acquaintanceship or his knowledge of Mr. Black? What purpose he might have?

Mr. Grosman: I don't know, except that he is so accustomed to say, "I don't remember," he keeps on saying, "I don't remember."

The Court: That's the only motive you can ascribe?

Mr. Grosman: Well, I could ascribe others, your Honor, but I—

Mr. Abraham Chazin: If your Honor please, Mr. Marcus testified at the depositions, when he was

asked, "What are the facts of the fraud?" said, among other things, "I don't know until my lawyers find out from your witnesses."

Now, it was just to meet that sort of a situation that the Courts have held—and as Mr. Brigadier argued, also, in connection with some other examination—it was held in the case of Fishman versus Marcouse that before "sweeping discovery" is granted the party seeking it "must somehow convince the Court that there is, at least, reasonable (460) ground to believe that a cause of action exists, and can be proved if the necessary facilities are afforded."

I believe, therefore, under proper procedure, in accordance with the decisions, after Mr. Marcus has put forth his case, if he shows your Honor that there is a reasonable probability that he can prove a case, then I think that would be the proper time for your Honor to rule on this very broad discovery.

The Court: Well, I know there has to be a showing of good cause. You just can't go snooping through anybody's books, unless you show good cause. And certainly if this man claims he was induced by fraud to enter into this contract, he certainly should knew before he looks at the books, generally, what the fraud was. I wouldn't expect him to know the details, I grant that, but he should know generally what the fraud was.

Mr. Tepper: This is not a case of snooping around anybody's books. This is not a case of a stockholder of A. T. T. & T., or the Telephone Company, coming to the office of the company to examine the books, although the cases are numerous where even a stockholder of one share can come in and look at the books of a corporation.

The Court: Upon a showing of good cause.

Colloquy

Mr. Tepper: Yes, sir. But here is a situation where, as I understand it, in answer to the argument of (461) opposing counsel, that we are talking now about September 14, 1948. I must call the Court's attention to the fact that the orderly trial of this matter was prescribed by your Honor, namely, that they go forward with their interpleader. This is the interpleader suit.

Mr. Brigadier: Oh, no.

I'm sorry. I didn't mean to interrupt.

Mr. Tepper: And your Honor said that that was the way it should be done, and that is the way we are doing it.

True, that in trying the interpleader matter, there will be other information and other testimony which will go into the record which would have a bearing on the other case. You just can't separate it down to—

The Court: They are too closely related.

Mr. Tepper: But it is of the utmost importance that this man who, through the testimony of Mr. Miller—by his own lips, his own testimony, wasn't out of this case, he still retained an interest in both of these corporations, and as the depositions will show, was entitled to receive, upon default, complete possession, 100 per cent control possession of both Milmar and the Riviera operating company. That's his testimony.

Now, under these circumstances, and in view of the (462) witness' testimony, in view of his denials, in view of his hazy memory, and that we will allude to in the future, and this isn't the time to do it at this moment, we will have an opportunity to sum up, I am sure—in view of all these things, why do they protest the examination of these records at this time? He testified that Marcus had full control and had these books up to a certain date, to the exclusion of everybody else, was his testimony. We want to refresh our recollection, if nothing else.

Colloquy

The Court: That's why I don't see any harm in permitting you to look at the books up to and including September 14, 1948, when this man's testimony is that he knows nothing about them, he had nothing to do with keeping them, and, if anything, Marcus is responsible for whatever is in those books, through Marcus' accountant. He emphasized that, that Hoffman was Marcus' accountant, and not his.

Mr. Brigadier: If your Honor please, I think we are going to get confused here, because I notice Mr. Chazin got up to answer you. Understand, I am not raising any issue about what you have spoken to. I am directing it merely to the proposition that, for the purpose of completing the cross examination of Mr. Miller on what was brought out by direct, that the cross examination should not be interrupted at this point.

(463) The Court: I understand.

Mr. Brigadier: You asked point blank why, and he gave you the answer. Credibility. Is that a reason to interrupt the cross examination?

As far as the other is concerned, I feel, frankly, I have no position. This is their problem, not mine.

Mr. Abraham Chazin: If your Honor please, as far as the other problem is concerned, I think they are groping for straws. It is evident, because through all their pleadings, through all their affidavits, they have two statements of fraud—one, he told them business was bad, when business was good. And Marcus' own deposition shows that he was there every night. And one of the instruments in evidence, one of the leases he drew, shows that he had the right to examine every particular thing that went into those books.

And the other alleged charge—

The Court: You needn't argue that. I am convinced that Mr. Marcus knew more about the books prior to

September 14, '48, than Mr. Miller will ever know. I can infer that from what I have heard already.

Mr. Abraham Chazin: I merely want to say this, your Honor. I believe that in accordance with orderly procedure, and probably—

The Court: That is all I am concerned with at (464) the moment.

Mr. Abraham Chahzin: Yes. And I think it is in accordance with your Honor's first reaction yesterday, that Marcus should first show reasonable cause by putting in his case before he is entitled to probe into the books of Bill Miller's Riviera.

Mr. Tepper: It was only in the interest of saving time that I made the suggestion. Apparently it has the reverse effect.

The Court: Yes.

Mr. Tepper: I said we had an hour and twenty minutes. And in an hour and twenty minutes to go through this testimony, the man's depositions, will result in not a completion and our being unable to complete the cross examination.

However, if we took this hour and twenty minutes now to look at that which he says Marcus always knew—and they do not deny the statement, or nobody does, the statement of Mr. Miller himself—then why shouldn't we have this hour and twenty minutes, if only to refresh our own recollection about what we want to do in connection with the cross examination?

This is supposed, they say, to be knowledge that we have.

The Court: You know what I am thinking of now. (465) I don't know what you can do with the books in an hour and twenty minutes, or ten minutes. I know these reorganization proceedings—it seems that after I appoint the accountants, it takes months to find out what I thought they could find out right away.

Colloquy

Mr. Tepper: If it should develop that in an hour and twenty minutes we cannot accomplish our purpose, of course, we still reserve the right, as your Honor has given us that right, to make further application to go into the books beyond September 14, 1948, if it should become material. So what harm is there in our examining these books for an hour and twenty minutes now? Nobody can get hurt. Right in this courtroom, nobody can get hurt. We are not removing the records.

The Court: So the only question now is how to use this hour and ten minutes productively. I am inclined to think it would do more good to have them look at the books now for an hour and ten minutes, up to September of 1948.

Then I shall allow it.

Mr. Brigadier: Your Honor understands that all I was concerned about—

The Court: I understand.

Mr. Brigadier: —the cross examination should go on.

(466) The Court: I was just wondering what would do the most good now.

This session is not as yet adjourned. We are just going to suspend for a while now. It may be that after they go and look at the books a while they may change their minds and say they can't do much, and then we will finish up. We will just suspend for a while.

(Recess.)

The Court: I understand that they will be at the books till one, and later, so I see that no useful purpose will be served in keeping witnesses and other counsel here. I am sure you have something better to do. So we will adjourn the trial till Monday morning at 10:15 o'clock.

Colloquy

(Whereupon, at 12:23 P. M., an adjournment was had in the above-entitled matter until 10:15 o'clock A. M., Monday, January 31, 1955.)

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(467) Newark, N. J., Monday, January 31, 1955.

(Hearing resumed pursuant to adjournment.)

(Appearances as previously noted.)

The Court: We recessed last Friday so that you could look over the books of the Riviera. Any report as to that chore?

Mr. Tepper: Yes, sir. There was only produced, in Judge Fake's library, one book, and that book of the Riviera Restaurant Company ran from April 1, 1948—and I presume to September 14, 1948.

This, in my judgment, was very singular for the reason that on two previous occasions we appeared before this Court and made argument to persuade this Court to give us an order for the examination of these books. Now they tell us they do not have the books. Upon inquiry, "Have you lost the books?" the answer is still, "We do not have the books." "Have the books been destroyed?" the answer is still, "We do not have the books." "Have the books been misplaced?" "We do not have the books."

Now, I submit to your Honor that it was bordering on the ridiculous for us to have had this argument before your Honor and have them argue that we were not entitled to (468) have these books, and that we haven't made sufficient showing to so entitle us, when all the time they knew, or had cause to know, that their answer was going to be, if your Honor did give us an order compelling them to produce these books, that, "We do not have the books."

Colloquy

Now, we are seriously handicapped in cross examination at this time, and in other features of our case. And so I believe your Honor should have some explanation as to why these books aren't here. Surely, no businessman, knowing that this case was going on, and has been going on for some four years, and prior thereto there was reason to believe there was going to be difficulty, would have misplaced these books or destroyed these books.

And so I believe that your Honor should direct that the books from the inception of this Riviera Company, down at least to September 14, 1948, when the contract about which this suit is, should be produced. I don't understand it, frankly.

The Court: Well, I understood that they would be produced, that's what I understood.

Mr. Abraham Chazin: If your Honor please, I am not surprised at this innuendo, because we have been getting that all the way through.

I am informed that the books from April 1 are the only books that are in existence. They were produced, in very, (469) very strong contrast to Mr. Marcus, who, according to Mr. Tepper's standards, should have books, but who said to us the other day in court—and if I am wrong, I would like to be corrected—that they haven't been found up to this date. A man of many businesses, of many accountants, but no books. I am informed that the books which are in existence are from the first day of April of '48, and those have been made available.

The Court: Are they the only books the corporation has?

Mr. Abraham Chazin: Yes, from '48, right down to the date they suspended business.

The Court: Well, am I to infer from that that there never were any other books?

Mr. Abraham Chazin: There were other books.

The Court: Have they been destroyed, misplaced, or what?

Mr. Abraham Chazin: My understanding is that they were not destroyed, but they cannot be found. They have been out of business now for a year and a half or so, they are no longer in those headquarters, and I understand that these are the only books that are in existence.

The Court: Well, if they are the only ones, I don't know what they can do about it.

Mr. Tepper: Is it an argument for counsel to say—(470) and I don't see that it could be any answer—that Mr. Marcus—

The Court: No, I am not interested in what Mr. Marcus did. When we get to Mr. Marcus, we will take care of him, if he doesn't have any books and can't explain them.

Mr. Tepper: All right. Now, it seems to me that counsel's client, Mr. Chazin's client, should make a little better explanation to this Court than to say that they stopped doing business a year and a half ago and the books aren't here There should be some better lead for us to follow up than just that.

Where were the books last? Who had them in his custody? What did he do with them?

This raises great suspicion. And it isn't innuendo, it is a direct charge that I make, no innuendo. It is a direct charge that unless they come forward and say that Mr. X had these books last, he had them at such and such an establishment, that establishment burned down, or we removed all the goods from that building to some warehouse somewhere, unless they do that, there is bad faith on the part of the client somewhere, not counsel. I have every confidence in Mr. Chazin,

and I wouldn't, under any circumstances, reflect upon counsel in any fashion whatsoever. But clients of counsel should explain this to the Court, not (471) counsel. And it isn't enough to say, "We don't have the books."

The Court: Well, shall we interrupt the trial now to interrogate those who should know?

Mr. Tepper: I would appreciate it.

The Court: Since there are so many charges, and countercharges, and cross charges made in this case of bad faith, constantly, now that we have got our teeth into one of them, let's find out what happened to the books.

Mr. Grosman: May I also call your Honor's attention to testimony given by Mr. Miller, on page 72 of his deposition, that the books—I am not quite clear, because it is all broken up here.

"We had all the books. But I said I don't know what happened to them from last October.

"Question: I see.

"Answer: Since the Riviera moved.

"Question: From October, 1953?"

Now, as I understand his testimony, these books were available as late as October, 1953. He first said, I think, that he didn't remember what happened to the books, and I called his attention to the fact—he said they were through with the books and for that reason didn't keep them—but they still had the condemnation proceedings on in which, (472) the probabilities were, they would require the books. And then he gave this testimony—I don't want to take the Court's time now to read it, but it runs from page 71, from the middle of 71, to 72 on in his testimony. He said that the books of Milmar—

Mr. Miller: I shook my head.

Mr. Brigadier: That's what he said.

The Court: Let's see about the books of Bill Miller's Riviera.

Mr. Grosman: As I understand it, all of the books were available as late as October, 1953. They have been in charge of his secretary, a girl name Nicki, and Mr. Hoffman, his accountant.

Now, I would like to have your Honor look at what they produced for books, for a concern doing millions of dollars worth of business. May we have that ledger that you produced?

Mr. Brigadier: I would like to be heard. You say I have no right to be heard because it involves Bill Miller's Riviera, but it involves the interruption of this examination—

The Court: Oh, yes.

Mr. Brigadier: —and I have a right to be heard.

Now, he just stated to you that he can go through pages of this and show that we had the books as late as (473) October, 1953. Why didn't he read what the man said? I would like to read it, just two lines.

"And at that time you had no books of Milmar Estate, Inc.?

"We had all the books. But I said I don't know what happened to them from last October till now."

Did that "October" refer to Bill Miller's Riviera? You just heard me read that line. Yet, that is what you were just told, that he testified that he had all the books, including Bill Miller's Riviera until now.

The Court: Well, let's not get into another stupid argument between counsel. The books should be accounted for. If they don't have them, we should know where they were last seen. What happened to them? Who had them last? That's all I am interested in.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Mr. Brigadier: Why not let's account for them during the taking of this testimony. Here is one man on the stand. I am going to call every witness. He can ask every witness the question about those books, instead of interrupting this case on a collateral, because that is exactly what will happen each day, there will be another collateral on which we will interrupt the case and never get the case tried.

All I know about it is what you heard, what Mr. Chazin got from his client.

The Court: I am sure of that.

(474) Mr. Tepper: Why should Mr. Brigadier, who has no interest in that, object to the Court's suggestion, that we have our teeth into one thing, let's pursue that now. Let's find out for the record now—where are the books? What happened? Let them account for the custody of them.

And I would suggest to your Honor that this is the best procedure now, since it is the one thing which will, I believe, clarify perhaps a lot of the things that have been going on here. So I would suggest, your Honor—if your Honor would follow the procedure outlined by you just a minute ago—let's put the accountant on the stand, let's find out from the officers who had the books last, and account for the custody of the books down to the present time. That's the best we can do at this moment.

The Court: That's the best you can do, is right. Well, Mr. Miller is on, start with him.

William Miller, resumed the stand.

Cross examination by Mr. Grosman (continued):

Q. Mr. Miller, did Bill Miller's Riviera, Inc., a New Jersey corporation, have a set of books? A. Yes, they did.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. And do you know who had charge of those books? A. Yes, sir. Mr. Hoffman and Nicki.

Q. You mean Jack Hoffman, the accountant? A. Jack Hoffman, and Nicki, my secretary.

(475) Q. Nicki Moran, your secretary? A. That's correct.

Q. Did you have anything to do with those books? A. I never saw the books in my life.

Q. You never looked at them? A. Never looked at a book in my life.

Q. Now, where were these books kept? A. They were kept at the office of the Riviera.

Q. And where were they worked on by Jack Hoffman? A. I am sorry. I am answering too fast. I don't know whether they were kept, up to the time Marcus was in charge, at the Riviera or at his office, because I never saw a book to this day. And I don't want to say it like I am stupid, but I used to get a slip—I would like to explain it, if I can, your Honor—I used to get a slip of paper from Nicki every night. And on this night—we had a system where the cashier would give it to the head cashier, to the checker, to the man at night, who would give it to Nicki in the morning. She knew I didn't look into books, so in order for me to know everything that was going on, at the finish of the night, or the morning when I came in, there would be a letter—a note on my desk, a paper, and it would say, "Balance, $15,000; due dealers, so much; how much shall I pay dealers; how much percentagewise," everything. And from this slip I would work.

(476) But actually looking—or worrying about the books, I never saw them in all the years I was at the Riviera.

Q. All right. Now, let me ask you this. You don't know where the books were kept? A. No, I don't. I think Marcus may have had them all the time up to '47.

William Miller—for Defendant Milmar I state—Recalled—Cross

Q. We are talking about the books of Bill Miller's Riviera. A. Marcus, I think, had them up till the time—up to the time that he was in the thing. Not actually in his office, but I think he had them in his possession, with Hoffman. He is the one that looked in the books. I didn't.

Q. Marcus stepped out of the Riviera when? A. I think it was at—when the bankruptcy, whatever the date of the bankruptcy, when we went into Chapter XI, then he stepped out at that time.

Q. And that was some time in '47? A. I believe so. I believe the records will show that.

Q. Now, after Marcus stepped out, assuming he had the books of the Riviera, who had the books? A. They were at the Riviera. The '47 books would be at the Riviera. What time did he step out in '47, then I can tell you more. What month in '47 did he step out?

Q. In January, '47, as I understand it. A. He stepped out in January, '47?

(477) Q. Yes. A. Then the books for '47 would have been at the Riviera, for '47. I don't know what happened before that, but the '47 books would have been at the Riviera.

Q. Now, to your knowledge, Mr. Miller, were any books of Bill Miller's Riviera ever destroyed? A. I wouldn't know. I never saw the books or handled them.

Q. Did anybody consult you with reference to the destruction of the books of Bill Miller's Riviera? A. No one would consult me, because they knew I knew nothing about it.

The Court: Did they?

The Witness: No.

Q. Who, to your knowledge, last had possession of these books after Marcus stepped out? A. Hoffman. I would imagine that Jack Hoffman did. He had the books.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. Did you have the books available in connection with the condemnation proceedings? A. I don't know.

Q. You don't know? A. No.

Q. Did you have the books available in connection with the bankruptcy proceedings of Bill Miller's Riviera? (478) A. I imagine. I wouldn't know.

Q. Do you know whether they were turned over to a creditors' committee? A. Beg pardon?

Q. Do you know whether they were turned over to a creditors' committee? A. I wouldn't know.

Q. You wouldn't know anything about it? A. No, I wouldn't know anything about the books.

Q. Now, who was the accountant in the reorganization proceedings? A. I think Hoffman.

Q. Well, did you have any other accountant? A. No, no one else.

Q. So it must have been Hoffman? A. That's correct.

Q. And Nicki Moran, your secretary? A. That's correct.

Q. Do you know where Nicki Moran lives now? A. I tried to get her, because she would be very valuable to me. I would love to have her, to tell the truth of what went on with this man. But Nicki is having a baby any day now. And maybe a week, or two weeks, or three weeks, and she could verify everything I said. And I have asked her to come over, but she can't, because she is having a baby (479) and I wouldn't ask her to come, when she is having a baby and is in that condition.

Q. Where does she live? A. She lives on Long Island.

Q. Do you know her address? A. No, I do not, but I can find out.

Q. Well, how did you communicate with her? A. I called her on the telephone. I have her number. I said I have her number and I will be glad to give it to you.

Q. Will you give us her telephone number? A. Very happy.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. Let's have it. A. I haven't got it with me. I have to look it up.

Have you got Nicki's number, Jack? Do we have it at the office, or would it be somewhere? I think it's in the phone book, in the Long Island phone book.

Q. Is her name still Nicki Moran? A. No, she is married. I will get the number. I haven't got it on me, but I will bring it in.

Q. Is it Mickey or Nicki? A. Nicki, N-i-c-k-i. I wish you would bring her in, please.

Q. Now, when are you going to get this name for us? A. Tomorrow. Or maybe later this afternoon. I will look (480) it up.

Q. And the address. A. Yes. I don't know about the address, but I will call her on the phone and get the information.

Q. Just to get the record straight, and to show that I am not deliberately trying to mislead the Court, as has been insinuated here, I direct your attention to page 74 of your deposition testimony and ask you whether you were questioned about the books of Bill Miller's Riviera at that time—do you remember being asked this question and giving this answer:

"Question: And do the books of Bill Miller's Riviera show that?

"Answer: I imagine they would.

"Question: Who handled the books of Bill Miller's Riviera?

"Answer: Jack Hoffman.

"Question: He is the gentleman sitting here in the room with us?

"Answer: Yes. That's Mr. Marcus' accountant.

"Question: You mean he gave you this accountant?

"Answer: Yes.

"Question: He is not his accountant now.

"Answer: Not now," and so on.

Do you remember being asked about the books of Bill (481) Miller's Riviera? A. That's correct.

Q. And were they in existence at that time? A. I don't know.

Mr. Grosman: I think that is all, with respect to the books. I would like to examine Mr. Hoffman.

The Court: I think we should, right now.

JACOB HOFFMAN, called as a witness, being duly sworn, testified as follows:

The Clerk: May we have your full name and address?

The Witness: Jacob B. Hoffman, 153 High Street, Closter, New Jersey.

The Court: You can only be examined on the Riviera books at this time.

Examination by Mr. Grosman:

Q. Mr. Hoffman, you are an accountant? A. Yes, sir.

Q. And were you connected in any manner with Bill Miller's Riviera, Inc., a New Jersey corporation? A. I was.

Q. In what capacity? A. I was the accountant.

Q. When did you become the accountant for Bill Miller's Riviera? (482) A. At the time the corporation was formed, April 1, 1946.

Q. And did you continue to be the accountant for this corporation for some time? A. Yes, sir.

Q. Until when? A. To the present time.

Q. You are still the accountant for the corporation? A. Yes, sir.

Q. Now, did you have charge of the books of the corporation? A. Yes, sir.

Jacob Hoffman—for Defendant Marcus—Direct

Q. Will you tell us what books were turned over to you, or what books you opened—you say you were the accountant from the inception of the corporation—did you set up the bookkeeping system? A. I set up the bookkeeping system.

Q. What books did you set up for them? A. Set up a full set of books, double entry system, sales records—

Q. Will you enumerate them for us? A. Sales records, purchase records, petty cash records, journal, general ledger, accounts receivable ledgers, accounts payable ledgers, loans and exchanges receivable ledgers.

Q. Anything else? A. I think that covers about all.

(483) Q. Now, how often would you audit these books? A. Well, generally—at the inception of this business, being a new business, we—the records take quite a little time to check, but we would keep a daily check on the records. And we would know the condition of the business on a daily basis, weekly basis, and it was really unnecessary for us to close any books, or to balance them. It was kind of busy at that time, starting a new business, taking over a new enterprise, and business was, at that time, bad. We had to watch it very carefully, as I represented both parties in this enterprise. I was not alone the accountant, but I was the one that had to represent two different individuals there, and the information requested from me, personally, was such that it kept me busy practically every day.

Q. So I gather from what you say that you were familiar with the books almost minute to minute. A. Yes, sir.

Q. Now, where did you keep those books? A. We had them at the Riviera.

Q. Any particular part of the Riviera? A. We had them in the files. We kept them in a letter file, locked.

Q. Locked. When was the last time you saw these books? A. Well, we have many books there. Which books are you (484) referring to?

Q. All of the books that you have enumerated, the books of account of the Riviera. A. When did I see them?

Q. Last. A. Well, it's a period of eight years. These books, after they are finished every year, we open up a new general ledger, we start over again, on the fiscal year, which starts April 1 of each year. And we set aside the other books, put them all aside, and start fresh with a—prepare our tax returns, start with our new balance sheets, new figures, and start the new year with a new set of books.

Q. Is that customary, to do that? A. That is customary in this type of business.

Q. Now, any reason why these books were renewed, a new set of books started each year? A. Well, it's customary in most businesses that they take the old set of books, set them aside, close your books, prepare your tax work, prepare your balance sheets, and so forth, and start a new general ledger, and continue right on with a new set of books, I mean starting from page one with the purchase book, page one with the sales records, cash receipts, and so forth.

Q. Were these books bound in permanent form or were they loose leaf? (485) A. Mostly loose leaf.

Q. I show you a ledger—

Mr. Grosman: May I have that ledger?

Mr. Abraham Chazin: I don't know what you are referring to.

Mr. Grosman: The ledger that you produced on Friday.

The Witness: I have them in my bag there.

Mr. Grosman: Would you get them, Mr. Hoffman?

The Witness: Surely.

(Witness leaves stand.)

Mr. Grosman: Would you take your bag with you? You may want something else out of there, Mr. Hoffman.

(Witness returns to the stand.)

The Court: You understand, I am not interested in going into any figures. I just want to know what happened to the books, that is all I want to know.

By Mr. Grosman:

Q. Now, is this the book—is this what purports to be all of the books available of Bill Miller's Riviera? A. No, sir. It is not all of them. We have other books.

Q. You have other books? A. Up to date.

Q. Is this all that was produced on Friday, to your knowledge? (486) A. No, it wasn't. We produced this because these books ended in September, 1948.

Q. I see. There are other books. A. Oh, yes. We have other books. Sure.

Mr. Grosman: May I ask that this be marked in evidence?

The Clerk: As whose Exhibit?

Mr. Grosman: Our Exhibit.

The Court: On their motion of production of books.

The Clerk: In evidence?

The Court: Any objection to it?

Mr. Brigadier: No.

The Court: I have got to decide the motion sooner or later, you know. The books are going to become important.

Mr. Abraham Chazin: I am not objecting to it, but I want to say this, your Honor. I assume that this is an inadvertence on counsel's part, that he means to put this in evidence only up to the date ruled on by your Honor, to wit, September 14, 1948, and what is in the books beyond that date is not to be considered to be in evidence.

Mr. Grosman: It is all they produced, your Honor. We asked for the production of books, and this is what they produced.

The Court: And I only asked them to produce the (487) books up to and including September 14, 1948. I never said a word about a day later. Are you telling me now that there are records in there later than the date in question?

Mr. Chazin: Yes, to tie up with the fiscal year which ends in April of 1949.

The Court: Oh. The evidence will only be up to September 14, '48, at this time. If during the case it appears that you are entitled to more, you will get it.

The Clerk: DM-6 in evidence, ledger book of Bill Miller's Riviera, fiscal year ending March 31, 1949.

(Received and marked Exhibit DM-6.)

Q. Now, do you say, Mr. Hoffman that there are no other books in existence for the period prior to September 14, 1948? A. As far as I know, there are no other books prior to this period.

Q. Well, now, you had the books in your possession. A. Not in my possession, the possession of the Riviera.

Q. Now, you saw them from day to day, as I understood you to say? A. Pardon me. Not 1947, or '46 records, or '48. I saw 1952, '53 and '54 every day. In those days I did see them, at that particular time.

Q. What days are you speaking about? (488) A. I am talking at the time in 1947, '46, when I was in charge there. I had the records, I looked—

Q. And you saw them every day. A. Well, I saw those records that I needed for that particular day, yes.

Q. Well, as I understood you to say, you were familiar with those records almost from minute to minute. A. That's right.

Q. So much so that it wasn't necessary for you to take off a balance sheet at all, because you knew it momentarily. A. Not that I knew it, but I had records made daily. I had memorandums that were shown to the individuals interested, I made weekly reports of funds that were received and disbursed, for the individuals, and for the business. And that's the record I had at that time.

Q. All right. Now, let's see if we are talking about the same period. For the years preceding September, 1948—that would be '48, '47, '46—did you have those books? A. The books—at that time?

Q. Yes. A. Of course I had them.

Q. And you had access to them daily? A. Yes, sir.

(489) Q. When you wanted a book, who would produce it for you, would you go to the file and take it yourself, or would somebody produce it for you? A. We had about four girls employed there, and if I needed anything, why, I would ask for it or take it myself.

Q. Well, now, the books for the years I have mentioned, what became of them? A. Well, in January of 1947, or in April—I think in December, 1946, we went under Chapter XI in bankruptcy. The creditors' committee did appoint an accountant for the court, and before Referee Schenck. They had the records at that time. And their accountant checked the records—had the records in his possession, and still had—as a matter of fact, I remember that in April the Federal Tax Department checked all those records.

Q. April of what year? A. 1947, for the year—for the prior year of April 1 to December, all the records were checked, I believe, by the Federal Tax Department. And the records during the period of Chapter XI bankruptcy matter were also checked. And after preparing the tax returns for that particular year, we put the books away. I put the books away, I suppose.

Q. Where? A. At the Riviera. I mean, I put them away in the file there for a while. We still needed them.

(490) Q. In their usual place, in their accustomed place? A. Yes, in the file—one of the files.

Q. Now, was that the end of the books, is that the last time you saw the books? A. Those particular books of 1947, it was the last time I practically saw them, when I got through with my tax returns at that time, because they were being handled by the accountant for the creditors' committee, also, during that entire period.

Q. Do you remember who that accountant was? A. I think it was a young man by the name of Starr.

Q. How do you spell his name? A. S-t-a-r-r, Alexander Starr, I believe, of Newark.

Q. Alexander Starr? A. I believe that was his name.

Q. Now, those proceedings under Chapter XI were discontinued? A. Yes, sir.

Q. The creditors were paid in full? A. No, sir.

Q. How much were they paid?

The Court: I am not interested in that. I am trying to find out what happened to the books. I certainly don't want to go through the reorganization.

(491) Q. The books, you say. were returned to you? A. Well, I believe they were, because I prepared the tax return. I am talking about the year ending 1947—March 30, 1947.

Q. Now, did you open books fo. the year 1948? A. Well, I was still in 1947. April 1, 1947, I opened up a new set of books.

Q. Now, you say that your fiscal year ran from April? A. April 1.

Q. April 1 to April 1? A. To March 31.

Q. March 31. A. Fiscal year.

Q. Now, for the year 1947—April, '47—to March 31, 1948, have you the books? A. No, sir.

Q. For that period? A. I haven't the books now.

Q. What became of them? A. I put them away, I suppose.

Q. Where? A. At the Riviera.

Q. What happened to them ultimately? A. Well, I don't know really what happened to them.

(492) The Court: If you know.

A. (Continuing) I don't know what happened to them. I know I prepared my tax returns, I have my tax reports, I have my own reports of the business condition of that particular year, I have the full reports on it, I know every transaction that was made, according to my report. I have my tax returns from the very inception, but the records for those years, I don't know where they are.

Q. Do you have your work sheets covering your examination of the books? A. We probably have some work sheets.

Q. Don't you keep work sheets in your own files? A. We do, for a period of six years or so.

Q. Yes. Now, do you have the work sheets of the Bill Miller's Corporation? A. I may have.

Q. For any given period of time? A. I may have some. I may have them.

Q. Do you have them for the years '46 to '48? A. No, sir.

Q. Why not? A. I may have them in my tax returns.

Q. Yes. A. I may have them attached to my tax returns. I haven't checked that, but I may have them, because if I have my tax (493) returns, I should have my work sheets with them.

Q. Where would you have your tax returns? A. In my files.

Q. You mean in your home, or in your office? A. In my office.

Q. And if you have them, will you produce them? A. Yes, sir.

Q. Now, you have no idea what became of the books of the Riviera for the years I have indicated? A. That's right.

Q. Didn't you continue to interest yourself in the affairs of this company right down to the present time? A. I became more interested as I went along.

Q. Yes. You knew there was litigation going on? A. Not at that time.

Q. You didn't know that? A. No, we had no litigation.

Q. You knew that your records might be checked by the income tax authorities? A. They were checked.

Q. That they might be rechecked at any time within six years? A. No, within three years, I believe.

Q. And you didn't keep the records available? A. We have the records for the past six years, I believe.

(494) Q. You have records? A. I have records, yes.

Q. Running back to what? A. Starting from April 1, 1948.

Q. Now, you said that each year you would open up a new set of books? A. Yes, sir.

Q. I show you this ledger, marked DM-6, and ask you whether this book covers merely one year or more than one year? A. This covers exactly one fiscal year, April 1, 1948, to March 31, 1949.

Q. Now, when did Bill Miller's Riviera go out of business? A. Well, they are still not out of business, as I would say.

Q. I mean the active operation of the business. A. Operation? October 4, 1953.

Q. 1953? A. Yes, sir.

Q. At that time the assets were sold—or the kitchen equipment, and the other fixtures of the night club were dismantled and sold? A. I don't believe that Bill Miller's Riviera owned that.

(495) Q. Well, it was dismantled, the night club was dismantled? A. Oh, the night club was dismantled; yes.

Q. Did you have anything to do with the removal of the books, the available books, at that time? A. I know all the records were packed up in boxes. I wasn't in charge of that. I only had—I had taken the records, the general ledgers that I had available, I took them to my office. But all the other records that I didn't need, like the subsidiary records, were put away in boxes and—

Q. Taken where? A. Well, I think some of these records were delivered to—I don't know whether it was delivered to—Mr. Kevelson's place of business in Jersey City.

Q. You had nothing to do with that? A. No, they were being packed up before I even got back to the place.

Q. Who packed them? A. Well, I believe some of the people in the office, Nicki—

Q. Do you know— A. —Mr. Dolan.

Q. Do you know who gave instructions to pack these records and send them over to Kevelson? (496) A. No one really gave any instructions, it was just done. These people—

Q. It was done on their own? A. It was just done. Everything was packed up. We had to get out.

Q. Well, now, have you any idea who these people were, by name, who packed these books? A. Well, we had Mr. Dolan in the office, Alfred Dolan—

Q. Wait a minute. Dolan, how do you spell that name? A. D-o-l-a-n.

Q. Allen? A. Allen, I believe.

Q. Do you know where he lives? A. And this Nicki Moran. Well, Mr. Dolan is in Las Vegas right now, employed.

Q. Employed by Miller? A. No, I think he is employed by the Sahara Hotel.

Q. Is that the hotel with which Mr. Miller is associated? A. Yes, sir.

Q. Now, who else? A. Miss Nicki.

Q. Nicki Moran? A. That's right.

(497) Q. You say these are the people who packed up these books? A. I probably helped, also.

Q. Well, do you know whether you did or not? A. Yes, I know I was there, part of the time. There were quite some records there. It took a couple of days to get all these things assembled, put together.

Q. Who told you to help in packing these records and shipping them out? A. No one told me. I just knew they had to get out of the place. I was in charge there. Mr. Miller wasn't there. The other officers weren't available, and I was put in charge to see that everything was taken out.

Q. Who put you in charge? A. Well, Mr. Miller.

Q. Did he give you any instructions? A. Well, I don't think it was necessary.

The Court: That's not the answer. Did he give you any, yes or no?

The Witness: No.

Q. Why did you send these books over to Kevelson, then? A. That was the only place I knew where to send it. I had no other place to send those records.

Q. How did you send them? (498) A. I believe by truck.

Q. Do you remember the name of the truckman? A. I don't know. I believe it was a truck sent by Mr. Kevelson.

Q. Do you know what books were sent to Mr. Kevelson? A. No, all I know, they were put in cartons.

Q. You don't know for what period? A. Corrugated cartons. No, sir.

Q. And all the books were sent? A. All the records that were in the files, and packages, and corrugated boxes, were all put together and all sent out.

Q. Were the sales tickets in there, too? A. Well, I believe all the records that we had. I just don't know.

Q. Did you keep sales records, records of the sales? A. Only for the periods that were necessary.

Q. You never had occasion to look at those books since you sent them over to Kevelson some time in 1947? A. I don't know what books went over. I haven't looked through the files.

Q. Do you know whether they are still in Kevelson's possession? A. Well, I know—yes, we have quite a bunch of cartons there, loaded cartons.

(499) Q. Now, you retained some of these books, did you? A. Yes, sir.

Q. In your own possession? A. Yes, sir.

Q. Which books did you retain? A. I retained all the records—I believe from April 1, 1948, up to date. And I have the records of Milmar Estates, also, up to date.

Q. You retained all the records of Riviera, from April, 1948—April 1, is it? A. April 1 is it; yes, sir. As a matter of fact, I wouldn't say all the books. I just took the records that I needed, like the general ledger, which are the books that I worked on. I don't work on any subsidiary ledgers. These are the totals of all records.

Q. You mean that the only book you worked with was this ledger, this general ledger? A. That's all I work with now. I always worked—

Q. You never saw any of the underlying records? A. I never looked for them; no, sir. I never bothered with the subsidiary ledgers. These are the records that I use for my purposes.

Q. Do you know to whom these records that you shipped to Mr. Kevelson were delivered? A. They were delivered to Mr. Kevelson's office.

(500) Q. You have seen them there since? A. I have seen them there. I have looked through records, looking for the books.

Q. Where did you see them on the Kevelson premises? A. In the room that I was assigned to, to do work.

Q. Now, what room was that? A. On the first floor.

Q. And all the records were there, as far as you know? A. As far as I know, they were delivered there, and I saw the boxes and cartons in there.

Q. When is the last time you saw them there? A. Last week.

Q. Now, what work were you assigned to do on these books? A. I wasn't assigned to do any work on these books, on the book that you have there, because those go back seven or eight years. I was just doing work on the current books.

Q. On the current books? A. Current records.

Q. Current records are still there? A. Yes. Some outstanding accounts, taking care of the payments.

Q. Was it you who produced this book marked DM-6? A. Yes, sir.

(501) Q. And you have no other records for this period? A. For that particular period?

Q. Yes. A. I have no records; no, sir. Not in my office.

Q. Well, where did you get this ledger from? A. From my office, from my own office.

Q. Did it occur to you to go down to Mr. Kevelson's place? A. I surely did. I worked there for three days looking for all records that I could find for that period.

Q. And you couldn't find any records. A. Yes, sir.

Q. You couldn't find the sales record, the purchase—the accounts receivable, payable, or the loans and expense? A. Not for that period, but I have them for the current periods. Because the accounts receivable ledger—

The Court: Don't volunteer so much. We will never get through. When he directs your attention to a specific period, answer that question only, please.

Q. Do you know what became of the books for this period we are speaking of?

The Court: I thought he answered that already, to the best of his ability. He doesn't know what became of them.

Is that right?

(502) The Witness: Yes, sir.

Q. Did you look in the cartons to see whether they were there? A. Yes, sir.

Q. In all the cartons? A. I didn't empty all the cartons, everything, but I looked through every carton that was there.

Q. And no records are there for this period? A. 1947?

Q. '47, '46 and '48, down to September 14. A. No, I have no other records but this book here.

Q. I am not asking what you have.

The Court: Just a minute. Don't you hear the question? He didn't ask you whether you have them. In the cartons, he wants to know whether the records were there.

The Witness: I didn't find any records for that period.

Q. Did you look? A. Yes, sir.

Q. Now, when these records were delivered to Kevelson, was there a receipt obtained for them? A. No, sir.

Q. You have no receipt? A. No, sir.

Q. I can imagine just what happened. You had to get (503) out, didn't you?

The Witness: Yes, sir; we were condemned.

The Court: The Commission wanted to knock the building down.

The Witness: That's right.

The Court: So you took all the records, without looking at them, you put them in cartons, and you got them out of the Riviera.

The Witness: That's exactly what happened.

The Court: Nobody anticipated that nine years later somebody would want to see them.

Mr. Grosman: But this case has gone on five years.

The Court: Not the Riviera case, the Milmar case.

Mr. Grosman: Well, they are all tied up together.

The Court: I know. Maybe they didn't think they would be tied up inextricably.

Q. When you went through these cartons which are now in Mr. Kevelson's possession, were the books for any other period except the period that you mentioned missing?

The Court: If you know.

A. I don't know.

Q. How many cartons are there there? A. I would say about 20.

(504) Q. How many did you send over? A. I don't know.

Q. More than 20? A. I don't know.

Q. Are you a certified public accountant? A. Yes, sir.

Mr. Grosman: All right.

The Court: Have you told us all you can tell us about the records?

The Witness: Yes, sir.

The Court: Any other questions from him?

By Mr. Grosman:

Q. Will you produce your work sheets tomorrow morning, please, for these years? A. Yes, sir.

Q. And particularly the loans, I am interested in the loans, receivable and payable, loans made to the corporation. A. Whatever I have the work sheets on, I will bring them in.

Mr. Grosman: All right.

(Witness excused.)

Mr. Grosman: Mr. Kevelson.

Mr. Abraham Chazin: I think it is presumptuous of Judge Grosman to start calling witnesses without asking (505) permission of the Court.

Mr. Grosman: The Court will take care of himself. Don't worry about the Court.

Mr. Abraham Chazin: I know that.

The Court: We are just trying to find out where the books are.

Mr. Abraham Chazin: I have no objection to Mr. Kevelson being called.

Mr. Grosman: I understood, your Honor, that we are to—

The Court: I want to hear it. I am interested in what happened to them, too, now, because there have been so many charges made against your side, let's hear some more now.

Al Kevelson, called as a witness, being first duly sworn, testified as follows:

The Clerk: May we have your name and address for the record?

The Witness: Al Kevelson, 1497 East 20th Street, Brooklyn, New York.

Examination by Mr. Grosman:

Q. Mr. Kevelson, what is your business? A. Asbestos business.

Q. Where is your plant located? A. 451 Communipaw Avenue, Jersey City 4, New Jersey.

(506) Q. You heard Mr. Hoffman testify with respect to the sending of a number of cartons containing books of Bill Miller's Riviera to you? A. Did he send them to me?

Q. You heard him testify that he did. A. Yes, he sent them to my place of business.

Q. And did you receive them? A. Yes, sir.

Q. And when did you receive them? A. Oh, I don't know the date.

Q. Well, the year. A. I think at the end of—some time toward the end of '53.

Q. And how many cartons were there? A. I don't know.

Q. Were there many? A. I don't know the exact number, but I'd say about 20.

Q. How big were these cartons? A. The carton is 14½ inches high by 20 inches wide and 14 inches in depth.

Q. Now, did you furnish the cartons? A. Yes, sir.

Q. Did you send the truck for them? A. Yes, sir.

Q. And it was your man who took them? A. Yes, sir.

(507) Q. Now, were these cartons marked in any way? A. Yes.

Q. By year? A. I don't know if they are marked by year, but each carton is marked with what the contents are.

Q. And have you had occasion to look in these records? A. No, sir.

Q. They are still in your place? A. Yes, sir.

Q. In Jersey City, are they? A. Yes, sir.

Q. Do you know whether the records for the years 1946, '47 and '48, up to September 14 of that year, are contained in those cartons? A. I don't know.

Q. They may or may not be? A. Well, as of now, I know that they are not, because Mr. Hoffman was looking for them. He couldn't find them, so I guess they are not there.

Q. Well, did you look for them at the same time? A. No, I did not look for them. I didn't think it was necessary for me to look.

The Court: Well, it wasn't necessary for you to look for them.

(508) The Witness: It wasn't necessary for me to?

The Court: It was not.

The Witness: No, it was not necessary.

Q. Do you know the name of the driver who brought the records to your place? A. No, sir.

Q. Well, was he a regular employee of yours? A. Yes, sir.

Q. But you don't remember his name. A. Well, I have four drivers. I don't remember which one picked it up.

Q. Now, when did Mr. Hoffman look at these records? A. Well, he looked just the other day, when they asked for them here in court, and he came back—in fact, he drove with me, if my memory serves me right, and he went looking for the books.

Q. What do you mean "the other day," last week? A. Yes, I think when we left here from court he went back with me to the office.

Q. Do you recall the date, the day of the week it was? A. The day that you requested the books, when you—

Q. When was that? You were here. A. I don't remember whether it—possibly Thursday, I imagine. I imagine it was Thursday afternoon.

(509) Q. You were over there Thursday? A. That's correct.

Q. Did he find any books at all? A. I don't know what he found.

Q. Did he take any books away with him? A. I don't remember.

Q. You don't know? A. No.

Q. Did you see him before he left? A. I don't know whether I left first and left him there, or he went ahead of me, I don't know.

Q. You don't know whether he took any books with him or not? A. No.

Q. Is he your accountant?

The Court: Is he your accountant, too?

The Witness: In my personal business?

The Court: Yes.

The Witness: No, sir.

Mr. Grosman: I think that is all.

The Court: Thank you, Mr. Kevelson.

The Witness: You are welcome, your Honor.

(Witness excused.)

The Court: We will take a five-minute recess and then Mr. Miller can resume the stand.

(510) (Short recess.)

Mr. Grosman: Now, if your Honor please, I would like your assistance in sending somebody—or you deputizing somebody to go over to this place where these books are kept and look through those cartons and see whether any of the records that we want are available.

The Court: Well, I will have to consider that application. I am certainly not going to hold up the trial while—

Mr. Grosman: I am not asking you to hold up the trial. That can be done while we are still trying this case. I think we have located the place where the books are, if they are in existence at all.

The Court: I will take that request under advisement.

Mr. Brigadier: I would like to ask your Honor if you would direct one question to Mr. Hoffman, because I am not clear about it—

Mr. Margulies: He left.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Mr. Brigadier: Oh, he left?

I am not clear whether he said he went through the 20 cartons. Did you understand whether he said that?

The Court: Well, he indicated that he went through the cartons.

Mr. Brigadier: Did he say that?

(511) The Court: He said he spent a lot of time there.

Mr. Brigadier: Going through the 20 cartons?

The Court: I don't know if you have ever gone through cartons trying to look for something. Unless they are well indexed, it is some job, believe me.

WILLIAM MILLER, resumed the stand.

Cross examination (continued) by Mr. Grosman:

Q. Mr. Miller, I understood you to say that both Mr. Marcus and his wife had begged you to get him out of this venture, is that correct? A. That's correct.

Q. And that what you were doing at the time was acceding to his wish, so that he would get his money out of there and go on about his own affairs? A. That's correct.

Q. Do I understand that you were doing this largely for his benefit? A. I won't say—we were doing it for both our benefit, both for his and mine.

Q. But primarily you had given in to his wish to get out of this venture, his wish, in which his wife joined him? A. That's correct.

Q. Now, may I ask you when at the last moment on (512) September 14, 1948, when he, as you put it, in substance, renegged on his agreement to take $125,000 for his interest in Milmar—that's what happened, isn't it? A. That's correct.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. —why, if you were doing all this for his benefit, did you volunteer to pay him $15,000 additional out of your own pocket? A. Because I needed financial aid very badly. I couldn't get it from Mr. Marcus in no shape. In fact, he tried to dispossess me. He did everything in the world to try to close the place. So I knew I had someone to help me. Actually, I gained nothing by the thing. And I knew this man would help me, and I had explained my situation. And so it was to my advantage to get him out, so we can go ahead and make a new deal.

Q. Let me ask you, was this arrangement, whereby Marcus was to get out, for his benefit or for your benefit? A. I have said it was for both.

Q. That is why, when he renegged, at the last moment, you, out of your own pocket, agreed to pay him $15,000 more? A. Can I answer that, counsel?

Q. Any way you like. A. My name was on top of the Riviera, Bill Miller's Riviera. I am getting tremendous moneys today because of (513) the value of my name. And it was my business. I had no other business like he did, so it was my business to see that I stayed in business. That was my asset. That was my asset for anything, it was my knowledge of this business, which I am getting paid for tremendously, from different sources.

Q. Well, did you figure that if that venture failed your name would be besmirched in some way? A. It certainly would. I worked very hard to keep my name important.

Q. A great many people have gone into ventures that have failed.

The Court: Let's not get into philosophical discussions with him. I think he has satisfactorily answered the question. Probably the frame of mind Miller was in at that time, if he wanted twenty-five more, he would have acceded to that, too.

William Miller—for Defendant Milmar Estate—Recalled—Cross

The Witness: I give you my word of Honor, Judge, I would have given him anything—

The Court: Well, that's the impression I am getting from your testimony. Whether I would do it, or somebody else, that's another thing.

Q. Your name was connected with the Embassy Club, was it not? A. Only to a certain time.

Q To what time? (514) A. Then I insisted that my name be taken down and that they never use my name again.

Q. When was that? A. At the time I stepped out.

The Court: Do we have to go into that now, with the Embassy, too?

Q. Did you ever represent that you owned Luna Park?

Mr. Brigadier: If your Honor please, I am going to object now. I have allowed two, three days of examination without objection on collaterals that have nothing to do with this case and nothing to do with the line of direct examination. We are now back again to Luna—

The Court: I don't want to hear about Luna any more. He has already testified about that Luna Park business.

Q. You said that $5,000 was taken out of the Embassy Club and used toward the purchase—toward the payment of your initial investment in the purchase of the Milmar property? A. I thought that $5,000 had been. But since then I asked Hoffman, after the question was put to me, and Hoffman said, "No, you didn't give—it didn't come from Embassy, Marcus put it up." He says, "In fact, we loaned, a little later, some money."

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. So you were in error about that? (515) A. Yes, I was completely wrong.

Q. Were you in error about any of the other testimony you gave here? A. No, I was not. This was something that I said at the time that I didn't know, I thought. But I checked, when I didn't know, I went to the man who knew, and asked him, and he said to me, "No, it didn't come from the Embassy."

The Court: Don't repeat it again.

The Witness: I'm sorry, your Honor.

Q. You said you thought it came from the Embassy? A. I say I thought I did. I may have not used the word, but I was under the impression that it did.

Q. Well, now, let's see what you said.

The Court: Why should we do that? The man has corrected himself and said he made a mistake.

Mr. Grosman: Well, if he was wrong about that, maybe he was in error—

The Court: Oh, I hear that in every trial. It could be.

Mr. Grosman: I would like to read him the question where he didn't say anything about "he thought," but made an outright answer.

The Court: Is it just one question and one answer? (516) Mr. Grosman: Yes.

The Court: Repeat the question and answer to him.

Q. Do you recall being asked this question—I am now reading from page 42 of his depesition in this cause ninth line down from the top—"Question: Who was to put in the additional $25,000 required for the acquisition of this property?

William Miller—for Defendant Milmar Estate—Recalled—Cross

"Answer: Al Bierman paid me twenty, and the balance we were putting in from the Mocambo."

Is that what you said?
A. Yes, I did, but I was mistaken.
Q. You were mistaken.

Mr. Brigadier: Why don't you read the next line, Judge?

Q. "Question: What do you mean by the balance from the Mocambo?
"Answer: Well, whatever we needed, the extra five thousand, I believe—I don't remember, but I think it came from the Mocambo."

The Court: My heavens, so you did say you "believed."

Mr. Grosman: He also said the other.

The Court: All right, then he corrected it. Even Grand Juries will let you correct your testimony. I would have to hang lawyers for the mistakes they make right (517) in front of me.

Q. Now, how many plans were submitted and rejected in connection with the sale of Marcus' stock on September 14, 1948?

The Court: Don't answer. It has been answered enough times. We are going to get through soon with Mr. Miller.

Q. Who do you say suggested the issue of new stock?
A. I believe it was Mr. Marcus.
Q. Did you ever say that you and he suggested it? A. I may have.

William Miller—for Defendant Milmar Estate—Recalled—Cross

Q. Was that a fact? A. I think—I am not sure, but I think that he said to me, at the time, "As long as we haven't got the stock—"

The Court: I know. I have heard that about a dozen times already.

The Witness: Yes.

Mr. Grosman: I am asking him now whether Marcus alone suggested that or whether he joined with him.

The Court: Well, you heard his answer to that, if that's the best answer he can give. He doesn't remember whether he did or whether they both suggested it. Is that right?

The Witness: That's correct, your Honor.

The Court: Because a jury could infer from that (518) that maybe the man who couldn't produce the stock might have suggested it, "What's the difference? We will issue new stock." That would be a fair inference to be drawn.

Mr. Grosman: Well, I am trying to find out whether his testimony on a previous occasion was different from what it is today.

The Court: I wouldn't be surprised if it is, Judge Grosman.

Mr. Grosman: I know, but we have got to have a record here, Judge. I can't assume that this man will say anything that comes to his mind.

The Court: Well, have you got a specific question and answer there where he said somebody else did it besides him and Marcus?

Mr. Grosman: No. He said, "we." He used the expression, "So we suggested, to save a lot of time, and to save a lot of nuisance, and go looking for stock, that we will put all the stock in the name of the cor-

poration, regardless of what name it was in, regardless of who it belonged to, regardless of whatever happened before September 14, and we issued new stock. He would resign as an officer, he would quit, and I would never see him again." He used the expression "we."

The Court: Who did you mean by "we"?

The Witness: I meant we all, after they got (519) through, and he suggested it originally, then we talked to the lawyers, there was some objection, but finally it was decided. When I say "we"—we decided, everyone decided that that was the way that we would do it.

The Court: That would be you, Marcus, Judge Lieberman, Mr. Schwartz.

The Witness: And his attorney, Mr. Schwartz.

The Court: That was the final determination.

The Witness: That was the final thing.

The Court: Now, do you know who suggested it originally, maybe, Judge Grosman would like to know.

The Witness: It was Mr. Marcus.

The Court: It was Mr. Marcus' idea.

Q. The original suggestion came from him? A. From Mr. Marcus.

Q. And I think you said there, "We had a discussion and he suggested—I don't know enough about law. He is a Bronx lawyer. I think he took—"

The Court: Who is the Bronx lawyer?

The Witness: Marcus.

Q. (Continuing) "—as long as he can't find the stock, perhaps it would be best to me—why not take and cancel all the stock, and give me and Mr. Bierman the corpora-

tion, and he will step out completely, and we will have nothing to worry about. And that was the way it was (520) drawn, supposedly drawn."

Now, you say that he is the one who made the original suggestion? A. That's correct.

Q. Now, you remember that Loew incident? A. Yes, I do.

Q. Marcus came and told you he had interested a man named Loew— A. That's correct.

Q. —who is quite a figure in the nightclub business? A. He is Mr. Lou Walters' partner, of the Latin Quarter.

Q. That Loew was prepared to pay $250,000 for Marcus' interest in the business? A. I have never testified—

The Court: In which business?

Mr. Grosman: Milmar Estates for the property and the Riviera business.

Q. Do you remember that information being communicated to you? A. I have never testified—I am sorry.

The Court: Did he ever communicate that to you?

The Witness: No, he never did; never.

Q. Did Mr. Loew come over and talk to you? A. Yes, he did.

(521) Q. And did he tell you what Marcus had said to him about the subject? A. He didn't go into that.

Q. And didn't you tell Loew not to touch it, to stay away, that you could handle Marcus better than he could? A. I certainly did not.

Q. What did you say to Loew when he told you about Marcus'—about the information Marcus had given him? A. Mr. Loew came to me, and came at a night that there was about 12 people in the room, and he looked around

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at this room, and he said, "No wonder they want to sell me this. I can see immediately."

And he discussed it with me, and he says, "Mr. Marcus wanted me to talk to you and see if you would like to sell the Riviera," because I had the lease on it.

And I said, "Mr. Marcus can't sell anything but what he owns. You better find out what he owns first." And he looked around, and he said, "Listen, the way this place looks, I don't want any part of it," and he walked out. That was the end of our conversation.

Q. The figure of $250,000 was never suggested to you—A. Never suggested.

Q. —by Loew? A. Never.

(522) Q. You never told him not to touch it? A. No, sir.

Q. All right. Now, business in the Riviera in September of '48 was very bad? A. Very bad.

Q. Who was your head waiter there? A. Bernardi.

Q. Did you have a man named Schimmerman there? A. No, Oscar Schimmerman was there in 1946, put in by Mr. Marcus and myself, and he almost broke us.

The Court: He only asked you if you had a man there by the name of Schimmerman. The answer is apparently no.

The Witness: No.

The Court: In '48 he asked.

The Witness: No.

The Court: Not in '48.

The Witness: No.

Q. When did you have him there, from what period to what period? A. The first year, why we went in bankruptcy.

Q. I think I asked you—if I didn't, I will ask you now—did you have more than one set of books for Bill Miller's

William Miller—for Defendant Miimar Estate—Recalled—Cross

Riviera? A. I never had more than one set—I don't know anything (523) about books, I testified.

The Court: You answered no. Why do you keep telling us the rest?

The Witness: I am sorry. I just keep on.

The Court: I know you keep on.

The Witness: I know it. I am sorry.

Q. Did you have duplicate slips, sales slips? A. No.

The Court: What is the sales slip, what we call the check or tab?

The Witness: Yes, I think he means that. But sales slip is usually when you get a receipt for your check.

Q. Well, now, let's have no misunderstanding about that. What I am referring to is the tab slip that you give to a customer for whatever he purchased in the way of food or liquor. A. No.

Q. You have no duplicates of those? A. No duplicates.

Q. And the tab as presented to you by the waiter, or given to the cashier, was the tab that you used to make up your records? A. Absolutely.

Q. Was there a man named Jack Marder working for you as a cashier at one time? (524) A. Who?

Q. Jack M-a-r-d-e-r. A. No.

Q. You never had a man by that name? A. I don't know any Jack Marder.

The Court: You mean you don't recognize the name?

The Witness: I don't recognize the name.

The Court: All right. When he asks for that, I am sure he can prove that you had a Jack Marder working for you.

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Recalled—Cross

The Witness: I don't recognize that name. No, no Jack Marder.

Q. The same man who was a cashier at the Embassy Club, didn't he ever work for you at the Riviera? A. No Jack Marder.

Q. Was there a man who worked as a cashier at the Embassy Club who was also a cashier at the Riviera? A. Yes.

Q. No matter what his name was? A. Yes.

Q. What was his name? A. Well, there was a number of men. In fact, we took a lot of the Embassy crew over to the Riviera.

Q. You wouldn't have more than one cashier— (525) A. We had 10 cashiers.

Q. You had 10 cashiers? A. Yes.

Q. And you took them all from the Embassy Club? A. Three or four, maybe five. I don't remember. This is nine years ago.

Q. Now, Mr. Miller, you told us at the last hearing that it was your understanding that in the event of a default by Kevelson, Marcus was to be returned only his 625 shares of stock in Milmar, is that correct? A. No.

Q. What is correct? A. He was supposed to get back 625 shares of Milmar, 50 per cent of the Riviera stock, and a note, $50,000.

Q. Yes. And you were to have what? A. I was to have 625 shares of Milmar, 625 shares of Riviera—sorry, 50 shares of Riviera, and owe him $50,000, the note would go back, less 37½, or whatever percentage we are supposed to get back in case there was a default.

Q. Well, now, isn't it a fact that in the event of a default, Marcus was to be placed in the position of being the owner of everything?

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The Court: Don't answer that. You have answered it before, about six times. You said no each time.

Mr. Grosman: Well, now—

(526) The Court: He certainly has answered that at least a half dozen times.

Mr. Grosman: Now, I want to ask him one more question, and I don't remember what he said the last time, and I want to connect it up with some of the testimony he previously gave.

The Court: But he has answered it so many times, that that was not the understanding.

Q. Is that true, Mr. Miller? A. That's correct.

Q. That was not the understanding? A. That was not the understanding.

Q. Now, I direct your attention to the testimony given by you on deposition, on page 95:

"Question: Now, Mr. Miller, was there any talk about depositing any stock of Bill Miller's Riviera with Mr. Lieberman—with Judge Lieberman on September 14, 1948?

"Answer: Yes, there was discussion about putting some stock in escrow.

"Question: Stock of Bill Miller's Riviera?

"Answer: I don't remember offhand.

"Question: What would be the occasion of putting up stock of Bill Miller's Riviera on September 14?

"Answer: The only reason for that is that in the event there was a default in this agreement Marcus would (527) be in a position to say, 'I own the Riviera. I own the Milmar Estates. I own everything. Get out. I want to put you out tomorrow.' He would be in the position to do it. So I imagine he wanted control of everything, because he always liked to have it."

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Do you remember saying that? A. Yes, I do.

Mr. Brigadier: Do you mind reading the next page?

Mr. Grosman: You read it. When your turn comes, you can read it.

Mr. Brigadier: I can tell the Court to.

The Witness: But I would like to answer that, your Honor.

The Court: You don't have to.

The Witness: I would like to tell him what I meant.

The Court: After listening to you for three days, don't you think I know what you meant by that?

Are you through with Mr. Miller?

Mr. Grosman: Just one question.

Q. You said something about Mr. Marcus being a Bronx lawyer? A. Yes, I did.

Q. You don't mean he is a member of the bar of the (528) Bronx, or New York, or any other bar? A. No.

Q. That was said sarcastically? A. That was said the way I mean it.

Q. How did you mean it? A. I meant that he draws papers better than a lawyer. If I had signed his paper, I wouldn't be here.

Mr. Brigadier: That's true.

The Court: See what he thinks of lawyers now.

Mr. Grosman: Anything further?

Redirect examination by Mr. Brigadier:

Q. Mr. Miller, you were questioned about the Mocamb in relation to your turnover of management to Mr. Marcus. I show you what purports to be a typewritten document dated April blank, 1946, addressed to Mr. William Miller, signed by whom? A. By William Miller.

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Q. And accepted by whom? A. Sam Marcus.

Mr. Brigadier: I would like to offer that in evidence.

Mr. Grosman: Let me see it, please.

(Document handed to counsel.)

The Court: It may be marked.

The Clerk: DME-40, document dated April blank, (529) 1946.

(Received and marked Exhibit DME-40.)

Q. Mr. Miller, on cross examination you were asked by Judge Grosman as to the transaction under which you turned over your stock and ownership in Mocambo. I show you what purports to be a memorandum of that transaction and ask you if that is the paper that was signed in connection with the turnover of the stock? A. It is.

Q. And who is it signed by? A. By David Parris and William Miller.

Q. And who was David Parris? A. That was the dummy for Sam Marcus.

Q. Now, at the same time did you receive a guarantee, dated the same date, February 8, 1947? A. Yes, I did.

Q. And that guarantee was signed by whom? A. By Morris Schwartz.

Q. And who was Morris Schwartz? A. A fellow who was stepping into the thing with Sam Marcus. And they gave me a guarantee that they would pay all taxes, which they never paid, which I am stuck for.

Q. And did you at the same time—

Mr. Grosman: Pardon me. May I see that one document?

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(530) Mr. Brigadier: I am going to let you see them all in just a moment, Judge. I want to get the three together and you can see them all.

Q. I show you what purports to be a photostat of a resignation, dated February 8, 1947, and ask you whether that is a photostat of the original? A. That's correct.

Q. And is that your signature? A. Yes, it is.

Q. And to whom was the original delivered? A. To Sam Marcus.

Mr. Brigadier: I call upon you to produce that original.

Mr. Grosman: Let me see what it is.

Mr. Brigadier: I then want to offer it.

(Document shown to counsel.)

Mr. Grosman: I object to these documents as in no way binding upon Mr. Marcus. They are between Mr. Schwartz and Mr. Miller and Mr. Parris and Mocambo, and so on.

Mr. Brigadier: Judge Grosman opened up the door to this whole line of examination by going into the Mocambo. On cross he asked whether or not he was in Mocambo. He explained he had turned over his interest to Mr. Marcus. The man testifies that Parris was Marcus' dummy. I submit they are relevant and material and competent.

(531) Mr. Grosman: Well, now, merely because I questioned him about it doesn't say that he can put all these documents in. And he says that Parris was Marcus' dummy. That doesn't make it so, of course. But certainly those other two documents don't mention the name Parris. They are with a man named Schwartz.

Colloquy

Mr. Brigadier: The witness has testified—one of them is the turnover agreement, the agreement whereby he gets out of Mocambo and Parris takes over. And Parris he has testified, is the dummy for Marcus.

The other paper is the paper signed the same date whereby Mr. Schwartz agrees to indemnify him with respect to this very transaction. And he testifies that this is the man that Marcus got in to take over in his place.

So I think it is perfectly material, since they opened the door to the whole thing of this Mocambo business.

The Court: Let me ask you this right now. Am I supposed to consider this Mocambo transaction to determine the issue in this case?

Mr. Brigadier: Sir, do you want my opinion?

The Court: Yes.

Mr. Brigadier: No. But I didn't open the door to it.

The Court: I know you didn't.

Mr. Brigadier: And you heard testimony for a (532) day and a half about Mocambo. I have no way of knowing how it has affected you, but I think we are entitled to show that what the man said in answer to his question is the truth. They tried to create the impression that Marcus was not interested in the Mocambo, that Marcus merely loaned the money to the Mocambo. They tried to get across the picture here that Miller has a sucker, if you remember, who he got in here, with all that money, and put all that money, that this man had nothing to do with the business, he was only lending money to it.

We are trying to show that is not true. Since the door was opened to it, I can't just sit back and allow their side of it, of the Mocambo transaction, to go in. I have to show you what the true transaction was by documents.

When it comes to the value of it, I agree with you absolutely, that it has nothing, in my opinion, to do with this case.

Mr. Grosman: Of course, I don't agree with that, your Honor.

The Court: Now, what do you think about it, Mr. Tepper?

Mr. Tepper: Well, it seems to be, by some waving of the hands on the part of Mr. Brigadier, that we can destroy all the Rules of Evidence. Here are some documents that do not even name or mention, or by inference refer to (533) Mr. Marcus, and they are being introduced into evidence—or Mr. Brigadier attempts to introduce them into evidence as being binding upon Mr. Marcus. And I respectfully submit that even if we were to allow them all the latitude in the world, by no Rule of Evidence, or any precedent, could these documents be introduced into evidence at this time. They are immaterial, they are irrelevant, and they are definitely not binding upon Mr. Marcus.

Now, the fact that there was some reference made to the Mocambo in testing this man's credibilty—

The Court: Some reference? That's the understatement of the trial so far.

Mr. Tepper: A great deal of reference. And a great deal of reference was required, in view of the man's faulty memory.

But these documents here are definitely unrelated to these proceedings, and I can't imagine under what theory they could be admitted into evidence.

The Court: How does it help me, Mr. Brigadier?

Mr. Brigadier: The main part of the cross examination had as its objective to show that Marcus had no connection with Mocambo, that his statements about Marcus' connection with Mocambo were not valid.

They challenge the veracity of his statement as to when he got out how he had turned over the management, how he finally (534) turned over the ownership, and these documents prove that.

That one proves the turnover of the management in April, 1946, as he said. And these show how he got out of Mocambo as stockholder in February, 1947, as he has testified.

Furthermore, he testified—we can ask him point-blank how he knows.

May I ask him that question, with your Honor's permission? How does he know that Parris was his dummy, if that's the question. You think that maybe he is drawing some conclusion, let's ask him.

Q. Mr. Miller, how do you know that Mr. Parris—

Mr. Grosman: I object.

All right, if you want to go into that. I reserve the right to cross examine.

The Court: I know, but let me get this straight. You only want to ask him about Mocambo when you think it suits your interest to ask him?

Mr. Grosman: No, no.

The Court: I have heard too much about Mocambo already. And if I have got documents to fortify what I heard from the testimony of witnesses, I would rather rely on the documents.

Mr. Grosman: Now, if your Honor please, you will recall that early in this man's testimony, when I asked him, "What did you give Marcus for your contribution towards the (535) $125,000 that was needed to take over the Milmar property?" he said, "I gave him valuable stock in the Mocambo, in the Embassy. I gave him a note—"

The Court: I don't know if he said valuable.

Mr. Grosman: "I gave him a note for $50,000, and he considered that payment, and I gave him Bierman's $20,000."

Now, I want to show—the only reason I asked him about that, when he said that he gave him this valuable stock, I wanted to show him that he testified to the contrary, as to the value of the stock, that this stock was absolutely worthless at the time.

Then it developed into whether or not Marcus was interested in the Mocambo. He said that Marcus was his partner in the Mocambo. And I showed you the testimony of this man, with a very faulty memory, according to him, that he gave before the Liquor Commission in New York, where he swore under oath that Marcus was not interested in Mocambo.

The Court: All right. Now, that's all true. What do you do when witnesses make contradictory statements and you are the Judge? You decide which one is true, just like the jury does, isn't that right?

Mr. Grosman: Well, when a man contradicts himself under oath, I disregard his testimony. He is (536) unworthy of belief.

The Court: I may determine that, too, at the right time and place, and I may not.

Mr. Grosman: You asked me. I told you what I would do.

The Court: That's right. I may decide—as I tell the jury, when I charge them, "You will decide whether he was telling the truth."

Mr. Grosman: The Rule is, of course, that once you show a man to be a liar, it doesn't make any difference where he lied, whether he lied here, or whether he lied before the Commission over in New York, he is just a liar, and you don't have to decide where he committed the perjury.

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The Court: Is that so? What do you tell a jury when you charge them?

(Discussion off the record.)

Mr. Brigadier: I wish to offer these documents in evidence, if your Honor please, for reasons that I have already stated.

First, memorandum of agreement between William Miller, hereinafter referred to as Miller, and David Parris, hereinafter referred to as Parris, dated February 8, 1947.

The Court: Well, I am interested in knowing how Mr. Miller knows Mr. Parris is a front, or a dummy, or (537) whatever he wants to call it, for Mr. Marcus.

Mr. Brigadier: I'm sorry. You're right. I meant to get that answer.

By Mr. Brigadier:

Q. You heard my question. How do you know? A. Parris told me—later, you know, later—that he was his dummy. Also, there was a court case where Parris testified. Parris testified against Binder.

Q. Did Marcus ever tell you?

Mr. Grosman: I object to that as leading.

A. I'm sorry. Marcus told me at numerous times, and—

The Court: What did Marcus tell you?

A. (Continuing) Told me that Dave Parris was his dummy, also that Anton was his dummy. And that all these people—in fact, it wasn't until we got—September 14 that I found out that Schwartz wasn't his dummy. I always thought that Schwartz was a dummy.

The Court: Who, the lawyer?

The Witness: Yes, the lawyer. I always thought—I didn't think Schwartz had part of this thing. He

told me so many people were part of this—I just didn't believe anything he told me. He is talking about liars—

The Court: I will decide that.

They may be marked.

Mr. Brigadier: I offer in evidence the (538) memorandum agreement between William Miller and David Parris dated February 8, 1947.

The Clerk: That will be marked DME-41 in evidence.

(Received and marked Exhibit DME-41.)

Mr. Tepper: Did your Honor rule on all of these?

The Court: They may all go in.

Mr. Brigadier: Memorandum of guarantee dated February 8, 1947.

The Clerk: It will be marked DME-42 in evidence.

(Received and marked DME-42.)

Mr. Brigadier: Mr. Marcus, will you produce the original of this resignation dated February 8, 1947?

Mr. Tepper: We don't have it. Never had it.

Mr. Brigadier: I offer the photostat.

Mr. Grosman: That was given to the Mocambo, Judge.

The Clerk: Marked Exhibit DME-43 in evidence.

(Received and marked Exhibit DME-43.)

Mr. Brigadier: If your Honor please, I wish to offer a document which was produced at the taking of the deposition by Mr. Marcus, from Mr. Marcus' files. It is marked in the deposition P-154, and is an agreement dated August 16, 1946, by and between Samuel Marcus, as (539) agent for certain interests holding stock in Mocambo, Inc., a New York corporation, and Robert Binder of Trenton, New Jersey.

May I for the moment interpolate this observation, that this is the transaction in relation to which you were shown—

The Court: A newspaper?

Mr. Brigadier: —a newspaper picture. And I direct particularly your Honor's attention to this second paragraph of this, which I would like to read to you:

"Whereas the parties hereto agree that the value of the assets—"

Mr. Grosman: If I—

Mr. Brigadier: You can talk when I get through.

Mr. Grosman: I object to it, your Honor. This document is not in evidence yet.

Mr. Brigadier: I am going to offer it in evidence. I am trying to explain the materiality to the Court.

"Whereas the parties hereto agree that the value of the assets and good will of Mocambo, Inc., is $165,000," signed by Samuel Marcus and bearing the date of August 16, 1946.

Now you can understand why I am offering it.

The Court: Yes, indeed, in view of the statement made here that the stock was worthless. So it may be (540) admitted on credibility and other points that I am going to have to decide, too.

The Clerk: DME-44.

(Received and marked Exhibit DME-44.)

Mr. Grosman: What is it?

The Clerk: Photostatic copy of a document dated the 16th day of August, 1946.

Mr. Brigadier: No further questions.

Mr. Kesselhaut called my attention to something—

The Court: Wait a minute. Judge Grosman is reading that document.

Mr. Grosman: Go ahead.

Colloquy

Mr. Brigadier: Something I overlooked, and perhaps I ended up with a misleading statement to you, so I want to correct it.

He points out that in the fourth paragraph the liabilities are listed as a hundred and fifteen thousand, so that that would make a net value of $50,000. So that if I created the impression that it's a hundred and sixty-five, the fault is mine. I wish to apologize to your Honor.

The Court: I am sure it was done inadvertently.

Mr. Brigadier: Yes, I didn't even notice that.

Mr. Tepper: Your Honor, may we ask for a five minute recess? We have something which we consider to be fairly important to discuss at this moment.

(541) The Court: Is that the first time you have seen this document, you and Judge Grosman?

Mr. Brigadier: They gave it to us.

Mr. Tepper: This is the first time that I have read it.

Let me put it this way, it undoubtedly was among a lot of documents that went in on the depositions.

Mr. Brigadier: You handed it to me.

Mr. Tepper: I don't think there is any question about it. I make no point of it. I merely—

Mr. Brigadier: Before you recess, may I ask something else, so you can check this during the recess? I have compared this paper that Judge Grosman put in evidence with the one that appears in the record of the case in New York, and I notice there is a piece torn off it. I would like if Judge Grosman can explain why the part showing the stamp of this as an Exhibit in the New York case has been removed.

The Court: Because they thought it was none of my business, probably.

Mr. Brigadier: They didn't want you to know about it?

William Miller—for Defendant Milmar Estate—Recalled—Recross

The Court: We will take a five minute recess.

(Short recess.)

Recross examination by Mr. Grosman:

(542) Q. Mr. Miller, did I understand you to say on Friday that you never heard of a man named Hartman? A. Who?

Q. Hartman, H-a-r-t-m-a-n. A. I didn't say that.

Q. How? A. I said I knew Lou Hartman.

Q. Did he make any investment in the Embassy Club, and Mocambo? A. I don't remember the details. I don't—

Q. Did he give you any money? A. I said I don't think he made an investment.

Q. You don't think he did? A. I don't think so. I don't remember.

Q. When did you step out of management of the Mocambo?

The Court: Do we have to go into that again?

Mr. Grosman: Please, just one question I want to ask him.

Mr. Brigadier: It was established that it was April, 1946.

The Court: Well, I will tell you, I wrote it down.

Mr. Grosman: Suppose you tell me. I don't remember.

(543) Mr. Brigadier: April, '46, is the document. April, '46, is his testimony.

The Court: That's what he said, April, '46.

Q. Is the Judge's note correct about that, you stepped out of Mocambo, out of control of Mocambo in April, 1946?

Mr. Brigadier: I object to the word "control." You get mixed up again between ownership and management.

William Miller—for Defendant Milmar Estate—Recalled—Recross

The Court: He said he turned the management over.

Q. Now, in April, '46, you stepped out of what, control or management? A. I stepped out of management.

Q. When did you step out of control? A. With the management I stepped out of control, but I still hadn't made any deals. He managed the place, and he would come to me with papers and say, "Will you sign this?"

Q. Did you have anything to do with the operation of Mocambo after April of '46? A. Only when Marcus would come to me and ask me to do a favor and sign this, or something like that.

Q. Did you sign any contract binding Mocambo after April of '46? A. I signed so many papers with Marcus—I said that before. That's why I was so sure that on September 14, that (544) whatever I signed, would be forgotten.

Q. Well, don't you remember— A. No.

Q. —when you stepped out of control, out of control of Mocambo? A. No.

Q. When you had nothing further to do with Mocambo? A. According to the date, 1947.

Q. When in '47? A. I don't know. According to the receipt there that I have, when I stepped out, I don't know.

Q. I show you a lease between Mocambo, Inc., and Planetary Recreations, Inc., dated January 23, 1947, bearing your signature as president— A. That's correct.

Q. —or secretary. Were you still the president or secretary of Mocambo in January of 1947? A. I was. Not on—

Mr. Grosman: All right. I ask that this be marked in evidence.

The Clerk: DM-7, lease dated the seventh day of January, 1947.

(Received and marked Exhibit DM-7.)

William Miller—for Defendant Milmar Estate—
Recalled—Recross

Q. I show you a check dated September 16, 1947— A. Can I find out when I stepped out, because I am confused (545) on this.

The Court: What do you want to see, a document?

The Witness: The document when I stepped out.

The Court: He wants the exact date when he stepped out.

(Document handed to the witness.)

The Witness: February 8, 1947.

The Court: February 8, 1947, you stepped out.

The Witness: I stepped out of management, and anything to do with it, but I was signing papers until I got this $1,500, and everything else. Up to that time I would only accommodate him and act as president, or whatever it was.

Q. Now, I show you a check dated December 16, 1947, to Lou Hartman for $2,500, signed by Sam Marcus. Do you know what that check was for? A. According to the check, it says, "Full payment, cash advanced, Bill Miller, Lou Hartman and Sam Marcus"—both of us—but he signed the check. That's not my—I haven't signed it, and I don't know anything about this check. I don't even know—my name is on it, but I don't know why.

Q. You don't know why your name is on there? A. No.

Q. Well, you have no idea why you would put your (546) endorsement on the back of a $2,500 check? A. I didn't put my endorsement on it. There is no endorsement of mine. Where is my endorsement?

Mr. Brigadier: Mr. Miller, do you mind if I, as a lawyer, address the Court?

The Witness: I am sorry.

William Miller—for Defendant Milmar Estate—Recalled—Recross

Mr. Grosman: Oh, I see.

The Witness: Where is my endorsement? Where is my name? May I show it—I can't help it, I must answer some questions.

Mr. Brigadier: That's why I am here for, Mr. Miller.

The Court: Will you be quiet?

The Witness: I am sorry.

The Court: Let me see the check.

(Document handed to the Court.)

Mr. Grosman: My mistake. It is not his endorsement.

The Court: That's all right. So he said it is not yours.

Q. Do you know how this endorsement came to be put on this check? A. Haven't any idea.

Q. You don't know why Marcus should give this man Hartman $2,500? (547) A. None whatsoever.

Q. It wasn't in connection with any transaction that you were concerned in? A. I don't remember. It may have been. I don't know.

Q. Is it possible, Mr. Miller, that you would be involved in a $2,500 transaction and not remember anything about it? A. Oh, yes.

Q. It is? A. Oh, yes.

Mr. Grosman: Oh, I forgot, you are the man with the bad memory.

I ask that this check be marked for identification.

The Clerk: DM-8 for identification, check dated 12-16-47.

(Marked Exhibit DM-8 for identification.)

Colloquy

Mr. Grosman: Now, if your Honor please, I am mindful of the fact that we have tried your patience to a great extent. I know what you said about Luna Park. I want to ask this man one question about it, because I consider it to be important. He represented that he was financially responsible because—first he said he owned Luna Park, then he said he had a 50 per cent interest in Luna Park.

Mr. Brigadier: If your Honor please, he didn't give any such testimony at all, that he represented he was (548) financially—in the course of this trial?

Mr. Grosman: Well, on deposition.

Mr. Brigadier: I don't know what he said in the deposition, but I had the impression that you are telling the Court that he made certain representations in the direct.

Mr. Grosman: I think he did. I think that he said that he owned Luna Park, if my memory serves me right, unless I am confused by what he said on deposition.

Mr. Brigadier: Yes. It is one thing to say he owned Luna Park—that is not what you said a moment ago—that he made representations as to his financial responsibility. All right.

Mr. Grosman: May I read what he said and end all this controversy?

Mr. Brigadier: What page in the deposition?

Mr. Grosman: Page 8.

"Question: Now, were you financially responsible at that time?

"Answer: I think so.

"Question: Did you have a credit rating at that time?

William Miller—for Defendant Milmar Estate—Recalled—Recross

"Answer: I don't know, but I know I was financially responsible. I owned Luna Park in Coney Island, 14½ acres, which belonged to me.

"Question: Exclusively?

(549) "Answer: With a partner, under a corporation called Luna Park, Inc. I was a 50 per cent partner.'

Q. Was that statement true? A. That's correct.

Q. Don't you know that back in 1945 a New York court declared that you had no interest, no further interest of any of the ventures in Luna Park? A. No.

Q. That isn't true? A. Wasn't that way.

Mr. Brigadier: Are we going to try Luna Park next?

The Witness: Yes.

Mr. Grosman: The man said—first he said he owned Luna Park.

Mr. Brigadier: I just want to make my position clear at this point, as to what is happening, because I don't think we really realize what is being done at this moment.

This man is now being questioned, not about testimony he gave in this proceeding, here before you—

The Court: No.

Mr. Brigadier: —he is being questioned about some testimony on his deposition about a matter which is entirely collateral, and he is asked, did he give this testimony in the deposition? He said yes.

(550) Now, let's assume for the sake of the argument that this is not even true. What are we going to end up by trying? Are we going to try the testimony and the issues as they are being tried here in court, or is counsel allowed to take anything in a deposition,

no matter—and you know there are no limitations in depositions as to what could be asked.

The Court: I know that.

Mr. Brigadier: And are we then going to try everything that is in this deposition, even though it bore no relation to what was being tried in this courtroom?

I object to this line of testimony.

Mr. Grosman: Will your Honor hear me?

The Court: Yes.

Mr. Grosman: I asked this man—my recollection is I asked him what he was supposed to have contributed to the initial payments being made on account of the Milmar property, and I asked him in that connection some time ago, I think, before your Honor, whether or not he did not represent in connection with his financial responsibility that he was the owner of Luna Park. I think he said yes.

Mr. Brigadier: I insist he was not asked that question in court in connection with his financial responsibility in contributions to the Milmar venture.

The Court: I don't know in what connection it (551) was asked, but I know he was asked. I have a very definite recollection.

Mr. Brigadier: Whether he had an interest in Luna Park.

The Court: That's right.

Mr. Brigadier: That was what the question was.

Mr. Grosman: Now I am asking him whether there wasn't a sheriff sale of whatever interests he may have had, not in Luna Park, but in an underlying operating company, whether the sheriff didn't foreclose his interest back in 1945.

The Court: And I suppose your objection is that if he did, so what?

Mr. Brigadier: It has nothing to do with this case.

William Miller—for Defendant Milmar Estate—Recalled—Recross

Mr. Grosman: Except it shows how he took in Marcus, that he told Marcus that he owned Luna Park, or he owned a half-interest in Luna Park, and that's the way he lulled Marcus into a feeling of security in advancing $125,000, when he knew that he was broke.

The Court: That's certainly new material. Nobody has testified to any such thing here.

Mr. Grosman: Well, I will ask him now.

The Court: I don't think it is the proper time and place. Maybe if Marcus says it when he is examined on (552) his direct, as to how he came in, it may become material then.

Mr. Grosman: All right. Your Honor rules—

The Court: I think you are premature. I suppose you intend to show in Mr. Marcus' case how he got into it.

Mr. Grosman: All right, Judge.

Q. Let me show you another check, photostat of a check, Louis Hartman to you, for $2,000. You still say you don't know who Louis Hartman was and that you had no business dealings with him? A. I am sorry. I never said I don't know who Louis Hartman is.

The Court: You corrected it about four times.

The Witness: I said—

The Court: Just a minute.

The Witness: I am sorry, your Honor.

The Court: When I am speaking, be quiet, in plain English.

The Witness: I'm sorry, your Honor.

The Court: You have corrected him already three or four times on that point. And you keep repeating it, Judge Grosman.

Mr. Grosman: My impression is that he first said he never heard of Hartman.

William Miller—for Defendant Milmar Estate—Recalled—Recross

Q. Now, I am asking you if, in view of that check, you still say that you don't remember any business transactions (553) with Hartman? A. I didn't say anything of the kind.

Q. All right. You tell me now what you said. A. You asked me whether Hartman had any interest in Mocambo.

Q. Yes.

The Court: That's right.

A. (Continuing) And I said I don't think so. I don't remember anything.

The Court: Where is the reverse side of this check?

Mr. Grosman: I don't know, Judge. That's the way it was given to me.

The Court: There is nothing on the check to indicate that it's ever been negotiated, nothing on it at all. And he better find that reverse side. That's not Judge Grosman's fault.

Q. Well, now, did you get that check from Hartman? A. I wouldn't remember. How would I remember?

Mr. Grosman: May I see it? What is the date of it?

The Court: January 7, '47.

It is not perforated, nothing to indicate that it has ever been negotiated.

Mr. Grosman: Of course, I didn't ask anything (554) about negotiating the check, I asked him if he received it.

The Court: He says no, he has no recollection of it.

Mr. Grosman: All right.

The Court: Apparently there was something attached to it, because the clips are right on here, two clips.

William Miller—for Defendant Milmar Estate—Recalled—Recross

Mr. Grosman: My client says he had the reverse side, but he hasn't got it now.

The Court: There are two clips on there. In fact, there were four clips.

Mr. Brigadier: What bank is it drawn on, Judge. Maybe we can get a microfilm.

Mr. Grosman: Corn Exchange.

Mr. Brigadier: May I make a note of it?

Mr. Grosman: Sure.

The Court: Apparently there was something attached to it, because there are four clips.

Mr. Brigadier: We will try to get the facts.

The Witness: Corn Exchange. What branch.

Mr. Margulies: Grand Central.

The Court: It may be, Judge, that he may have it in that file he has got there, the other side.

Mr. Grosman: He is looking for it now, Judge

The Court: Will you look for it, please? We will (555) adjourn for lunch. See if you can find it. Because he must have had it. There are four clips on there.

Mr. Grosman: May I have this marked for identification.

The Clerk: DM-9 for identification, photostat of front part of check dated January 7, 1947, No. 295, drawn on the Corn Exchange Bank & Trust Company.

(Document marked Exhibit DM-9 for identification.)

(Noon recess.)

Afternoon Session

Mr. Grosman: Now, if your Honor please, Mr. Marcus has found what he tells me is the back of the check. Do you want to see it?

The Court: Yes.

William Miller—for Defendant Milmar Estate—Recalled—Recross

(Document handed to the Court.)

The Court: Well, now, that's much better, isn't it?

Mr. Grosman: Well, it probably came loose.

(556) The Court: Yes. It is strange it should come loose, they had four clips on it, two clips came off altogether, and two are still on. You better clip it together now so it stays.

Show it to them. I don't want them to think we are clipping something together that shouldn't be clipped together.

Mr. Brigadier: If your Honor please, in view of the fact that they don't match—I am not saying that it is not the back, but I think there ought to be something by which we can hold Mr. Marcus. I intend to check with the Corn Exchange Bank and see if this is the back of the check.

You are representing to the Court that your client stated to you—

Mr. Grosman: That's right.

Mr. Brigadier: That's what I want the record to show—that that is the back of this check.

The Court: That's right. You can check it, because now it means something. Before it didn't mean too much.

Now you better show it to him.

WILLIAM MILLER, resumed the stand.

Recross examination by Mr. Grosman (continued):

Q. Now, Mr. Miller, I show you Exhibit DM-9 for (557) identification. Look at the back of it. Is that your signature on the back? A. That is.

William Miller—for Defendant Milmar Estate—Recalled—Recross

Q. Does that refresh your mind as to what the meaning of that check was, what it was given for? A. No, it does not.

The Court: It doesn't refresh you at all?

The Witness: No.

Mr. Grosman: All right.

The Court: Anything further from Mr. Miller?

Mr. Brigadier: That's in evidence?

Mr. Grosman: Yes, it is marked.

The Clerk: It is only marked for identification.

Mr. Brigadier: You are not offering it in evidence, Judge?

Mr. Grosman: No, not at this time.

The Court: Why should he offer it now? This man doesn't know what it is all about.

Mr. Brigadier: Except that he has identified his signature on the back.

Mr. Grosman: When Marcus gets on the stand, I will have him testify.

The Court: He will probably tell you what it is all about.

Mr. Grosman: May I have the note? There is a (558) $50,000 note here.

The Court: It's in evidence.

(Document handed to counsel.)

Mr. Grosman: There is another one. The first one. The earlier note.

Mr. Margulies: DM-5.

Mr. Grosman: We have it.

I think that is all.

Mr. Brigadier: I have just one or two questions.

William Miller—for Defendant Milmar Estate—Recalled—Redirect, Recross

Redirect examination by Mr. Brigadier:

Q. You were asked by Judge Grosman, before the recess, to locate the telephone number and address of Nicki Moran. Have you done so? A. Yes, I have.

Q. Will you please read that into the record so Judge Grosman can take it down? A. Nicki Moran, Ravenswood 8-2884. The address is 2712 24th Avenue, Astoria, Long Island.

Q. Now, also prior to the recess, you were asked by Judge Grosman whether you knew a Jack Marder, and your answer was you don't know any— A. No, I don't know Jack Marder.

Q. You had a conversation with me during the lunch hour in which I attempted to question you about it? A. Yes.

(559) Q. Do you know any Marder? A. Yes, I do.

Q. What is the name of the Marder you know? A. Harold Marder.

Q. And Harold Marder was employed at the Riviera? A. That's correct.

Q. Can you tell us when he was last at the Riviera? A. When Mr. Kevelson stepped in—with this new—when the whole—

Q. Well, September 14? A. September 14, 1948.

Q. That would be easier. A. That's when he left, about that time, maybe a couple of days later or before.

Recross examination by Mr. Grosman:

Q. Was Harold Marder a cashier—employed as a cashier at the Riviera? A. Yes, he was.

Q. And did he come from the Embassy Club? A. That's correct.

Q. And had he been a cashier there? A. Yes, he was.

Q. The name Marder didn't mean anything at all to you when I asked you? A. No.

(560) Mr. Grosman: All right. That's all.
Mr. Brigadier: That's all.
The Court: Step down.

(Witness excused.)

Al Bierman, plaintiff herein, called as a witness in his own behalf, being duly sworn, testified as follows:

The Clerk: May we have your full name and address, sir?
The Witness: Al Bierman.
The Court: What is your full name, Albert?
The Witness: Albert Bierman, 28 Ridgemoore Drive, Clayton, Missouri.

Direct examination by Mr. Brigadier:

Q. Mr. Bierman, I know you have some difficulty physically, but will you try and raise your voice as loud as you possibly can? A. Yes.

Q. So that we can hear you down at this end of the room.

Mr. Bierman, do you know Samuel Marcus? A. I do.

Q. How long have you known him, approximately? A. Eight, nine years.

Q. Do you know Bill Miller? A. Yes, sir.

(561) Q. How long have you known him? A. Quite a few—10, 15 years.

Q. Now, I want to direct your attention to the month of July, 1948. A. Yes, sir.

Q. At that time what business were you engaged in? A. Traveling salesman.

Q. In what line? A. Boys' wear.

Q. I see. And how long had you been in that business prior to July, 1948? A. Twenty-five years.

Q. I see. Now, did you customarily take a vacation? A. Yes, sir.

Q. And when did you take your vacation in 1948? A. I finished up about the middle of July—

Q. Of 1948? A. 1948—with my trip.

Q. Then you came here? A. Right after that I came up to New York; yes, sir.

Q. Where did you stay? A. At the St. Moritz Hotel.

Q. I see. Now, at that time you were a shareholder, were you not, of Milmar Estates? A. Yes, sir.

(562) Q. You had become a shareholder through that $20,000 investment— A. Yes, sir.

Q. —that everyone speaks of. Now, when you arrived here in 1948, as you said, and stayed at the St. Moritz, did you go over to the Riviera? A. Yes, sir.

Q. How often did you go there? A. Three or four nights a week.

Q. I see. And you stayed from, you say, the latter part of July—is that what I understood you to say—1948? A. Yes, sir.

Q. Till when? A. About the third or fourth of September.

Q. And during that time, from the latter part of July of '48 till the third or fourth of September, '48, how often were you at the Riviera? A. At least four—between four and five nights a week.

Q. Now, when you arrived there the first time, in the latter part of July, 1948, did you have any conversation with Mr. Mareus? A. I met Mr. Mareus on several occasions, and spoke to him back and forth.

Q. And was there anything said with respect to the (563) selling of the stock, or the property, or anything to

do with respect to Mr. Marcus getting out of the Riviera? A. He expressed a desire to get out of the Riviera, get his money back and get out.

Q. Don't drop your voice. We don't hear you. A. I can't help it.

Q. Now, as a result of this conversation that you had with Mr. Marcus about his getting out, did anything finally happen between you and Mr. Marcus? A. Yes, sir.

Q. Will you tell us when that happened? A. The latter part of August.

Mr. Brigadier: Will you let me have that receipt? What is that Exhibit number?

Mr. Margulies: DME-1.

(Document handed to counsel.)

Q. I show you DME-1. Will you look at the date of that, just to get the date fixed? A. August 27.

Q. Now, in relation to that date, when did you have the conversation with Mr. Marcus? A. Three or four occasions prior to this.

Q. Prior thereto? A. Yes, sir.

Q. And I show you Exhibit DME-2—I show you (564) Exhibit DME-3, dated August 18, 1948—let's use the original. I show you Exhibit DME-3, dated August 18, 1948, and ask you whether, prior to August 27, 1948, you recall having seen this Exhibit? A. I was in the Riviera prior to this.

Mr. Grosman: Please answer the question.

The Court: Look at the page on there, too. That might help you.

A. I was in the Riviera—

Mr. Grosman: Now, your Honor—

The Court: First tell him whether you saw that.

A. I saw that in Mr. Miller's hands. He was reading it to me.

Q. Was it prior to August 27, 1948? A. Yes, sir.

Q. Now, I show you Exhibit DME-2, dated August 26, 1948, and ask you whether you saw that Exhibit prior to August 27, 1948? A. Mr. Miller was reading this to me, also.

Q. I see. And this was on what date in relation to the date of August 27? A. August 26.

Q. This was on August 26? A. Dated prior to this.

Q. And you say he was reading this one to you, also? (565) A. Yes, sir.

Q. Now, as a result of his reading these Exhibits, DME-2 and 3 to you, was there—now, don't tell me the conversation, but was there a conversation between you and Mr. Miller? A. Yes, sir.

Q. And as a result of that conversation, did you speak to Mr. Marcus? A. Yes, sir.

Q. On what date did you then speak to Mr. Marcus? A. On the 27th of August.

Q. Now, will you tell us what you said to Mr. Marcus and what he said to you? A. Mr. Marcus and I went upstairs, of the Riviera, and drew up this agreement.

Q. When you say "this agreement," you are referring to— A. DME-1.

Q. —DME-1, dated August 27? A. Yes.

Q. Now, before that was drawn, was there any conversation between you and Mr. Marcus? A. Yes, sir.

Q. Was there an agreement orally arrived at? A. Yes, sir.

(566) Q. Will you tell us what that agreement was that was orally arrived at between you and Mr. Marcus? A. Mr. Marcus told me that he was very desirous of selling his interests in Milmar, and he wanted to get out. And for $125,000 he was to turn over all his stock, papers, notes,

everything else he had in his possession pertaining to he and Mr. Miller, for that amount. And we went upstairs—

Q. Now, wait a minute. A. I'm sorry.

Q. Before you go upstairs, was there anything said about how much money he wanted? A. $125,000.

Q. Was there anything said as to how much down payment he wanted? A. $19,000 and $1,500 a month when the Riviera was closed and $3,000 a month when the Riviera was open.

Q. The nineteen thousand down payment at the time you were going to sign this receipt? A. Yes, sir.

Q. How much down payment was there to be made altogether? A. $30,000.

Q. And he was to postpone how much? A. The difference —the balance.

(567) Q. You can do it. A. $95,000.

Q. All right. That's what we want. Now, you say you had arrived at these terms with him— A. No, sir.

Q. —before you went upstairs? A. He knew about these terms.

Q. You had talked about them? A. Had talked about them; yes, sir.

Q. Before you went upstairs? A. Yes, sir.

Q. Now, when you say you went upstairs with Mr. Marcus, where did you go upstairs? A. In the office of the Riviera.

Q. And who was in that office at the time? A. Mr. Marcus and I. And the telephone operator.

Q. What was the name of the telephone operator? A. I don't remember.

Q. Was it Miss Nicki Moran they have been talking about today? A. No, sir.

Q. Now, what happened when you got upstairs? A. Mr. Marcus had drawn up several of these papers enumerating stocks, the amount of shares, and that wasn't satisfactory

to me, because he had told me that he was going (568) to turn over all his stock that wasn't owned at that time by Miller and myself.

Q. Now, when you say "drawn up," what do you mean by "drawn," was it written? A. Typewritten.

Q. All right. Can you type? A. No, sir.

Q. Can Marcus type? A. Yes, sir.

Q. Did you see Mr. Marcus type— A. Yes, sir.

Q. Just a minute. We had enough trouble with Mr. Miller. Let's not have it with you. A. I'm sorry.

Q. Wait until I finish my question.

Did you see Mr. Marcus type the Exhibit which is in front of you, DMF-1? A. Yes, sir.

Q. You saw him type that yourself? A. Yes, sir.

Q. Now, do I understand that before this one was typed there were others typed? A. Yes, sir.

Q. You used the word "drawn" before. I want to make sure what you meant. Was it typed? (569) A. Yes, sir.

Q. In other words, these others were not written out in longhand, is that right? A. They were first written out in longhand and then he started to type them.

Q. And then what would happen? A. Tore them up, destroyed them.

Q. Why? A. Because they weren't satisfactory to me.

Q. Why weren't they satisfactory to you? A. He enumerated things in there that weren't supposed to be in there.

Q. And then he finally typed this one? A. Yes, sir.

Q. And this one was satisfactory to you? A. It contained the word that I wanted in there.

Q. Yes. Now, after this had been typed, did you then produce the $19,000? A. Yes, sir.

Q. In what form was that $19,000? A. There was nine thousand in cash and two checks for five thousand each.

Q. And did you show it to Mr. Marcus? A. Presented it to him.

Q. And then what did Mr. Marcus say? (570) A. He said, "I don't want the cash. Just give me the checks."

Q. Did he tell you why he didn't want the cash? A. It was late at night and he didn't want to carry around $9,000 with him.

Q. I see. Now, will you look at that Exhibit and tell us in whose handwriting the figure $10,000, appearing above the first line on the right side, in whose handwriting that is? A. Sam Marcus.

Q. And who struck out the figure nineteen thousand, the typed figure? A. Sam Marcus.

Q. And who made the asterisk alongside of that? A. Sam Marcus.

Q. Now, whose initial is this in the circle? A. Sam Marcus.

Q. And it stands "SM," is that it? A. That's right.

Q. And whose initials are alongside of it? A. That's mine.

Q. And those initials are what? A. "Al B."

Q. I direct your attention to the signature at the bottom of this Exhibit, whose signature is that? (571) A. Sam Marcus.

Q. And did you see him write that? A. Yes, sir.

Q. Now, I direct your attention to the asterisk, the lower asterisk of the two—you see, there are two on this page. A. Yes, sir.

Q. —and I ask you, who wrote that asterisk? A. Sam Marcus.

Q. I direct your attention to the handwritten words, "Received two checks at $5,000 each," and ask you who wrote those? A. Sam Marcus.

Q. And who wrote the initials "SM" alongside of it? A. Sam Marcus.

Q. And the "Al B"? A. That's mine.

Q. Now, also underneath that were the words "and $9,000 cash." is that right? A. Yes, sir.

Al Bierman—for Defendant Milmar Estate—Direct —

Q. Who struck out this, ' and $9,000 cash''? A. Sam Marcus.

Q. And was that stricken out at the time that you say this objection was raised to his taking home cash late (572) at night? A. Yes, sir.

Q. Now, after you procured the execution of that—oh, you did deliver to him the two checks totaling the ten thousand, is that right? A. Yes, sir.

Q. Then what did you do with that Exhibit? A. Showed it to Bill Miller.

Q. I see. Was there any conversation in your presence that evening thereafter between Bill Miller and Sam Marcus? A. I don't remember.

Q. I see. Now, prior to this date had there been any other occasion in which you had been present with Mr. Marcus with relation to a proposed sale and purchase of Marcus' interests? A. Yes, sir.

Q. Where had that taken place? A. Sam Marcus' office.

Q. When was it? A. Some time the latter part of July.

Q. I see. A. Maybe the first part of August.

Q. I see. Who was present? A. Sam Marcus, Bill Miller, myself.

(573) Q. Was Robert Schwartz there? A. No, sir.

Q. And this took place, you say, in Sam Marcus' office? A. This took place in Sam Marcus' office.

Q. Where was that? A. On 42nd Street.

Q. In what city I mean. A. New York City.

Q. What was the occasion of this meeting? A. When I arrived in New York, Mr. Miller told me at that time—

Mr. Grosman: I object to what Miller told him.

Mr. Brigadier: All right.

Q. You cannot testify to anything that was said to you by Mr. Miller when Marcus was not present.

But as a result of something that Mr. Miller told you, you did go to Mr. Marcus' office? A. Yes, sir.

Al Bierman—for Defendant Milmar Estate—Direct —

Q. Will you tell us what happened in Marcus' office, in Marcus' presence? A. We were supposed to pay him ninety-five—he was supposed to sell us his stock for $95,000.

Q. When you say—

The Court: Wait a minute. "He"?

(574) The Witness: Mr. Marcus. I'm sorry.

Q. When you say he was supposed to, was there a discussion about it? A. Yes, sir, Mr. Miller and I discussed it when I came to town, and he told—

Q. Yes, but, you see, you cannot tell us, because Judge Grosman is objecting, because he has a right to, to anything that happened between you and Miller when Marcus was not present. I want you simply to relate what happened in Marcus' office on this occasion. A. We went to Mr. Marcus' office for the purpose of buying his interest in Milmar. And the conversation in his office, in Mr. Marcus' presence, was that he at that time—prior to that he wanted $95,000, and then he raised it from ninety-five thousand, or $90,000, to $125,000.

Q. I don't get what it is you are saying. Did you say ninety or ninety-five? It seems to me I heard both figures. A. I think it was $90,000.

Q. Now, you say there was a discussion in Mr. Marcus' office on this day about his selling for $90,000? A. Yes, sir.

Q. And when was it that he raised the figure? A. While we were sitting there talking to him.

(575) Q. And raised it to what? A. To $125,000.

Q. And why was he raising it, did he make any statement? A. He had told Mr. Miller that he had had an offer—

Q. Did he say from whom? A. —from a Mr. Loew, or he was negotiating with a Mr. Loew. I don't remember the exact conversation.

Q. Did he mention the figure? A. $125,000.

Q. And what happened when Marcus told you that? A. Mr. Miller and I got very mad and walked out.

Q. Were there words exchanged between you? A. Quite a few.

Q. I see. Now, you relate that, in relation to this date of August 27, as taking place when? A. Right prior to this. I don't remember. It was the early—either the latter part of July or the first part of August. I just don't remember.

Q. See if this helps you fix any day. Exhibit DME-3 is dated August 18, 1948; DME-2 is dated August 26, 1948; and the one that you have been looking at is dated August 27, 1948. Now, does that help you place, in relation to dates, as to when this meeting took place in Marcus' office? (576) A. Still the latter part of July or the first part of August.

Q. Prior to any one of those dates that appear on those papers before you? A. Yes, sir; prior to all of this.

Q. Now, the night that you obtained the receipt from Mr. Marcus, DME-1, to whom did you deliver it? A. Bill Miller.

Q. And was Marcus present when you delivered it to Bill Miller? A. Yes, sir.

Q. And was there any conversation between Miller and Marcus in your presence— A. No.

Q. Wait a minute. —as to any meeting to be arranged? A. I think they said they were going to get the lawyers together, and Marcus was to call him for a date, or something. I don't remember the exact words, but they were going to get together in the lawyer's office.

Q. I see. You did not attend any such meeting, did you? A. No, sir.

Q. What happened to you after that? A. I was sick right after that—I was sick at that time, (577) and I didn't know how sick I was. But later on, a couple of weeks after that, I had a heart attack.

Q. And did you authorize Mr. Miller to act on your behalf— A. Yes, sir.

Q. —in closing up this transaction? A. Yes, sir.

Q. And you sent the telegram, DME-4, which has been put in evidence?

(Instrument handed to the witness.)

A. Yes, sir. What was the date?

Q. September 12. A. Yes.

Q. How long thereafter did you sustain your heart attack? A. Nine days after that.

Q. I see. And is that why the mortgage instruments had to be mailed down to you for execution? A. Yes, sir.

Q. And these acknowledgments show that they were taken in the State of Virginia, in the City of Norfolk? A. Yes, sir.

Q. Is that where you were at the hospital? A. Yes, sir.

Q. What hospital was it? (578) A. Norfolk General.

Q. Did you know that the person who was buying in was Mr. Kevelson? A. Yes, sir.

Q. And had you had any of the discussions with Mr. Kevelson prior to the time that you left in September? A. Very little. I only met him once or twice.

Q. I see. Now, you knew that the agreement had called for the payment of a total of $125,000? A. Yes, sir.

Q. Had you agreed to contribute any part of that hundred and twenty-five thousand? A. Yes, sir.

Q. How much had you agreed to contribute? A. 20 per cent.

Q. And who was to contribute the remaining 80 per cent? A. Mr. Kevelson.

Mr. Brigadier: I see. That is all.

Cross examination by Mr. Grosman:

Q. Mr. Bierman, you say your business is what? A. Boy's wear.

Q. What does that mean? A. Boy's clothes.

Q. And you are a traveling salesman? (579) A. Yes, sir.

Q. Working out of where? A. Working out of St. Louis.

Q. And you are also interested in nightclubs, are you? A. What is that again?

Q. Are you also interested in nightclubs? A. I am not now, no.

Q. Well, you were back in August of '48? A. No, sir.

Q. Well, you had made an investment in this Bill Miller's Riviera, or Milmar Estates, hadn't you? A. Yes, sir.

Q. Well, had you been interested with Miller in any other nightclub? A. Have I ever been interested?

Q. Yes. A. No, sir.

Q. Weren't you interested in a club called the Capri? A. Yes, sir; I was.

Q. Yes. You mean you alone? A. Mr. Miller was not interested in that.

Q. Well, I thought you told me a moment ago that you were not interested in any other nightclub. (580) A. You asked me presently or prior to this? I don't know how you asked that question. Ask it over again, please.

Q. Were you ever interested in any other nightclub? A. At one time; yes, sir.

Q. In which nightclub? A. Capri.

Q. Where was that located? A. In Long Island.

Q. Miller had nothing to do with that? A. No, sir.

Q. Now, were you interested in the Embassy? A. I was not.

Q. Were you a salesman when you were interested in the Capri nightclub? A. Yes, sir.

Q. Are you interested in a venture out in Las Vegas now? A. I am not.

Q. Do you live out in Las Vegas? A. I do not.

Q. Have you been out to Las Vegas lately? A. Yes, sir.

Q. Stopping at the same hotel where Miller is stopping? A. I was a guest at Mr. Miller's home.

(581) Q. Oh, I see. How long have you been with the company that you are working for now? A. Twenty-five years.

Q. And how long have you been in this business? A. Almost 40 years, I guess.

Q. Were you interested in any other ventures? A. Had a little restaurant business in North Carolina.

Q. How did you become associated with William Miller? A. I met Bill Miller many years ago. An acquaintanceship that lasted for a long time.

Q. Where did you meet him? A. The first time I met him, in 1926 or 1927, in Chicago.

Q. Well, when you met Bill Miller, what was he doing? A. At that time?

Q. Yes. A. He was in a show called Le' Maire Affairs.

Q. Do you recall what you said with regard to this subject on your deposition? A. You didn't ask that question.

Q. I asked you this question and you gave me this answer, page 4:

> "Question: Now, how did you become associated with Mr. William Miller?"

(582) Do you remember being asked that question? You said, "I met Bill when he was running the Copa." A. That's right.

Q. "Question: Where?

> "Answer: Copa City in Miami Beach, Florida. We became very good friends. And right after that he came to New York and opened up the club in New York.
>
> "Question: What club?
>
> "Answer: Embassy."

Do you remember that? A. Yes.

Q. You said nothing about having met him in Chicago, did you? A. You just asked me how long I have known him.

Q. Pardon? A. You asked me how long I have known him.

Q. I asked you when you became associated with him. A. I misunderstood you.

Q. You misunderstood? A. I misunderstood then. You asked me when I got acquainted with him.

Q. When did you become interested in the Riviera? A. I was never interested in the Riviera.

Q. What's that? A. I have never been interested in the Riviera.

(583) Q. What did you become interested in? A. Milmar Estate.

Q. How much money did you put into it? A. $20,000.

Q. And who did you send the money to? A. Mr. Bill Miller.

Q. Did you buy stock in the corporation? A. I bought $20,000 worth.

Q. Worth of stock in Milmar Estates? A. Yes, sir.

Q. And you got stock for it, did you? A. I do not. Did I get stock for it?

Q. What's that? A. Ask that question. I can't hear you.

Q. Oh, you can't hear me? A. No.

Mr. Grosman: I'm sorry.

The Court: Repeat it.

(Question read as follows: "And you got stock for it, did you?")

A. I did not.

Q. You didn't get any stock for your $20,000? A. No, sir.

Q. What did you get for your $20,000? A. I didn't get anything. The interest.

(584) Q. Well, you sent it up to Miller to purchase an interest—a $20,000 interest for you in Milmar? A. That's right.

Q. Did you ever get stock in Milmar? A. I did not.

Q. You mean to this day you never received stock in Milmar? A. Stock certificate are you asking?

Q. Yes. A. No, sir.

Q. Well, did you receive anything? A. No, sir.

Q. For your $20,000. A. No, sir.

Q. Now, do you know what you are supposed to get for your $20,000? A. Yes.

Q. What? A. Supposed to get 10 per cent interest in Milmar Estates.

Q. Did you ever get it? A. What?

Q. Your 10 per cent interest. A. Did I get a stock certificate, or what? Yes, I have an interest in it.

The Court: No. Pay attention. Did you ever (585) yet your 10 per cent interest?

The Witness: I never received a stock certificate.

Q. Did you receive anything else for your 10 per cent?

The Court: He said no.

A. No.

Q. Was that before Milmar Estate, Inc., had been incorporated? A. What was before?

Q. When you sent your $20,000 to Miller. A. Well, I presume it was so; yes, sir.

Q. Where were you at the time you sent the check to Miller? A. Miami Beach, Florida.

Q. Now, I asked you the last time whether you had a photostat—whether you had a check showing the money you sent to Miller, and I think your lawyer said you had a photostat of it. Do you remember that? A. Yes, sir.

Q. Have you got that photostat here

(Document handed to counsel.)

Q. Where is the reverse side of this check, do you know; was there a photostat made of the reverse side of that check? (586) A. No, sir.

Q. Why did you make only a photostat of the face of the check?

The Court: He didn't testify that he made it.

Mr. Grosman: I don't mean he made it, of course.

Mr. Brigadier: The bank made it, and the bank didn't microfilm the back of the check. We tried to get the back of the check. You say he made it.

Mr. Grosman: All right, I will reword my question.

Q. Did you have it made? A. Have what made?

Q. Photostat of this check. A. This check was made for photostat; yes, sir.

Q. At your request? A. At my request.

Q. Now, where is the original check? A. I don't know.

Q. Didn't it come back to you? A. Why, yes. But this is 1946.

Q. Yes. A. It's nine years ago. I wouldn't carry—

Q. You don't carry checks that long? A. I don't know. I have got papers. I don't think I have got this check; no, sir.

(587) Q. Did you look for it? A. I tried to find it; yes, sir.

Q. When? A. Four, five years ago.

Q. And you couldn't find it? A. I looked through papers and I couldn't find it. That's the reason I went to the bank and had this one made.

Q. Do you recall whether that check was endorsed and put through the bank? A. Well, I don't know. The bank charged me with $20,000.

Q. Do you know what endorsements there were on the check? A. No, sir; I don't remember the endorsements on that check.

Q. You don't? A. No.

Q. All right. Now, it was drawn on what bank? A. Commercial National Bank, Charlotte, North Carolina.

Q. Now, at the time you sent Bill Miller this check for $20,000 for an interest in Milmar Estates, you knew nothing about the real estate that Milmar Estates owned, or was about to acquire? A. Yes, sir; I did know.

Q. Oh, you did know? A. Yes.

(588) Q. What did you know about it? A. That it was going to be the Riviera property. I didn't know the word "Milmar" at that particular time. It hadn't been—

The Court: Incorporated?

The Witness: Incorporated.

Q. Did you know how much property was going to be acquired? A. I didn't measure it; no, sir.

The Court: He didn't ask you whether you measured it. Did you know how much was going to be acquired?

The Witness: I didn't know; no, sir.

Q. Now, your name was not included in the deed to the property acquired by Milmar, was it? A. No, sir.

Q. Even though you had put $20,000 into the venture? A. That's right.

Q. Do you know why your name was not included in the deed? A. I do not.

Q. Now, when did you decide that you were going to buy out Marcus' interest in Milmar? A. Twenty—

The Court: Do you want that receipt?

(589) The Witness: Yes.

A. Twenty-seventh of August, 1948.

Q. Was that the first time you made up your mind that you were going to try and buy out Marcus? A. No, sir. It was prior to that. As I said before, we went to Marcus' office—

Q. How many days prior? A. I don't remember the exact number of days.

Q. Well, was it a day, was it a month, six months, how long? A. Several days.

Q. Several days. Prior to the time that you contacted Samuel Marcus about buying his interest in Milmar, had anyone else negotiated with Marcus? A. I didn't hear you, Judge Grosman.

The Court: Mr. Bremer, will you repeat it, please?

(Question read.)

A. To do what?

Q. To do what you were trying to do. A. Well, I don't know, outside of Mr. Miller.

Q. When did Miller first talk to you about buying out Marcus? A. When I came up here, the latter part of July.

Q. Of '48? (590) A. 1948; yes, sir.

Q. Now, after you and Marcus had gotten together on this receipt dated August 27, I believe, how long did you remain here before— A. Four or five days.

Q. That would bring you down to when? A. I think I left here around the third or fourth of September. I am not sure.

Q. And then you say seven or eight days later you had this heart attack? A. I had a heart attack on the 21st day of September, 1948.

Q. Didn't you tell the Judge that you had your heart attack eight or nine days after the date of that receipt? A. I did not.

Mr. Brigadier: Oh, no.

The Witness: I certainly did not.

Mr. Brigadier: After the telegram. The telegram is dated September 12, and it was eight or nine days after September 12.

Q. Now, in the meantime, between August 27 and—September 12, was it?

Mr. Brigadier: The telegram was the 12th.

Q. —or between August 27, 1948, and the time you (591) had your heart attack, were you in communication with Miller, or he with you? A. Yes, sir.

Q. About this transaction? A. Once or twice.

Q. Did you authorize him to do anything for you in connection with this transaction? A. Yes, sir.

Q. What? A. I sent him a telegram—sign my name to any paper whatsoever that he deemed necessary.

Q. You weren't consulted about details? A. I left the details entirely up to him.

Q. Do you know anything about an offer made in your name to Samuel Marcus to purchase from him 12½ per cent of the outstanding stock of Milmar Estate, Inc.; do you know anything about that? A. Yes, sir.

Q. Were you consulted about that offer? A. Yes, sir.

Q. By Miller? A. By Marcus and I.

Q. When? A. Right after August 27. I just recollect that something did happen.

(592) Q. Well, did you reach an understanding? A. About what?

Q. About this 12½ per cent. A. May I look at that, please?

Q. No, I am asking you questions.

Mr. Brigadier: I think the witness should be permitted to look at the Exhibit, if your Honor please.

The Court: If he needs it to refresh his recollection.

Mr. Grosman: Now, there is nothing in my question that would require him to look at it.

The Court: What is the question?

(Record read.)

A. When Marcus and I were negotiating the purchase of his stock, he says, "Suppose this deal doesn't go through?" So I says, "If it doesn't go through, I would like to buy 12½ per cent more stock in this corporation."

That remark was predicated on the fact that if this deal did not -wasn't consummated. Yes, sir.

Q. And you agreed on a valuation of $500,000? A. That was his theory; yes, sir. He said the property is worth a half million dollars. I says, "Okay, it's worth a half million dollars. I want 12½ per cent" prior—of that amount less the mortgage—you know, the money that's been paid on the mortgage.

(593) Q. Did you discuss with Miller whether or not this property was worth a half million dollars? A. Mr. Miller was sitting right there. He heard every word of it.

Q. He heard Marcus say that the valuation of the stock which you had agreed to purchase would be based upon a valuation of a half million dollars? A. That was Mr. Marcus' idea.

Q. Did he say anything—did Miller say anything? A. I don't remember what he said.

Q. Did he protest? A. Sir?

Q. Did he protest that the stock was not worth a half million dollars?

Mr. Brigadier: I object. The testimony was not that the stock was $500,000. All you have to do is look at the Exhibit to see that what they agreed upon was the valuation of the real estate was to be taken at five hundred thousand, less the mortgage on the property.

The Court: I heard what he said. That's exactly what he said. He didn't say the stock was worth a half million dollars. He said the valuation put on the land.

Mr. Grosman: Well, may I read what this writing says?

(594) The Court: I don't know about the writing, I am talking about what he testified to, what I have heard here.

Q. Now, I show you a letter dated September 14, 1948, addressed to Samuel Marcus, signed Al Bierman by Bill Miller, attorney.

Mr. Brigadier: Show him the original. It's in evidence.

The Court: Where is the original? Have you got it there?

Mr. Margulies: DME-25.

(Document handed to the witness.)

Q. I show you Exhibit marked DME-25 and ask you whether you are familiar with the contents of that letter? A. No, sir; I don't.

Q. Anything in that letter about $500,000 valuation on the land of the corporation?

The Witness: Your Honor, this letter is all distorted. I didn't write this letter.

The Court: No one says you wrote it. You were asked did you ever see this letter before.

The Witness: Only one time, when they showed it to me at the examination.

The Court: Is that the only time you ever saw it?

The Witness: Yes, sir.

(595) Q. Well, did you authorize William Miller to make that offer on your behalf? A. I did not authorize any-

body to make this kind of an offer, because this is distorted. This was not made in the event of a default. This was made in the event that the deal that we had pending didn't materialize, not default.

Q. Well, wouldn't that be a default? A. No, sir; it wouldn't.

Q. If it didn't materialize? A. It certainly would not, because the receipt there says if this deal doesn't go through within ten days. No, sir; this is default, it has nothing to do with—

Q. I thought you said—pardon me. Go ahead.

The Court: Don't both talk at one time. And don't get excited. Just keep your bearing. What is it you started to explain?

(Record read.)

The Court: With what?

The Witness: When I made this agreement, your Honor—

The Court: Speak up.

The Witness: —I said that if the deal didn't go through—there was no such a word "default" incorporated in that, in my original statement. This was written by (596) someone else while I was away from here and had it signed by Mr. Miller.

The Court: And you never saw it until it was shown to you at the taking of the deposition, is that right?

The Witness: That's the truth.

The Court: All right.

Q. Well, now, didn't you testify, Mr. Bierman, that you had sent Bill Miller a telegram authorizing him to sign your name to all papers— A. Yes, sir.

Q. —in connection with this transaction? A. Yes, sir.

Q. And you also testified that you had the most absolute confidence in Bill Miller? A. Yes, sir.

Q. Whatever he did in connection with this deal was all right? A. Yes, sir.

Q. So when you say that this letter, DME-25, is a distortion and does not represent what you understood— A. When Mr. Marcus and I were talking in his office about this, there was no such word as default in the original conversation. Our conversation pertained that if the deal didn't materialize that we were buying all his stock for (597) $125,000—it had nothing to do with the word "default" whatsoever.

Q. Now, Mr. Bierman, suppose you tell us now, did Bill Miller, by virtue of the telegram which you sent him, marked DME-4, have authority to bind you in connection with this Milmar transaction, or did he not? A. He did.

Q. So that whatever he did, including the signing, the execution of this letter, DME-25, you stand by, don't you? A. Yes, sir; I do, but I would like to—

Q. Well, what is your objection?

The Court: You explained it already.

A. Yes, sir; I do.

Mr. Grosman: All right.

The Witness: May I say this, your Honor—

Mr. Brigadier: Wait till you are asked a question.

Mr. Grosman: I would like to have it explained.

Mr. Brigadier: I don't want him to do any more talking than what you ask him. We had three days of this volunteering information.

The Court: In fact, I have never seen witnesses so voluble when not asked questions. My trouble is getting them to answer questions that are asked.

(598) Q. Now, you took a personal dislike to Samuel Marcus, did you not? A. Well, I wouldn't call him a good friend, no.

Q. I didn't ask you that. But you took a personal dislike to Samuel Marcus? A. I don't like him.

Mr. Grosman: All right.

The Court: That's an American privilege, too, I guess.

Mr. Grosman: It's a free country.

Q. You wanted to get rid of him, is that right?

The Court: Don't nod.

A. Yes, sir.

Q. Why did you want to get rid of him? A. He was annoying Mr. Miller. He was going to try to ruin—with his attitude he was going to ruin the success of the Riviera, whereby I would lose my money.

The Court: Well, wouldn't he lose his, too, if he ruined it?

The Witness: Well, I don't know whether he would or not. The place would have gone broke.

Q. Well, he had more money in there than you had, didn't he? A. Yes. He has more money than I have now.

The Court: Oh, no. He has invested more in there (599) than either you or Mr. Miller. Why would it be to his advantage to see it ruined?

The Witness: I didn't—his attitude would have ruined it. That's what I meant to say, your Honor.

The Court: Oh, you don't mean to imply that was his avowed purpose.

The Witness: Oh, no, sir.

The Court: All right.

Q. Now, had he done anything to annoy you? A. He was just overbearing with me, that's all.

Q. Is that all he did to annoy you? A. That's all.

Q. How many times had you seen Mr. Marcus in connection with the Milmar Estates? A. I don't know.

Q. Well, was it once, twice? A. Several times.

Q. Just several times. And in that period he had managed to make you dislike him? A. Yes, sir.

Q. And all he did was to have an overbearing attitude? A. Yes, sir.

Q. Anything else he did? A. That's all.

(600) Q. I direct your attention to your deposition examination, and read these questions to you and your answers—

Mr. Brigadier: Indicate the page, Judge.

Mr. Grosman: Page 16.

Q. "Question: Well, what do you mean, you want to get rid of him?

"Answer: Because he wasn't a nice person."

Do you remember being asked that question and giving that answer? A. Yes, sir.

Q. "Question: Had he done anything to you up to that time?

"Answer: He did everything he could to harass Mr. Miller and myself."

A. That's right.

Q. "Question: Had he done anything to you?

"Answer: He was very snotty and every time he had a chance to talk to him—

"Question: Will you wait until I ask the question. Had he done anything to you to antagonize you?

"Answer: Yes.

"Question: What had he done?

"Answer: Well, he just screamed at me, every time I came near him he used to scream at the top of his voice like (601) a mad man. I think the man's insane, ought to go to a psychiatrist, or something.

"Question: And you took a dislike to him?

"Answer: Not for any personal reason, outside of the fact that he was just obnoxious."

Do you remember giving those—being asked those questions? A. (Witness nods.)

Q. "Question: He was obnoxious to you?

"Answer: To me; yes, sir."

Now, do you say now that all he did was merely act overbearing to you? A. Judge Grosman, I didn't want to repeat those things over again.

Q. Why not? A. Well, I didn't deem it necessary. You have the deposition there.

Q. Now, which is your correct answer? A. My original statement.

I didn't want to bring it out, your Honor.

The Court: Weren't you influenced somewhat in your opinion of Mr. Marcus by what Mr. Miller told you of the troubles he was having with him?

The Witness: No, sir; not exactly.

The Court: No?

(602) The Witness: No, sir; not exactly.

Q. What do you mean, "not exactly"? A. I was there several times and he was just—just as I testified.

The Court: What do you mean, he was difficult to get along with?

The Witness: Very, very difficult. I used to have to walk away from him. He would start screeching and screaming. I used to get nervous and walk away from him.

Q. Well, Miller was a very dear friend of yours, was he not? A. Yes.

Q. And when Marcus was giving Miller a workout, didn't that affect you, didn't that make you angry? A. I used to walk away. I didn't want to hear it.

Q. Now, you went down to Marcus' office with Miller? A. Yes, sir.

Q. Are you sure about that? A. Yes, sir.

Q. You and Miller were there alone? A. Yes, sir.

Q. And where did you go from there? A. We stayed right there.

Q. Well, didn't you go anywhere else? (603) A. At that time; no, sir.

Q. You are now talking about August 28? A. August 28?

Q. Yes. A. No, sir; I didn't see him on August 28.

Q. How many times— A. August 28, I don't remember.

Q. How many times did you go to Marcus' office? A. Once or twice.

Q. Well, was it once or was it twice? A. I don't know. I don't remember. Either once or twice.

Q. When did you go there the first time? A. Prior to when the agreements were signed.

Q. That's August 27? A. Prior to then; yes, sir.

Q. Pardon? A. Yes, sir; prior to that.

The Court: Well, you testified on your direct it was either late in July or early in August. Is that what it is?

The Witness: Yes, sir; prior to this signing. Yes, sir.

Q. Well, now, did you go to Marcus' office with Miller after the agreement, or the writing, DME-1, was (604) signed? A. No, sir.

Q. That was signed on August 27, 1948? A. Yes, sir.

Q. Are you sure about that? A. Yes, sir.

Q. I direct your attention to your testimony on deposition, page 17.

"Question: Now, did you negotiate with Marcus to buy out his interest?

"Answer: I did.

"Question: When?

"Answer: Prior to August 28, or whatever it was. I met him there and we went down to his office.

"Question: Where?

"Answer: On 42nd Street. I don't know the address. And from there we went up to Bob Schwartz' office."

Do you remember being asked those questions and giving that testimony? A. Yes, sir.

Q. Well, now, you only went to his office once or twice? A. I don't remember.

Q. Do you remember going from Marcus' office up to his lawyer's office, Schwartz' office? (605) A. I don't remember that.

Q. Well, now, why did you say in your deposition examination that you did go up to Schwartz' office? A. Must have been—I was mistaken about that.

Q. Were you ever in Schwartz' office? A. One time.

Q. With whom? A. With Mr. Marcus, Mr. Miller.

Q. Do you recall when you were in Bob Schwartz' office with Miller? A. I can't hear you.

Q. Do you recall when you were in Bob Schwartz' office with Miller? A. It was right after the signi g of this paper, or this August 28.

Q. Twenty-seventh? A. Twenty-seventh, whatever it was.

Q. How many days after? A. I don't remember that. Maybe the next day, or a day after that. I don't remember.

Q. When was it that Marcus jumped his offer? A. That was the latter part of July, when I first went down to his office, with Mr. Miller.

Q. You went there in July of '48? A. In the last part of July or the first part of August.

(606) Q. And did you go there a second time? A. I believe I was only there once. I am not sure. I may have been there the second time. I don't remember.

Q. When did Marcus jump his—

The Court: Demand.

Q. —agreement to sell his stock from ninety thousand to a hundred and twenty-five thousand? A. The first time we went down there. That was the latter part of July or the first part of August.

Q. The latter part of July? A. Or the first part of August.

Q. Was that when you agreed to buy—when did you agree to buy—you and Miller agree to buy Marcus' interest for $125,000? A. The 27th day of August.

Q. That was after Marcus had signed this receipt, DME-1? A. That receipt was signed, predicated on the fact that he was going to sell for $125,000.

Q. Well, now, will you tell me, please, why you didn't include that figure in this receipt that you say was drawn and redrawn a number of times. A. It wasn't necessary, because it said, on the bottom down here, in the event—this was to be "received from Al Bierman $19,000 pending deposit, pending negotiation for (607) the purchase of my stock of Milmar Estates, which includes all outstanding stock." He told me that, and that was all—there was conversation between Marcus and I.

The Court: Isn't the price mentioned in there?

The Witness: No, sir; it isn't.

The Court: No price?

Mr. Grosman: No.

The Court: You know, I asked if someone would be good enough to make photostats of these very important documents—

Mr. Brigadier: I thought they were delivered to you.

The Court: —so I could have them in front of me while they are talking about them.

Mr. Grosman: I am sorry, Judge.

The Court: I didn't ask you.

Mr. Abraham Chazin: I had photostats made over the weekend.

Mr. Grosman: They have been very generous with photostats.

The Court: This is very important.

Mr. Brigadier: I understood that you had them. This is the first I heard that they weren't delivered to you. I had given instructions last week, and I am surprised.

I understood that the Judge had a copy of every one of (608) these papers.

Mr. Grosman: Now, Mr. Bierman, if you are at all distressed, you tell me.

The Witness: Go ahead.

The Court: Take it easy. I can take a short recess.

The Witness: Go ahead.

Q. Let me see if I get this thing straight.

Originally Marcus had offered to sell for $90,000? A. Yes, sir.

Q. Right? A. Yes, sir.

Q. When he got down to it, he jumped his price from ninety to a hundred and twenty-five thousand? A. Yes, sir.

Q. That was when you went up to his office with Miller? A. Yes, sir.

Q. And that was the latter part of July or the early part of August? A. Yes, sir.

Q. Now, was that when you and Miller walked out? A. Yes, sir.

Q. You walked out in a huff and said, "Nothing doing," you walked out? (609) A. Yes, sir.

Q. Now, then you got together with him again and you agreed to meet his price of a hundred and twenty-five thousand? A. Yes, sir.

Q. So that on August 27, 1948, when the writing, DME-1, was signed, you knew that Marcus was a very fickle sort of a person, right? A. That's right.

Q. You knew that he had gone back on his word— A. Yes, sir.

Q. —to sell for $90,000 and had demanded a $35,000 increase, right? A. Right.

Q. Now, you went upstairs in the nightclub, into a room in the nightclub, and you proceeded to draw a number of agreements which culminated in the drawing of the agreement, DME-1, right? A. That's right.

Q. You say Marcus wrote these things out in longhand, then he proceeded to type them, right?

Mr. Brigadier: Would you answer, please?

The Witness: I said, "Yes, sir."

Mr. Grosman: He can't answer, because it is an effort for him.

(610) The Witness: Yes, sir.

Mr. Grosman: Unless you want him to answer.

Mr. Brigadier: I want the record to get his answer.

Q. I am asking you now, Mr. Bierman, why, in view of the fact that you were dealing with a man of this type, who had given you proof of the fact that you couldn't rely on his word, why you didn't insist upon inserting in this agreement, whereby you were paying him $10,000 deposit, the amount that you were to pay him for the purchase of this stock; why didn't you do it? A. There was another paper that Miller read to me—Marcus came over and gave him another paper. All the details were enumerated in this particular paper, that Marcus was to get $19,000 on deposit, and that's why I had $19,000 with me when this paper was drawn up, for this $19,000—he was to get $125,000.

The Court: Was that price stated in the other paper?

The Witness: In the other paper; yes, sir.

The Court: Well, is there such a paper? Why are we wasting so much time?

The Witness: He has it right there.

The Court: Let's see it.

Mr. Brigadier: The August 26 paper.

(611) The Witness: He has got it there somewhere.

(Document handed to the Court.)

The Court: This is the original.

Mr. Grosman: Is that the unsigned paper, Judge?

The Court: I have one sheet here. That's all. There is no signature on it.

Is that the paper you refer to, the one shown you by Mr. Miller?

The Witness: Yes, sir. $125,000, $19,000 in execution of this agreement—

The Court: I can read it.

The Witness: I am sorry, sir.

The Court: Did you notice that letter was addressed to Mr. Sam Marcus?

The Witness: Yes, sir.

The Court: Any signature on it?

The Witness: No, sir.

The Court: Well, who was this supposed to have been written by to Sam Marcus?

The Witness: Mr. Marcus brought this letter up to Mr. Miller for me to sign.

The Court: Did you see him give it to him?

The Witness: No. Mr. Miller read this to me when I came in that afternoon. The minute—he said Mr. Marcus gave him this letter for me to sign.

(612) Q. What afternoon? A. The day before—either this date or the day before. I don't remember right off.

Al Bierman—for Defendant Milmar Estate—Cross

Q. Are you sure about that? A. Yes, sir.

Q. Now, this letter, this unsigned letter, marked DME-2, is dated August 26, 1948? A. That's right.

Q. A day before your receipt, DME-1? A. That's right.

Q. So you knew on the 27th of August that the price was to be $125,000? A. Yes, sir.

Q. I am asking you now, why wasn't that put in the receipt? A. I didn't think it was necessary. I had the $19,000 to give him, your Honor, and he was to go ahead—

The Court: Well, you answered, you didn't think it was necessary.

The Witness: Yes, sir; that's it.

Q. Now, isn't it a fact, Mr. Bierman, that the reason Mr. Marcus would not accept the $9,000 in cash, because you wanted to give him that $9,000 in cash, and he insisted that all transactions, all money transactions were to be by check? (613) A. He did not.

Q. Well, he didn't take the $9,000. A. The only reason he didn't take—no, sir; he didn't take the $9,000.

Q. But he did take the $10,000 check? A. Yes, sir.

Q. Now, you say that he was to buy all of the stock—you were to buy all of the stock? A. All the outstanding stock that wasn't owned by Bierman and Miller.

Q. Did Miller own any stock? A. Yes, sir; Miller and I owned 50 per cent of Milmar.

Q. I thought you said that you never received any stock?

The Court: What's inconsistent about that?

Mr. Grosman: Well, he said—

The Court: He just said he never received the evidence of his investment.

Q. Did William Miller have any stock? A. I don't know whether he received the certificates or not.

Q. Now, do you know what you testified to on your deposition examination with respect to how this receipt, DME-1, was drawn; do you recall what you said there? A. I don't remember; no, sir. Refresh my memory.

(614) Q. Page 19. "Question: And it was in the night-club that a writing of some sort was drawn?

"Answer: Yes, sir.

"Question: Who drew the writing, who drew the writing up?

"Answer: Both of us."

Do you remember saying that? A. Yes, sir; if it's in there.

Q. Is that true? A. Mr. Marcus did that.

Q. Now you say that Mr. Marcus did it. A. I might have—might have been figuring it or something, with a piece of paper, but maybe it was the wording, the way it was worded, or something. I don't remember.

Q. How many checks did you give him for the $10,000? A. Two, $5,000 each.

Q. Whose checks were they? A. I don't remember.

Q. Was either of them yours? A. No, sir.

Q. Might one of them be yours? A. At that time I wasn't sure, but I am positive now that it wasn't mine; no, sir.

(615) Q. Now, who do you say typed out this receipt, DME-1? A. Mr. Sam Marcus.

Q. Sam Marcus? A. Yes, sir.

Q. Wasn't there a stenographer up there, or telephone operator— A. Yes, sir.

Q. —who typed that receipt? A. No, sir.

Q. He typed it? A. Mr. Marcus.

Q. What did you do while this was going on? A. Tearing up other papers that he had typewritten, that I didn't like.

Q. How long did the preparation of this receipt take? A. I don't know how long it took.

Q. Was it an hour, two hours? A. Thirty minutes, something like that, 30, 40 minutes. Maybe less.

The Court: That's your best guess?
The Witness: Yes, sir.

Q. Were either of you drunk on that occasion? A. No, sir.

(616) Q. Had you been drinking at the bar— A. No, sir.

Q. —before you went upstairs? A. No, sir.

Q. Was this agreement signed at the bar? A. No, sir.

Q. Where was it signed? A. Upstairs. Either upstairs or in the little captain's room downstairs. One of the two places. I don't remember that.

Q. Now, when you were examined on deposition, page 26, you were asked about the $9,000 in cash, were you not? A. Yes, sir.

Q. You were asked this question and gave this answer, "Did you offer Mr. Marcus $9,000 in cash that night?

"Answer: I don't remember."

Is your memory better now than it is now? A. I offered Mr. Marcus $19,000, and the reason that the $19,000 was handed to him was because we went up with the purpose of giving him $19,000, as the agreement from the day before, that he was to receive that. When I handed him the $19,000, he didn't want the cash, because it was late at night, and he did not want to carry that cash with (617) him.

The Court: I know, you told us that. But now he is referring to what you said on the taking of a deposition.

The Witness: I didn't remember right offhand. I am sure that I offered it to him.

Q. Well, now, is it true that you said in your deposition hearing that you didn't remember whether you offered Marcus $9,000 in cash that night? A. If I said it, I didn't mean it in that way, because I remember offering him the money, and he didn't want it.

Q. You were asked, "You might have done so?

"Answer: I might have; could have. I don't remember."

A. That's right.

Q. Now, what has occurred since you testified on your deposition to refresh your mind? A. The mere fact that Sam Marcus came up to get $19,000, and I handed it to him, and he didn't want the cash, and he scratched out the words, "nine thousand dollars,"—the nineteen thousand. And he inserted on top, "Two five thousand dollar checks."

It was handed to him, your Honor, but he handed it back to me, necessitating the changing of the wording in the receipt.

Q. Have you read your testimony on deposition—(618) A. No, sir.

Q. —since you gave it? A. Might have looked through it. I don't remember—the chances are I looked through it once or twice.

The Court: Did you read it? That's all he asked you.

Q. Well, I thought you said just a moment ago that you didn't read it. A. Once or twice, I went right through it. I just happened to think about it.

Q. Now you say it was once or twice? A. Yes.

Q. When is the last time you saw your testimony on deposition? A. A week ago.

The Court: I think we will take a five minute recess. And I suggest by that time you have what questions

you want to ask him in that deposition, because it is quite annoying to sit here as a Judge and wait while people thumb through depositions innumerable times to see what they are going to ask next.

(Short recess.)

The Court: Where is the witness?

Mr. Brigadier: While we are waiting for the witness, I am going to make an objection. I think you can (619) hear it before the witness gets in.

Judge Grosman put a question to the witness that since he gave the testimony that he read he is now, for the first time, giving different testimony, when actually Judge Grosman knows that he corrected that testimony in the deposition on page 38 and told the story that he is telling now here today. So it isn't the first time that he is telling that—gave that testimony, he gave it in the deposition.

Mr. Grosman: I didn't say it was the first time he was telling the story.

Mr. Brigadier: I am sure that the Judge has the impression that this is the first time that you are hearing this interpretation, whereas he gave it on page 38 of the deposition.

The Court: I spent about 15 years of my life hearing people testify. I think I have a pretty good impression. And I have had all kinds of lawyers before me. And some day I shall classify them for the benefit of all concerned. Every man has his own way of trying a case.

Of course, killing time is terrible, not only to the Court, but to counsel and other persons involved. Now I have four "ready" cases awaiting the disposition of this case, two of them jury cases. I don't know how much longer this is going to go on.

(620) Mr. Grosman: Well, I am going to be through with this witness in a moment or two.

The Court: I am only interested in the ultimate facts on which I shall decide the issue. I am not interested in any collateral matters.

Q. I show you the receipt, DME-1, the handwriting at the bottom there, the last paragraph, did you see Marcus write that? A. I was right there.

Q. You saw him write it? A. Yes, sir.

Mr. Grosman: All right. That's all I want to know.

The Court: All you had to do was say yes.

The Witness: Yes, sir.

The Court: He didn't ask you if you were there. Did you see him write it? The answer is yes.

The Witness: Yes, sir.

Q. All right. Now, you say that Marcus had agreed under that receipt, DME-1, to sell all of his stock— A. Yes, sir.

Q. —with the exception of your stock and Miller's stock? A. That's right.

Q. How much stock was he supposed to have? (621) A. I don't know.

Q. Well, you were supposed to have 50 per cent, you and Miller. A. Fifty per cent; yes, sir.

Q. And did he have the other 50 per cent? A. Did he?

Q. Yes. A. I presume he did.

Q. Now, you had this receipt, DME-2, before you; it was given to you the day before the receipt, DME-1, was pre-prepared? A. It was not given to me, sir.

Q. Well, didn't you say—

The Court: No, he said it was read to him.

Q. Or was read to you? A. That's right.

Al Bierman—for Defendant Milmar Estate—Cross

Q. Were you familiar with the contents of DME-2 when DME-1 was prepared? A. There were two things in here—yes, I was familiar with part of it.

Q. Yes? A. Yes, sir.

Q. Now, may I call your attention to the fact that this writing, DME-2, provides, "The undersigned Al Bierman does hereby offer to purchase all of your shares (622) of Milmar Estate, Inc., consisting of approximately 62½ per cent of the outstanding shares." A. Yes, sir. Now, that is the reason why I insisted upon that receipt. He put this in one of the receipts and I tore it up. I want the word "all" the outstanding stock.

Q. Yes. A. I didn't want 62½ per cent, or a certain amount of stock.

The Court: Don't get excited, Mr. Bierman. A man in your condition shouldn't get excited. Just take it easy.

The Witness: Thank you.

The Court: You get used to that in litigation.

Q. You insisted that all of the outstanding stock be included in this receipt, DME-1? A. Yes, sir.

Q. With the exception of that owned by William Miller and Al Bierman? A. That's right.

Q. Because you had been told, a day previous, that Marcus had 62½ per cent? A. I wasn't told; no, sir. I read this in this paper—Mr. Miller read this to me, in my presence. And I says, "Bill, this is wrong. He hasn't got 62½ per cent." (623) He says, "You're right."

Q. Did you know how the stockholdings were held, the stock of Milmar Estate? A. How do you mean that?

Q. Did you know who held the stock, in what proportion? A. I don't know what you mean by that, who held it, or what.

Q. Do you know who held the stock of Milmar Estate, Inc.?

The Court: Who were the stockholders?

The Witness: Mr. Miller, myself and Sam Marcus.

Q. How much stock did Miller have? A. He and I had 50 per cent.

Q. Yes. Did you know how much stock Marcus had? A. Fifty per cent.

Q. You are sure of that? A. Yes, sir.

Q. Did you ever heard about a man named Schwartz owning any stock? A. Never heard—never heard of Schwartz' name owning any stock. I had never met Schwartz until I came up here, which was right after the signing of the—

Q. You met him the latter part of August? A. Yes, sir.

(624) Q. Or the early part of August? A. The latter part of August. I never met him before that. I think it was August or September, the first couple of days of September.

Q. Then, as I understand it, you refused to be guided by the statement in this receipt, DME-2, which described Marcus as owning 62½ per cent of the outstanding shares of Milmar? A. Yes, sir.

Q. DME-3, did you ever see this before?

(Document shown to witness.)

The Court: That's the one you said was read to you.

A. Yes, this was read to me, also.

Q. I thought DME-2 was read to you. A. Both of them.

Q. Both of them read to you over the phone? A. No, sir; in person.

Q. Who read them to you? A. Mr. Miller.

Q. Well, didn't you, yourself, read them? A. He read them to me while I was standing alongside of him, just like the Judge and I, and he is reading to me.

Q. I see. Did you follow him while he read to you? A. No, sir; I didn't follow him. I was standing there (625) while he was reading it to me.

The Court: Well, were you paying attention to what Mr. Miller was reading?

The Witness: Oh, yes. Yes, sir.

Q. Do you know why this writing, DME-3, wasn't signed? A. No, sir; I don't. Wait a minute. Yes, sir. Mr. Miller told me later on that the reason he didn't sign this is because these things were blank in here.

Q. What things were blank? A. Well, for instance, right in here he says, "The party of the first part agrees to pay five thousand to the party of the second part upon the signing of this agreement," blank dollars to be paid—he wasn't sure how much money he would ask on the completion of the thing.

Q. So this writing, DME-3, was never signed? A. Evidently not.

The Court: As far as you know, it was never signed.

The Witness: Never signed; no, sir.

Q. Now, you got along well with Marcus, did you not; he liked you? A. I didn't like him.

Q. Well, he liked you.

The Court: Why do you interject that? Judge (626) Grosman said he liked you, did he?

The Witness: I don't know.

The Court: As far as you know?

The Witness: I don't know whether he did or not.

Q. Didn't you say he did on your deposition hearing? A. Maybe he did. Maybe he did like me. I don't know.

Q. But you didn't like him. A. I didn't like him.

Colloquy

The Court: You have established that now, Judge Grosman, sufficiently.

Mr. Grosman: I think that is all.

The Court: Anything further?

Mr. Brigadier: Well, I just want him to sit here while I do this, because I think that is the way I am supposed to do it.

I wish to offer in evidence page 38 and the first 15 lines of page 39 of Mr. Bierman's deposition, under the rule which permits me to offer the deposition touching on the part that he was questioned about by Judge Grosman. And this contains the part that I referred to your Honor before.

Mr. Grosman: Now, if your Honor please, I would like to have that read into the record. I don't know (627) whether they include both pages or parts of pages, or what.

Mr. Brigadier: All of page 38 and the first—I will be glad to read it into the record, but I didn't want to take up the time of the Court to do it—and the first 15 lines of page 39. The stenographer can copy it later, unless your Honor feels you have to sit here while I read it.

The Court: You don't do me any favor by reading it.

Mr. Brigadier: Well, that's all I want to do, make the offer of page 38 and the first 15 lines of 39.

The Court: Ending where on 39?

Mr. Brigadier: Ending on the words, "he was going to deliver them back to me and Miller."

The Court: All right. Can you put it in later, sir? Start at the top of 38.

Mr. Grosman: Where does that end on page 39?

Mr. Brigadier: All of 38 and down to here (indicating).

Excerpt from Deposition of Al Bierman Read Into Record

The Court: Anything else from Mr. Bierman?

Mr. Brigadier: No, that's all, if your Honor please.

(Witness excused.)

(In compliance with the above direction, the (628) following excerpt from deposition of Al Bierman is made a part of the record:)

"Answer: It wasn't—I didn't make the changes. Mr. Marcus scratched out this amount here and—

"Question: The nineteen thousand and substituted ten?

"Answer: Yes, sir.

"Question: And you think he wrote, 'received two checks of five thousand dollars each?'

"Mr. Brigadier: Can I break in a minute there? I didn't get the answer to that last question.

"(Record read.)

"Mr. Brigadier: And the 'here' was the ten thousand?

"Mr. Grosman: Yes.

"Mr. Brigadier: I wasn't clear whether you were referring to the one on top or the one on the bottom.

"Mr. Grosman: The ten thousand dollars substituted.

"Question: Did you have $9,000 in cash with you that night?

"Answer: Yes, sir.

"Question: In addition to the two $$10,000 checks?

"Answer: Yes, sir.

"Mr. Brigadier: Two five thousand dollar checks.

"The Witness: Five thousand dollar checks.

"Mr. Grosman: Two five thousand dollar checks.

(629) "Question: And you tendered that $9,000 to Mr. Marcus, did you?

"Answer: Yes.

Excerpt from Deposition of Al Bierman Read Into Record

"Question: He refused to accept the cash?

"Answer: The only reason he refused it—

"Question: No, did he refuse it?

"Answer: Yes.

"Question: Now, you can tell us why, if you like.

"Answer: I am sorry. He didn't want to carry that much cash that late at night—that is, at nighttime.

"Question: What did you mean by the statement 'that late at night'?

"Answer: Well, it was at nighttime. It could have been 10 o'clock, 11 o'clock, maybe he wasn't going home, I don't know what he was going to do. He didn't want to take the cash.

"Question: Now, did you agree on the purchase price of Mr. Marcus' stock that night?

"Answer: All of his stock, and everything else that alluded to Mr. Marcus' holdings in Milmar, notes that Mr. Miller had signed, and every piece of paper that was ever executed between them, he was going to deliver them back to me and Miller."

The Court: Well, it's almost 4 o'clock. Who (630) is to be called next?

Mr. Brigadier: Mr. Kevelson, and that will be my last witness on my main case.

The Court: I ask the question for the benefit of other lawyers who are having their cases held. Have we reason to believe, on a reasonable estimate, that we will conclude all the testimony this week?

Mr. Grosman: It all depends on how long they are going to cross examine Mr. Marcus.

Mr. Brigadier: I will be through with the case that I am trying tomorrow, I have announced.

Mr. Tepper: That's the interpleader case.

Mr. Brigadier: I am proving the first count that I

have filed, as to the nature of this transaction.

The Court: The interpleader suit?

Mr. Brigadier: That's right. Then I understand that the next thing we are going to go to is the fraud case.

The Court: That's right. Do you think we can do it all this week?

Mr. Grosman: I will do the best I can, Judge. You know, I have got a couple of cases besides this one. I would like to get out of here, much as I enjoy your presence.

I will do the very best I can. I don't know. You might stagger this case a bit.

(631) The Court: Well, ordinarily I would do it, but since it is such an old case, I think, in fairness to all litigants here, we should conclude it as soon as possible.

Mr. Grosman: I will do the very best I can.

The Court: All right, sir. That is all I can ask all counsel, to do the best they can. I ask your cooperation in going as rapidly as possible, for the benefit of all concerned, and other litigants who are awaiting their day in court.

Ten fifteen tomorrow morning.

(Whereupon, the hearing was adjourned to be resumed Tuesday, February 1, 1955, at 10:15 A. M.)

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(632) Newark, N. J., Tuesday, February 1, 1955.

(Hearing resumed pursuant to adjournment.)

(Appearances as previously noted.)

The Court: Did we finish with Mr. Bierman?

Mr. Grosman: I think so.

Al Kevelson—for Defendant Milmar Estate—Recalled—Direct

Now, if your Honor please, you will recall that yesterday during the course of the day some question came up as to how the contradictory testimony is to be weighed.

The Court: You will give me that at the end of the case. I don't want it now, because I am afraid there is going to be a lot of contradictory testimony before we get through. In fact, I am quite certain. I find that in any transaction as old as this you are bound to get contradictory testimony; the older they are, the more you get.

Mr. Grosman: Well, there is contradictory testimony, but when a man testifies under oath in one way, in one place, and another way in another place, it's a little different.

The Court: It never happened before?

Mr. Grosman: Oh, I suppose it happened before.

The Court: Call your next, please.

(633) Mr. Brigadier: Mr. Kevelson, please.

Al Kevelson, called as a witness, having been previously duly sworn, testified as follows:

Direct examination by Mr. Brigadier:

Q. Mr. Kevelson, where do you live? A. 1497 East 21st Street, Brooklyn, New York.

Q. And what is your occupation? A. Asbestos.

Q. Are you connected with some asbestos company? A. Yes, sir.

Q. What is the name of the company? A. Ace Asbestos Manufacturing Co., Inc.

Q. Is it located in New Jersey? A. In Jersey City.

Q. Now, do you know William Miller? A. Yes, sir.

Al Kevelson—for Defendant Milmar Estate—Recalled—Direct

Q. And how long have you known him? A. About 10, 11 years.

Q. Do you know Samuel Marcus? A. Yes, sir.

Q. And how long have you known him? A. Well, I met him, officially, say, some time during the year of 1949.

The Court: Will you hold it just a minute. What is your first name?

(634) The Witness: Al.

The Court: Not Al, your first name. Albert?

The Witness: No, just Al. I always used Al, your Honor.

The Court: Well, I am certain that wasn't given to you when you were born, Al. That's a nickname. My nickname is Al, too, sometimes. My name is Alfred. What is your first name?

The Witness: I guess it's Albert.

The Court: You don't know?

The Witness: No, I never went by any other name but Al.

The Court: All right.

By Mr. Brigadier:

Q. You say that you actually met him face to face for the first time in '49? A. That's correct.

Q. Can you state the month, approximately? A. I'd say—it would be hard, but I know it was after July, 1949, possibly in August or September, somewhere around that time.

Q. Now, prior to this time had you ever spoken to him? A. I did.

Q. And you had spoken to him when and where? (635) A. I spoke to Mr. Marcus over the telephone on September 14, 1948, for the first time.

Q. I see. Now, prior to September 14, 1948, had you been to the Riviera nightclub? A. Yes, sir.

Al Kevelson—for Defendant Milmar Estate—Recalled—Direct

Q. I direct your attention to either the latter part of the month of July, 1948, or the early part of August, 1948—you have heard Mr. Miller's testimony here with respect to your meeting with him at the Riviera? A. I did.

Q. Will you tell us when it took place? I'd say about the last few days in July or the beginning of August.

Q. And what conversation did you have with him? A. I spoke to him with reference to buying an interest into the Milmar Estate, Inc.

Q. This was at the Riviera? A. That's correct.

Q. Now, what did Mr. Miller state to you?

Mr. Grosman: Miller?

Mr. Brigadier: Miller, yes.

A. Mr. Miller stated to me that he is looking for somebody to buy out his partner in the Milmar Estates, Inc., if I was interested, and I said I was. And he proceeded to tell me the facts of how to go about the purchase of this (636) partner that is in business with him. And he told me the balance of the mortgage that is due, he told me the payments, how they have to be met, and he discussed with me, in general, the importance of the Bill Miller's Riviera, that it is a tenant of this real estate project, and if the Riviera does good, that will enhance the value of the Milmar Estates, Inc.

Q. Now, did he state any price at which the proposition was available? A. Yes. He said he thinks he can get it for $125,000, a cerain amount of money down, and a certain amount paid when the Riviera would be open, and a certain amount paid when the Riviera would be closed.

Q. Did he state what the amounts would be? A. He said the purchase price would be $125,000, $30,000 down and $1,500 a month when the Riviera would be closed and $3,000 per month when the Riviera would be open.

Al Kevelson—for Defendant Milmar Estate—
Recalled—Direct

Q. That's as to the balance of the ninety-five. A. The ninety-five thousand.

Q. Now, what did you tell Mr. Miller at that time?

Mr. Grosman: Well, now, if your Honor please, I don't think this ought to go too far, this leading.

Mr. Brigadier: What is leading about my asking what did he say to Mr. Miller, sir?

The Court: You are discussing a lot of things (637) when Marcus wasn't around at all.

Mr. Grosman: Marcus wasn't there.

Mr. Brigadier: May I be heard on that, your Honor.

The Court: Yes, sir.

Mr. Brigadier: Remember, Mr. Miller already testified that he reported all of this conversation to Mr. Marcus.

The Court: All right. I will take it back.

Mr. Grosman: That is no reason, your Honor, why this man should violate the Rules of Evidence.

Mr. Brigadier: It isn't violated—I am sorry, I don't want to argue—it is tied in with the fact that the man has already testified—

The Court: Go ahead, lose 10 or 15 minutes discussing that. He will be through in a second with this conversation.

Mr. Grosman: All right.

By Mr. Brigadier:

Q. What did you say to Mr. Miller after he had stated this to you? A. I asked him if my accountants could look at the books and he said they can.

Q. And did you arrange for them to do it? A. I did.

(638) The Court: Now, which books, Riviera or Milmar, or both?

The Witness: Well, I just said "books" at that particular time.

Al Kevelson—for Defendant Milmar Estate—
Recalled—Direct

The Court: All right.

Mr. Brigadier: I would like to ask him, if your Honor will permit me.

Q. Did the accountant look at the books? A. They did.

Q. Did they report to you what they had looked at? A. They did.

Q. What did they report to you? A. They reported to me that they looked at the—

Mr. Grosman: I object.

Mr. Brigadier: If you object, I won't press it. I thought you wanted to hear this, too.

Mr. Grosman: I think you ought to put it in properly, if you are going to bind Marcus.

Mr. Brigadier: If there is an objection, I won't press it.

Mr. Grosman: I object to it.

Q. As the result of the inspection of the books by the accountants, did you then report back to Mr. Miller? A. I did.

Q. And what did you tell Mr. Miller?

(639) Mr. Grosman: I object to that as not binding ~~on~~ Marcus. Pure hearsay.

Mr. Brigadier: This again was tied in by the testimony that Mr. Miller gave.

The Court: We will adopt the Criminal Rule, it is not binding on Marcus, since he was not there.

Mr. Grosman: And Miller did not testify with all this detail as to what he reported to Marcus.

Mr. Brigadier: But he did it.

The Court: He said he reported to Marcus. I don't know if he went into great detail.

Mr. Grosman: To what extent?

Al Kevelson—for Defendant Milmar Estate—
Recalled—Direct

Mr. Brigadier: You haven't heard yet what he is going to say.

The Court: Will you please answer the question?

The Witness: Will you repeat the question?

(Question read.)

A. I told Mr. Miller that I was ready to do business.

Mr. Brigadier: Now, that's certainly testified to.

Q. Did you then have a subsequent conversation with Mr. Miller? A. I did.

Q. And what was that conversation with respect to? A. He said to me that—

(640) Mr. Grosman: Well, now, your Honor, I must object again. Conversation between him and Miller is not binding on Marcus.

The Court: No doubt about that.

Mr. Brigadier: This again will be, as you will see in a moment, exactly what Mr. Miller testified to he reported to Mr. Marcus. I am going to question him about the $5,000 and that Exhibit that is already in evidence, which Miller identified, in which he told Marcus he had gotten the $5,000 from Kevelson.

The Court: I believe he said so.

Mr. Brigadier: Will you let me have that Exhibit, please?

Mr. Margulies: DME-31.

(Document handed to counsel.)

Q. You say you then had a conversation with Mr. Miller? A. That's correct.

Q. Did Mr. Miller request anything from you? A. Yes he said, "If you are interested to do business, I think that

you should come up here with a deposit so that we can bind this contract, that I can show Mr. Marcus that I have a customer to do business."

Q. And did you go to the Riviera? A. I did.

(641) Q. And what did you do when you got there? A. When I got there I gave Mr. Miller a $5,000 deposit.

Q. I show you Exhibit DME-31, dated August 1948, and ask you whether that is the receipt given to you by Mr. Miller for that $5,000? A. It was.

Q. And this was written on the back of a Riviera sheet, is that right? A. That's correct.

Mr. Tepper: Are you offering that?

Mr. Briagdier: It is already in evidence.

Q. Now, when did you next hear from Mr. Miller about this transaction? A. Well, I was in touch with Mr. Miller, as the time went on, and he kept telling me that he has been negotiating with Mr. Marcus, and they are arranging the time, and the place, where they will sit down to close the contract.

Q. All right. Now, did you give any other money to Mr. Miller besides this $5,000? A. I did.

Q. And how much did you give him? A. $19,000.

Q. In addition to this five? A. That's correct.

Q. Making a total of twenty-four? (642) A. That's correct.

Q. When did you give him the additional nineteen? A. Some time during the month of August, I'd say the latter part of August.

Mr. Grosman: The year?

Q. What year, Mr. Kevelson? A. 1948.

Q. Now, did you subsequently receive any word from Mr. Miller, sir, as to whether a contract was going to be

drawn? A. I was informed that on September 14 he was going to the offices of Mr. Marcus' lawyer to draw the necessary papers.

Q. I see. Now, on the 14th did you receive a telephone call? A. I did.

Q. I think you have already testified you did. And where were you when you received this call? A. I was in my normal course of business making calls and selling merchandise.

Q. I mean where were you at the particular moment. A. Well, the call was directed to my office, and I called into my office periodically, and they told me that Mr. Miller called—

Mr. Grosman: Please. I object to what members (643) of his staff told him.

Mr. Brigadier: Is this so crucial? I want to point out simply how he—

Mr. Grosman: You keep running away.

The Court: As a result of all these calls, did you speak to Marcus?

The Witness: Yes, sir.

The Court: Okay.

Q. All right. Will you tell us what the conversation was? A. First I spoke to Mr. Miller. And he told me that he is here at the office now, and everything was decided upon, and all of a sudden Mr. Marcus came up that he wants another $15,000. And I told Mr. Miller that I wasn't interested, this deal has been going over for over a month's time, and there is no reason why at this time we should have to pay any more money, I am not interested at all.

And after a while I received another call, and I called back, and he put on Mr. Marcus, on the telephone. And I went over the whole deal with Mr. Marcus. I told him, "I can't understand why you are asking for more money

now. This deal has been pending for several weeks. You know that you agreed to sell for $125,000 to get out—lock, stock and barrel—to take $30,000 down, which we are ready to (644) give you, and the balance of $95,000 to be paid $3,000 a month when the Riviera is open and $1,500 a month when the Riviera is closed. And I can't understand why now you are asking for $15,000 more."

The Court: Very good. What did he say to you; what reason did he give you for demanding $15,000 more, if he did demand it?

The Witness: He didn't give any reason that I can remember of, he just wanted $15,000 more.

Q. What did you tell him? A. I told him, "I am not interested at all."

Q. You did not agree to pay it? A. Absolutely. Then he put Mr. Miller on. And I said, "Bill, if he does not agree to the terms that we have outlined, that I just went over with Mr. Marcus, and yourself, count me out. I am not interested."

Q. Now, were you subsequently informed that there had been a closing of the transaction? A. That particular night at the Riviera, Bill Miller congratulated me, and I congratulated him. He said that the deal had been closed.

Q. I see. Now, when was the next time after September 14, 1948, that you spoke to Marcus again? A. The next time, as I said, was at his office, some time during either July, August or September of 1949.

(645) Q. That was the first time that you spoke to him face to face since September 14, 1948? A. That's correct.

The Court: Wait a minute. He went through several months. When, after September 14, 1948?

The Witness: I'd say about the—August or September of 1949.

Al Kevelson—for Defendant Milmar Estate—
Recalled—Direct

The Court: '49. A year later now.
The Witness: That's correct.
The Court: Excuse me.

Q. That was after the question of the dower had arisen, is that right? A. That's correct.

Q. And you went to see him? A. That's correct.

Q. Tell us how you got in touch with him. A. Well, I asked the office of the Riviera for his address.

Q. You phoned him? A. Yes, sir.

Q. Did you make an appointment with him? A. Yes, sir; that's correct.

Q. And you went to see him pursuant to that appointment? A. That's correct.

(646) Q. Now, will you tell us what happened when you got there? A. When I got over there I sat down with Mr. Marcus and I told him the predicament we were in, we changed over the mortgage, and one of the attorneys of the mortgagee told us that we have a faulty—

The Court: Title?

A. (continuing) —title, because of the fact that we have to get the signatures of Bill Miller's wife and Sam Marcus' wife, and I said, "Bill Miller already received his wife's signature, and I think, in all fairness, according to the deal, that you should give me your signature."

The Court: You mean his wife's signature.
The Witness: His wife's signature. I'm sorry.

A. (continuing) And we discussed it for a while. And he kept hammering away, telling me that Bill Miller did this, and Bill Miller did that. And I told him I wasn't interested, "All I know is that on September 14, 1948, you agreed to give us a clear title, you got out lock, stock and barrel, and I think in all fairness, as a businessman, you

should give us, or get for us your wife's signature. We should not be tied up with any dower rights whatsoever."

And the final windup was, he said he is not interested, he wants to give Bill Miller aggravation.

(647) Q. Did he at that time state to you that he considered himself still a stockholder of Milmar Estate, Inc.?

Mr. Grosman: I object to that as leading.

Mr. Brigadier: I think it is leading, Judge Grosman, but don't you think it's about time you stopped making this objection?

Mr. Grosman: I don't think so, no. If you want to testify, take an oath and testify.

Q. Was there anything said at the particular occasion by Mr. Marcus with respect to his ownership of stock in Milmar? A. There was not.

Q. Was there anything said by Mr. Marcus as to whether or not he was still an officer of Milmar? A. There was not.

Mr. Grosman: The same objection.

The Court: You are doing the same thing over again.

Q. Was there any other conversation, besides that which you have related here as having taken place? A. There was no conversation other than that that I just related.

The Court: Well, did he give any other reason except the fact that he wanted to give Bill Miller (648) aggravation as his reason for not getting his wife to sign the dower away?

The Witness: That's the only reason he gave.

The Court: All right.

Q. After the September 14 transaction took place did you meet with Miller at the Riviera? A. I did.

Q. And was there a meeting for the election of officers?

Al Kevelson—for Defendant Milmar Estate—Recalled—Cross

A. There was an informal meeting held and we elected the officers.

Q. Of Milmar? A. That's correct.

Q. And who was elected president? A. I was.

Q. Who was elected secretary-treasurer? A. Bill Miller.

Q. Now, from that date on down to the date that the Riviera closed, how often would you say that you were there during the time that the Riviera was open, during the month that it was operating? A. Well, I was there several evenings a week, and possibly once or twice during the day.

Q. And during that entire period of time, from September 14, 1948, to the day that the Riviera actually (649) ceased operating, did you ever see Samuel Marcus there? A. No, sir.

Q. After the acquisition, or closing of the transaction of September 14, 1948, did you, Miller and Bierman come to any arrangement as to the stock division among yourselves? A. Yes, we did, as—

Mr. Grosman: Wait a minute. You have answered.

Q. What arrangement did you come to? A. I was 40 per cent owner, Bill Miller was 40 per cent owner and Al Bierman was 20 per cent owner.

Q. I see. And is that the basis on which you have operated ever since? A. That's correct.

Mr. Brigadier: That is all.

Cross examination by Mr. Grosman:

Q. Mr. Kevelson, prior to September 14, 1948, were you a frequent visitor at the Riviera, the nightclub? A. Yes.

Q. Well, over what period of time? A. Well, I imagine I would get there possibly once a week, twice a week.

Q. For how long a period, a month, year, six months? A. Well, during the time that they were open.

Al Kevelson—for Defendant Milmar Estate—Recalled—Cross

(650) Q. In the year 1948? A. Oh, I was there in '47. I was there in '48.

Q. Did you ever see Sam Marcus there? A. No, sir.

Q. You never met him there? A. No.

Q. You saw Miller there? A. Yes, sir.

Q. You knew him? A. Yes, sir.

Q. Now, Mr. Kevelson, who do you say first approached you about buying an interest in Milmar, or Riviera? A. Mr. Bernardi and Mr. Ostadol.

Q. Not Mr. Miller? A. No, sir.

Q. He was not the first one to approach you? A. No, sir.

Q. And who are these two men that you have just named? A. Mr. Bernardi was the maitre d' at the Riviera and Mr. Ostadol was one of the captains.

Q. And what did these men say to you with respect to the subject? A. They asked me if I am interested in the purchase of (651) the property where the Riviera is located.

Q. What did you say? A. I said, "If it's a good deal, I am interested."

Q. Did they name any terms to you, did they state any terms? A. No, not at all.

Q. When next did you meet Miller? A. Approximately five, 10 or 15 minutes after that.

Q. They brought him right over to your table? A. No. They came over to me and said that Mr. Miller would like to see me. And we went into the captain's room.

Q. And what happened there? A. And we sat down and Mr. Miller proceeded to tell me about the deal, in reference to buying out Mr. Marcus.

Q. And what did he tell you? A. He told me that he has a partner by the name of Sam Marcus, who is interested with him in the real estate here, and that he can get him out for a certain amount of money. And I asked him how much, and he said $125,000, payable $30,000 down, and the

Al Kevelson—for Defendant Milmar Estate—
Recalled—Cross

balance of ninety-five to be paid out $3,000 per month when the Riviera is open, $1,500 per month when the Riviera is closed.

And then I asked him several questions about the real estate. And he told me the balance of the mortgage, and how that has to be paid. And he reiterated to me the (652) importance of Bill Miller's Riviera doing business, and if she does better business, it will enhance the property.

And I asked him, as any ordinary businessman would ask him, "Why do you want to get Mr. Marcus out?"

He told me that he is having difficulty with him, he does not let him operate the business, certain things he would like to do in running this business to do a better business, to bring in certain acts, to run the place the way he would like to, and Mr. Marcus did not let him, he would always come in, and grab the money from him for the rent, and he could not get along with him whatsoever.

Q. And he told you all this on the first occasion, when Bernardi and the other man first broached this subject to you? A. That's correct.

Q. Now, did he tell you how Marcus was interfering with the operation of the business? A. Well, he told me, as I just stated before, that—

The Court: Aside from the question of booking acts, what other reason did he have that Marcus interfered with him?

The Witness: He told him that—

The Court: Grabbing the rent—

The Witness: That's right. He told him he always came in and grabbed the rent, he wanted his rent (653) money, even though business was a little slow; he wouldn't give him a chance to breathe, and he was always on top of him; and instead of concentrating on his business he had to concentrate how to manipulate how to pay him the rent.

Al Kevelson—for Defendant Milmar Estate—Recalled—Cross

Q. Outside of the fact that Marcus wanted the rent paid to Milmar—I suppose you mean Milmar? A. That's correct.

Q. —did Miller say how Marcus interfered with him in the operation of the Riviera? A. No, not more than that.

Q. Only that. The only way that Marcus cramped his style was by demanding rent? A. By demanding rent. And, as I said before, did not let him do certain things in the Riviera, was always on top of him, I imagine.

Q. Well, did he tell you how Marcus could prevent him from doing anything that he wanted with the Riviera? A. Well, in a way it led to that, for the fact that he couldn't concentrate on his business. He had to worry about paying him the rent, to collect the money all the time. And that hampered his style in trying to run the Riviera business.

Q. So you get back to the single proposition that the only way that Marcus interfered with Miller was by demanding that the rent due from the Riviera to Milmar be (654) paid, right? A. And that hampered his style in running the business.

Q. Yes. Now, you are certain, Mr. Kevelson, that on that first occasion, when this proposition was broached to you, first by Bernardi and his associate, and then by Miller, that Miller told you on that occasion that Marcus' interest in Milmar could be purchased for $125,000, is that correct? A. That's correct.

Q. And that could be paid at the rate of $3,000 a week while the Riviera was open—

Mr. Tepper: A month.

Q. —a month, while the Riviera was open—was it a month? $3,000 a month, or a week? A. A month, the first of every month.

Q. And $1,500 a month when the Riviera was not open; is that what Miller told you on that first occasion? A. Well, he said he can get it for those terms.

Al Kreelson—for Defendant Milmar Estate—
Recalled—Cross

Q. Yes. And $30,000 down? A. That's correct. He can get it for those terms.

Q. And this was when? A. I'd say about—just about the end of July or the beginning of August.

Q. There is no doubt in your mind about that? A. That's correct.

(655) Q. Did he say anything to you about Marcus having agreed or being willing to sell his interest in the Riviera for $90,000? A. No, sir.

Q. You never heard that figure? A. No, sir.

Q. Now, you met Marcus after you had agreed to buy this place, to buy his interest? A. Did I meet him personally, face to face?

Q. Yes. A. The only time—the first time I met Mr. Marcus was at his office, some time during the months of August and September, 1949.

Q. That's when you went to speak to him about this flower business? A. That's correct.

Q. Prior to that you had never met him? A. Not to my knowledge. Maybe I had seen him somewhere but I do not know.

Q. I don't mean that. I mean meet him face to face. A. No.

Q. Introduced to him. A. No, sir.

Q. Did you ever try to find out whether the stories Miller had told you about Marcus were true or not? (656) A. No, sir.

Q. You took Miller's word for that? A. That's correct.

Q. Now, what was to be done with the $125,000 that you had agreed to furnish? A. That was supposed to be paid to Mr. Marcus, to get him out completely from Milmar Estates, Bill Miller's Riviera, a note that he held of Bill Miller's, and any other papers with signatures that he had, or any dealings or connections with these corporations and Bill Miller personally, to be paid $30,000 down—

Al Kerelson—for Defendant Milmar Estate—Recalled—Cross

The Court: Don't repeat that.

The Witness: All right.

Q. Now, were you told by Miller, prior to the time that you agreed to pay out $125,000 for Marcus' interest in these companies, what stock had been issued and was then outstanding of Milmar? A. No.

Q. Or of the Riviera? A. No.

Q. Do you know how much stock Marcus had in Milmar? A. No, sir.

Q. Or in the Riviera? A. No, sir.

Q. Do you know how much stock Miller had in Milmar? (657) A. No, sir.

Q. Or Bierman? A. No, sir.

Q. No one ever told you that? A. No, sir.

Q. Weren't you concerned, when you turned over $125,000 to buy out Marcus' interests? A. Oh, they told me that they owned 50 per cent.

The Court: Who's "they"?

The Witness: Mr. Miller and Mr. Bierman owned 50 per cent of the stock, and Mr. Marcus owned 50 per cent of the balance of the stock of Milmar Estates.

Q. Did you demand proof— A. No, sir.

Q. —of ownership? A. No, sir.

Q. You took their word for it? A. Yes, sir.

Q. You never dealt with these men before? A. No, sir.

Q. Did you draw a report, a credit report on any of them? A. No, sir.

Q. And how did you pay this money, and to whom? A. I gave Bill Miller $5,000 the first time, then I gave (658) $19,000; and then on the first of the month following the date of the contract, which would be October 1, 1948—we were still open—we mailed a check—when I say "we" I am referring to Milmar Estate, Inc., I being president—

mailed a check to Sam Marcus for $3,000. And we followed through our contract thereafter.

The Court: He wanted to know whether you paid anything personally except the five and nineteen. Is that right? Did you pay anything else in?

The Witness: Yes, sir.

The Court: That is what he is asking you about. Not what Milmar paid, what you put in.

The Witness: I thought he said how was it paid.

The Court: He meant your share.

The Witness: Yes.

A. Yes, I did, I deposited money into Milmar Estates at the First—

Q. Now, the original $5,000 that you turned over to Miller for this purpose—or, rather, for the purpose of buying out Marcus' interest, that was in cash? A. That's correct.

Q. And the $19,000 was in cash? A. That's correct.

Q. And all other moneys that you turned over in connection with this transaction was in cash? (659) A. No, some was cash, some were checks of Al Bierman's.

Q. Some were checks of Al Bierman's? A. That's correct.

Q. How much was in checks of Al Bierman's? A. I don't know the total amount, but if he did give me a check, it would represent 20 per cent of the payment that was due to Sam Marcus.

Q. Bierman only gave you $6,000, didn't he? A. He did not give it to me, he gave it to Mr. Miller.

Q. Well, did Bierman give you any money at all? A. Yes, sir.

Q. How much money did he give you? A. He gave me 20 per cent of every payment that we had to make to Mr. Marcus.

Q. And he gave you that by check? A. Check and cash.

Al Kevelson—for Defendant Milmar Estate—
Recalled—Cross

Q. Did you keep a record? A. No, sir.

Q. Don't you keep records? A. I didn't keep any record on that transaction.

Q. Why not? A. Because most of the payments were through the Milmar books and I knew that that would be sufficient for a receipt.

Q. Now, 20 per cent of what was Bierman supposed to put up? (660) A. Of every payment that we made to Mr. Marcus.

Q. Of $125,000? A. Of the $30,000, the deposit, and the balance that was due him of ninety-five thousand, he had to pay 20 per cent.

Q. Did he pay 20 per cent? A. Yes, he did.

Q. So that he would have to put up $25,000. A. Well, a fifth of a hundred and twenty-five would be twenty-five thousand—would be his share, that's correct.

Q. And you say that he put that up? A. That's correct.

Q. In addition to the $20,000 that he originally gave Miller? A. Well, he stated that he gave it to him. And it is in addition to that.

Q. So that Bierman put up $45,000 for his interest in Milmar? A. That's correct.

Q. Are you sure about that? A. Well, I can only be sure of the twenty-five, and what I heard here in court, that he paid twenty thousand. If he gave any money to Milmar before I got in, I do not know.

Q. I see. You say that $25,000 of Bierman's money (661) went through your hands, 20 per cent? A. That's correct.

Q. Do you know how much of that was in cash? A. No, sir.

Q. Do you know how much was by check? A. No, sir.

Q. You kept no record? A. That's correct.

Q. You say there was a record kept in the books of Milmar? A. Well, just a record of each check that went out.

Al Kevelson—for Defendant Milmar Estate—
Recalled—Cross

Q. Went out? A. Went to Sam Marcus, payments on the first—

The Court: Let's see if we can clarify it. You mean when the payments were made on the first of each month, Bierman would put up 20 per cent, you would put up 40 per cent and Miller would put up 40 per cent?

The Witness: No, I would put up—

The Court: How did Bierman do it, he is trying to find out.

The Witness: Bierman paid 20 and I paid 80. It was my obligation and Bierman's obligation.

The Court: All right. Now, would that be on the monthly checks, that he would put up 20 per cent?

The Witness: That's correct.

(662) The Court: And that would go into the Milmar account?

The Witness: We would deposit it in the Milmar check account, and a check would be drawn by Milmar Estates and sent to Sam Marcus.

The Court: Well, wasn't the Riviera paying rent to Milmar?

The Witness: She was.

The Court: You better take it on before I become a lawyer.

Mr. Brigadier: If your Honor please, I point out at this point to you that the answer that they filed admits that they received this money. Why are we receiving testimony on it? They admit that they received the $90,000. So is that a fact in issue when their own answer admits receiving that ninety thousand?

Mr. Grosman: This is cross examination of this man.

Mr. Brigadier: But you should cross examine about something that is in issue. This is not an issue, be-

cause you have admitted it in your answer.

Mr. Grosman: We admit that we received $90,000. But I want to know where this money came from, because to all appearances these people are paying out Marcus with his own money, funds in Milmar in which he still had a very (663) substantial interest.

Mr. Brigadier: This is not the first time you have heard this statement made.

The Court: No, I know.

Mr. Brigadier: Even if it were true, it still isn't a point in issue. I don't think it makes the slightest difference where this money came from. The issue is: Was there an agreement that we were to pay a hundred and twenty-five thousand; what were we to get for that hundred and twenty-five thousand; did Marcus receive the hundred and twenty-five thousand? His answer admits that he received the ninety, and the other thirty-five is the interpleader.

Mr. Grosman: We are entitled to cross examine this man on his testimony, your Honor.

Mr. Brigadier: I am only concerned that we shouldn't have another three days like we had with Miller, where you spent 15 minutes on the facts in issue.

Mr. Grosman: And we still couldn't get a responsive answer out of him.

Mr. Brigadier: Let the Judge decide that.

Mr. Grosman: You sound like a broken phonograph record "All I know I was supposed to—everything was forgiven and after September 14 I was the owner of everything."

Mr. Kesselhaut: Do you object to that, Mr. Grosman?

(664) The Court: I could take a recess and you could start a real free-for-all now between you.

Al Kevelson—for Defendant Milmar Estate—Recalled—Cross

By Mr. Grosman:

Q. Do you remember testifying on your deposition? A. That's correct.

Q. Did you ever tell that story that you told now on your deposition hearing?

Mr. Brigadier: What story?

A. In reference to what?

Mr. Brigadier: I object to the question. You can't ask the—

Mr. Grosman: Will you let me finish my question?

Mr. Brigadier: Finish it and identify it.

Q. This story you have just told, that Bierman was supposed to contribute 20 per cent of every payment made on account of the $125,000 paid to Marcus; did you testify to that same effect on your deposition hearing? A. I did. In fact—

Q. You did? A. In fact, you will see it several times through the deposition, that whenever I said "I" I was referring to Mr. Bierman and myself.

The Court: I take it, Mr. Grosman, you have been through the deposition and you are now ready to show that he didn't say it, is that it; or are we just going to (665) have parts read to show that he did say it, to reenforce what he said?

Mr. Grosman: No, your Honor. I am a little confused by this man's answer. I understood that originally there was to be $30,000 put up, of which he put up twenty-four thousand in cash, and Bierman paid six thousand.

My recollection is that from that point on I never heard that of each payment put up that Bierman was supposed to contribute to the respective payments 20 per cent.

Excerpts from Deposition Read Into Record

Mr. Brigadier: That's not true.

The Court: Well, I will tell you what we will do, to save time—

Mr. Brigadier: Do we have to show him in the Exhibit?

The Court: Show him, if it is going to save time.

Mr. Brigadier: Page 31 shows that 20 per cent of every dollar—Bierman's contribution was 20 per cent of every payment made.

Then on 51, "I think you said that all of the money that went to pay Mr. Marcus came from you.

"Answer: That's correct.

"Question: You would give the money to Mr. Miller, he would—

"Question: I mean outside of the moneys paid by (666) Mr. Bierman, the remaining moneys came from you.

"Answer: We would deposit the moneys into the Milmar Estates' bank account and a check would be forwarded."

Page 80, "Question: That was your money, in fact, which you turned over to Milmar Estates, was deposited and checked out.

"Answer: That's correct.

"Mr. Brigadier: Yours alone?

"The Witness: Mine and Bierman's.

"Mr. Brigadier: I want to make sure because Judge Grosman keeps saying 'your money.'

"The Witness: I think he agreed before—

"Mr. Brigadier: I know, but I would like it each time clearly indicated in the record what the fact is.

"The Witness: All right."

The reason that was done is because in the middle of the deposition Judge Grosman kept saying "your

money" after he had testified it was Bierman's and his, and I wanted to make sure. I anticipated this very thing would happen that happened today. That's why you have that remark.

Mr. Grosman: Well, you are a prophet.

The Court: Great foresight.

Mr. Brigadier: Well, I am right. It turned out that I am right.

(667) Mr. Grosman: Now, is there anything in any of his deposition that out of each payment Bierman—

Mr. Brigadier: You ought to look in the deposition for a change. I shouldn't do your work.

Mr. Grosman: Let me finish. If you want to take the floor, go ahead.

The Court: Wait. Don't get excited about it.

Mr. Brigadier: All right. Page 31, if your Honor please.

"Question: How much did you pay?

"Answer: When the payments were due, every time we had to send Mr. Marcus a check, we deposited the money into Milmar Estate, Inc., and we sent him a check.

"Question: That was your money that was deposited?

"Answer: Mine and Mr. Bierman's.

"Question: Well, his only to the extent of $6,000.

"Answer: No, 20 per cent of every dollar."

What does that mean?

The Court: It is very clear to me.

Mr. Grosman: All right. I asked him if he ever told that story before. I don't know why I stirred up such a hornet's nest.

The Court: Well, generally, when counsel asks a question like that, he is ready to show by the deposition that he said otherwise. And that is the only time

they ever (668) use the depositions, is to contradict a man, not to fortify what he said.

Mr. Grosman: My impression was that Bierman put up originally $20,000 with Miller—

The Court: Don't you repeat it. I heard what you said.

Next question.

By Mr. Grosman:

Q. Now, your name never appeared in any of these contracts between Miller and Bierman and Marcus? A. That was signed on September 14?

Q. Yes. A. No, sir.

Q. Or at any other time? A. No, sir.

The Court: Why did you just specify that day?

The Witness: I thought that was what he was alluding to.

The Court: Because I haven't seen your name on any of these documents here.

The Witness: No, because I didn't sign any paper.

The Court: All right.

Q. Now, all the contributions made by you, your 80 per cent towards the purchase of the Marcus interests, (669) were made in cash? A. That's correct.

Q. Did you take that cash out of any bank? A. I took it out of my vault.

Q. You had the money in a vault? A. That's correct.

Q. Any reason why you didn't pay that money by check?

Mr. Brigadier: I am going to object again for the reason I stated before to your Honor, it is not an issue in the case. Their answer has eliminated the issue. They admitted receiving the money. His argument is that he is going into this for some kind of a discrediting proposition, because we may have used

Samuel Marcus' own money. There isn't the slightest bit of evidence yet from him in this case to that effect. Let him wait till he gets to Samuel Marcus.

But as far as this issue is concerned, they have admitted receiving the money. I have never heard of litigating an issue that is admitted.

Mr. Grosman: Now, your Honor, we have a right to cross examine this man for the purpose of affecting his credibility. And I say that any businessman who makes it a practice to take cash out of a vault, and pay it the way this money has been paid, must make an explanation of it.

(670) Mr. Brigadier: But why?

The Court: Is that so? You ought to sit here and hear how many times they pay in cash. Sometimes I think there is more money in vaults than there is in checking accounts in this country.

(Discussion off the record.)

(Short recess.)

By Mr. Grosman:

Q. Mr. Kevelson, the $30,000 given to Miller, I believe, was turned over to Marcus, the original $30,000? A. That's correct.

Q. Did you pay all that money over to Miller? A. That's correct—twenty-four thousand I gave to Miller, not thirty.

Q. You gave him twenty-four thousand? A. That's correct.

Q. Did you handle the other six? A. No, sir.

Q. How was that paid over?

The Court: If you know.

A. I don't know.

Q. Now, will you tell me, please, why it is that if you were buying Marcus' stock interest for a hundred and twenty-five thousand, you and Bierman, for a hundred and

twenty-five thousand, you turned the money over to (671) Milmar and had Milmar check it out to Marcus instead of you checking out direct to Marcus? A. I didn't quite understand your question.

The Court: Mr. Bremer, repeat the question.

(Question read.)

A. Well, I imagine that's the way we agreed to set it up. And, furthermore, it would be a permanent record to show that he got paid for it.

Q. Well, how many corporations were you interested in at that time that had bank accounts? A. One corporation.

Q. Weren't there several that you were interested in? A. That's the only corporation that I was interested in.

The Court: Which one?

The Witness: Public Building Material Company.

The Court: Is that your company?

The Witness: Yes, sir.

Q. Couldn't you have used the account of that company to make checks out to Marcus instead of going through the routine of turning the cash over to Milmar, then to have Milmar check it out? A. I don't understand you.

Q. Did you have a personal checking account? A. I did.

(672) Q. Why didn't you deposit the money that you were paying Marcus for his stock interest in your checking account and then check out to Marcus direct from that, pay him by check? A. No particular reason. Because we started out to do it through Milmar and that's the way we continued to do it.

Q. So all the contributions that you made, your personal contributions, to this $125,000 were made in that fashion? A. That's correct.

Q. Do you have anything to show that you turned over $100,000 in cash on account of the purchase of Marcus' interest in Milmar, to Milmar?

Al Kevelson—for Defendant Milmar Estate—
Recalled—Cross

Mr. Brigadier: I object on the ground that the witness hasn't testified that there was turned over a hundred thousand dollars in cash to Mr. Marcus. His testimony was, first, as to the thirty thousand and then to the balance of sixty. And as to that the testimony was that the money was deposited in to Milmar and checked out by Milmar. The checks are in evidence. Marcus has admitted receiving those checks. They have filed an answer in which they have admitted receiving the money.

Mr. Grosman: I don't know what he is talking about, Judge. I am asking the witness whether or not he personally has anything to show that he contributed a hundred (673) thousand dollars to Milmar for the purpose of paying Marcus—or depositing in this Court on account of the Marcus interest, and so forth.

Mr. Brigadier: Did you include the money in the interpleader? If you did--

Mr. Grosman: All the money has been paid, you say.

Mr. Brigadier: Okay. I withdraw the objection.

By Mr. Grosman:

Q. Now, have you anything to show— A. No.

Q. Let me ask you this—withdraw that question.

The Court: He said no already.

Q. You say no? A. That's correct.

Q. How much money did you contribute towards the payment of Marcus' interest? A. I originally put in $24,000, and then when each and every payment was due, I would deposit—

The Court: No, no. I can't listen to that again. It's getting to be like a phonograph record. You know how the Nazis used to get people crazy—by repeating the same record over and over again until they went

nuts. I don't want to hear it over and over again. He said a dozen times how he did it. Whether you believe it or not is (674) another point.

Mr. Grosman: I didn't ask him how he did it. I want to know, for the record, how much he contributed entirely as a total.

A. Eighty per cent of $125,000.

Q. That would be a hundred thousand dollars? A. That's correct.

Q. That's all I wanted to know from you.

Now, will the records of Milmar Estate, Inc., show your contribution of a hundred thousand dollars? A. No, it won't show all that, because we deposited the balance into the Federal Court.

Q. Well, how was that done, wasn't that done through the account of Milmar? A. No, it was not.

Q. How was that done? A. It was paid direct to the Court.

Q. By check or cash? A. Cash.

Q. Whose cash was it? A. Mine and Mr. Bierman's.

Q. Now, the 80 per cent that you contributed towards this $125,000 was your own money? A. That's correct.

Q. No one gave you that money—I am talking about (675) the hundred thousand, your 80 per cent—to turn over to Milmar, or to the Clerk of this Court? A. My money.

Q. None of it came from Milmar or the Riviera? A. Nothing came from the Riviera and I don't think any of it came from Milmar.

Q. Well, don't you know? A. Oh, to the best of my recollection, whenever we sent out a check, we would deposit that money.

Q. And would the books of Milmar show that? A. That's correct.

Q. The bank deposit book and the other books of ac-

count? A. The bank deposit book would show pretty near a day or two before the first that we deposited $2,000, or $1,500, the amount that was due to make that payment.

Q. Now, who in the Milmar organization did you turn over your cash to? A. I made most of the deposits myself.

Q. Who did you report the deposit to for the purpose of making the entry in their books A. I would mail the deposit slip to Nicki.

Q. To Nicki Moran, the secretary or the bookkeeper? A. That's correct.

Q. Did you ever check the books of Milmar to see (676) whether or not the entries had been made, that you were given credit for the deposit you had made? A. I did not.

Q. Did you ever have anyone else do it on your behalf? A. I did not.

Q. Now, how soon after September 14, 1948, did you and Miller and Bierman take over the affairs of Milmar Estates? A. A day or so later we met at the Riviera. When I say "we"—

The Court: Are we going to go through that again?

Mr. Grosman: No, I just asked him when he did it.

A. A day or two after September 14, 1948.

Q. And you became the president? A. That's correct.

Q. Miller became the secretary? A. That's correct.

Q. From that time you have been actively engaged in the performance of your duties as president of Milmar Estate, Inc.? A. That's correct.

Q. You are familiar with everything that has gone on with that company? (677) A. That's correct.

Q. Did you borrow money from the bank shortly after you became president of Milmar Estate, Inc.?

Mr. Brigadier: I object on the ground that it has nothing to do with the issue that we are trying. The only issue that I understand we are trying is the issue of what was the transaction.

Al Kevelson—for Defendant Milmar Estate—
Recalled—Cross

The Court: Don't you repeat it, too.

Mr. Brigadier: All right. Then you know my objection.

The Court: That's what we are trying. I am not asking for an accounting of Milmar Estates.

Do you object to the question?

Mr. Brigadier: I do, sir.

The Court: I sustain it.

By Mr. Grosman:

Q. Did Bill Miller's Riviera pay rent to Milmar? A. It did.

Q. How much a month in September, October, 1948?

Mr. Brigadier: I object to that on the ground that it also has nothing to do—anything subsequent—

The Court: Don't make a speech. If you object, I sustain it.

Q. Did the rents received by Milmar Estates from the Riviera, were they sufficient to meet the carrying (678) charges on the mortgage—

Mr. Brigadier: I object for the—sorry.

Q. —on the mortgage and on the relief that is attached, and so on?

Mr. Brigadier: I object for the same reason.

The Court: Objection sustained.

Mr. Grosman: Now, if your Honor please, the reason I asked those questions, because I was laying the foundation for the examination of the books of Milmar. I want to show that even though Milmar had no business, except to take care of the carrying charge on this real estate, they had been borrowing tremendous sums of money, some of which was paid out during

the course of this litigation. I don't want to go into the circumstances of that again.

Now, we made application for the inspection of the books for the purpose of verifying those loans and what was done with that money. Your Honor will recall that you said you would take that up during the course of these proceedings.

The Court: That's right. Now, I ask you how is that material on the question of the contract of September 14, 1948, when all I am concerned with is: Did Mr. Marcus sell all his right, title and interest, and whether he was induced by fraud to go in it? That you will show on your case.

(679) Mr. Grosman: We are entitled to know whether the money really came from Mr. Kevelson, or whether having gotten in there, they used Marcus' assets, because at that time, we claim, he was an 80 per cent owner.

The Court: I know, but, Judge Grosman, this contract says he sold. And he is not going to inquire now, unless there is proof shown on your side, that there was actionable fraud in inducing him to sign all these papers which he prepared, and his lawyers.

Mr. Grosman: Well, he didn't prepare them.

The Court: Well, his lawyers did. He is pretty good. He has been sitting there writing notes ever since this trial started as fast as my reporter can take them down.

We are going to stick to that contract and what happened prior to the signing of the contract in the main case now.

Mr. Grosman: All right. I must take an exception, your Honor.

The Court: You may take it, sir. It is your privilege.

Al Kevelson—for Defendant Milmar Estate—Recalled—Cross

Mr. Grosman: I ask your Honor for leave to examine the books of Milmar for the purpose of ascertaining whether or not the contributions made by this man, as he says they were made, actually went in through the books of the company.

(680) The Court: I don't see how that is material now. Your answer admits you got all the money you were supposed to get under the contract.

If you are going to get technical, I am going to get technical, too. Talk about a fishing expedition, this is getting worse than a whaling expedition. Mr. Marcus doesn't know what happened. He shouldn't critimize the other people you claim don't know what happened.

Mr. Grosman: Well, all right, your Honor, if that's your ruling.

The Court: That's my ruling. I have got to get through with this main case.

Mr. Grosman: All right.

The Court: Then see if there is any merit to all the counterclaims, crossclaims and so forth.

By Mr. Grosman:

Q. Now, let me ask you, Mr. Kevelson, did you have anything to do with the filing of this interpleader suit? A. I discussed it with Mr. Miller and Mr. Bierman.

Q. And with whom else? A. And with the attorneys.

Q. Who are the attorneys? A. Chazin & Chazin.

Q. And at the time that this suit was filed were (681) you and Miller and Bierman in control of the Milmar Estate Corporation? A. Yes, we were.

Q. Can you tell me then how it is that Miller and Bierman became the plaintiffs and Milmar Estate Corporation, of which you gentlemen were in control, became a defendant? A. I imagine we did that because they were the ones that originally signed all the papers on September 14, 1948, and I thought that would be the right way to go about it.

Al Kevelson—for Defendant Milmar Estate—
Recalled—Cross

The Court: You thought or your lawyers thought?

The Witness: I imagine the lawyers did.

The Court: In other words, you followed your lawyers' advice?

The Witness: Yes, sir. Yes, your Honor.

Q. Now, you knew to whom this money was payable, did you not? A. That's correct.

Q. There was no doubt in your mind about that? A. That's correct.

Q. And that was Sam Marcus? A. That's correct.

Q. And was he entitled to that money? A. That's correct.

(682) Q. Now, can you tell me why this interpleader suit was brought? A. Well, we had a discussion—

Mr. Abraham Chazin: Pardon me. Could I hear that question?

The Court: Repeat it, Mr. Bremer.

(Question read.)

A. We had a discussion and we—

The Court: Who is "we"? We don't know. Judge Grosman wasn't there, I wasn't there, Mr. Brigadier wasn't there.

The Witness: I'm sorry, your Honor.

A. I, Bill Miller and the attorneys, we had a discussion that—

Mr. Brigadier: What attorneys?

The Witness: Chazin & Chazin.

A. (continuing) And according to the way the contract was drawn up we had found out that the corporation was getting—made most—signed most of these papers and we

felt that we had been making the payments, and if anything should happen to the corporation and a receiver should be appointed, the corporation would turn around and hold us liable again and we would have to pay double, because Bill Miller and Bierman bought the stock from the corporation and they did not receive any money because Sam Marcus was (683) getting all the money. And then if a receiver was appointed and when he would pick up the books and see that we made a deal with Bill Miller and Al Bierman and she did not get any payments, she would go to try to get the money from them.

The Court: Who told you that?

The Witness: Chazin & Chazin.

The Court: Who was the corporation?

The Witness: Milmar Estates.

The Court: Who was in the corporation at that time?

The Witness: Myself, Mr. Miller and Al Bierman.

By Mr. Grosman:

Q. And that is the way that it was decided to work it out? A. That's correct.

Q. Miller and Bierman were to sue the corporation.

The Court: Did you authorize your attorneys, Messrs. Chazin & Chazin, to file the interpleader suit?

The Witness: We did.

The Court: Did they explain to you what it meant?

The Witness: That's right, they did.

The Court: All right. Next question.

Q. Miller and Bierman then sued the corporation, (684) Milmar Estates, right? A. Did they sue the corporation?

Q. Yes. A. I don't know if they sued the corporation.

Q. Well, you know that Milmar Estate, Inc., is a party defendant in this suit. A. Well, I don't know the legal

aspects. If they are, then I guess it's on the record. I don't know.

Q. And at the time, then, and ever since, Miller, Bierman and you were in complete control of this corporation which is being sued in this cause, Milmar Estates? A. That's correct.

The Court: Now don't labor that point. I noticed that long ago.

Q. Now, did you give Miller any money prior to September 14, 1948, to turn over to Bierman? A. I only gave him money—the $5,000 as a deposit, and then I gave him—

The Court: No, no. He asked you a simple question. Did you give Miller any money to turn over to Bierman?

The Witness: No, I did not.

The Court: Well, that's the answer.

The Witness: I'm sorry, your Honor. I did not.

The Court: Anything further from Mr. Kevelson?

(685) Mr. Grosman: I just want to read one answer that he gave here, Judge.

The Court: Yes, sir.

Q. Now, do you say that you did not give Miller any money prior to September 14, 1948, to turn over to Bierman?

Mr. Brigadier: To turn over to Bierman?

Mr. Grosman: Yes.

Mr. Brigadier: That wasn't your question. Your question was whether or not Bierman gave him money to turn over to Miller.

The Court: No, no.

The Witness: No.

Mr. Brigadier: I'm sorry.

The Court: The question was did this gentleman

ever give any money to Miller to turn over to Bierman, and he said no. Is that right?

The Witness: That's correct.

The Court: Did Mr. Miller ever represent that anybody else but Mr. Marcus was going to get the money you were turning over to him in this transaction?

The Witness: He did not, your Honor.

The Court: Did he tell you it was for the purpose of buying Mr. Marcus' interest in the Milmar Estates?

The Witness: That's correct.

(686) The Court: Did he ever represent that there was any other purpose involved?

The Witness: No, your Honor.

The Court: All right.

Mr. Grosman: Now, I don't understand, your Honor. May I ask him again?

Q. Did you give any money to Miller to turn over to Bierman prior to September 14, '48? A. No, sir.

Q. You did give Miller money prior to September 14, '48? A. I did.

Q. Now, let me ask you, you got a receipt for $5,000 you gave to Miller? A. That's correct.

Q. Is that the only receipt you ever got from him? A. That's correct.

Q. Why didn't you get a receipt for the larger sums that you turned over to him? A. No particular reason why.

Q. You thought you had to have a receipt for the five thousand but not for the remaining moneys? A. I don't think—I thought I had to have a receipt, but I think Mr. Miller gave me the receipt because he wanted to show it, possibly to make another paper to show (687) Mr. Marcus that he received the $5,000.

Mr. Grosman: I think that is all, your Honor, except that I want to renew my motion for leave to examine the books of Milmar for the purpose of show-

ing that Marcus was being paid with his own money.

The Court: You don't have to repeat it again. I will hold my decision in abeyance until I think the time comes when you are entitled to that. And it's not here yet.

He is through cross examining, step down, Mr. Kevelson.

(Witness excused.)

The Court: Next.

Mr. Brigadier: That's our case, if your Honor please.

I might say this, that unless you want to hear testimony from me about the interpleader suit, the advice that I gave, because it seems to me so obvious on the face of it—

The Court: I don't want to hear it. Lawyers can differ on whether an interpleader suit is necessary or not. Whether I think you should have brought it or not is beside the point.

Mr. Brigadier: I didn't bring it.

The Court: Whoever did. That's beside the point. I am here to adjudicate the merits of this interpleader suit. (688) And that is all I am interested in.

Mr. Brigadier: That's our case, if your Honor please. That would cover the first and second counts of my counterclaim and crossclaim, the transaction of September 14.

The Court: Now, what does it cover?

Mr. Grosman: The testimony thus far covers what, Mr. Brigadier.

(Record read.)

Mr. Brigadier: I have limited it to that because I understood that was the order of proof.

The Court: That's what I suggested as the order of proof.

Mr. Grosman: Now, how about the interpleader? Does this testimony apply to the interpleader?

Mr. Brigadier: It applies to the interpleader in the manner I pointed out to the Court. Then you filed an answer in the interpleader suit in which you said, "Presently you are not prepared to state whether or not you are entitled to the money that is on deposit in the Court for the reasons of facts set forth in your separate defenses and your election to rescind the transaction."

And I said therefore the Court can't decide the interpleader until it has first heard your contention—

The Court: That's right.

(689) Mr. Brigadier: —that you are entitled to rescind because of fraud.

Mr. Grosman: Well, now, I just want to get this thing straight in my mind. Have you put in all the testimony you are going to put in on the interpleader?

Mr. Brigadier: I have put in all the testimony—I am doing what the Court has asked us to do, I have put in all the proofs on Counts 1 and 2 of my counterclaim and crossclaim, in order to establish what the transaction of September 14 was. I understood that you were then, when it got to your case—you would then go ahead with the fraud case, because you said you can't take any position with respect to the interpleader until the Court first decides whether or not you are entitled to rescind.

I will say right now the proof I put in on Counts 1 and 2 of the crossclaim and counterclaim would be the same evidence we would put in on the interpleader, only that you would have to put it in. But we are not going to ask the Court to hear it all over again, twice.

Mr. Grosman: What I want to know is whether the evidence of the plaintiffs on the interpleader is in, because I want to make a motion, and I can't make a motion if all the proof is not in. That's all.

Colloquy

Mr. Brigadier: I say that that isn't a question that I should be called to answer, for the reason of the (690) position they have taken. They have taken a position in their interpleader answer that they cannot state what their claim is with respect to this claim until your Honor first hears and determines what they have set up by way of counterclaim.

I don't care what he says he wants to know now. This is what your Honor has decided to go along with and he should wait till we have heard it.

The Court: First things first. If the contract is no good, we dispose of that first.

Mr. Grosman: If your Honor please, I am talking about—they are the plaintiffs, they brought this suit on interpleader. Now, what I want to know from them —never mind our side of it. If your Honor decides the motion adversely to me, why, then, of course, we will go on with our defense.

But at this time they have nothing whatever to do with our defense. The thing I want to know is, have they put in their proofs on the interpleader or do they intend to offer any more proofs?

Mr. Brigadier: My answer is, I put in the proofs on the first and second counts of the counterclaim and crosselaim.

The Court: Can you answer his other question?

Mr. Brigadier: When we get to it, my assumption (691) will be that it will be the same evidence that I have put in on the first and second counts of the—

The Court: That's only an assumption.

Mr. Brigadier: That's right, as of this moment.

Mr. Grosman: May I ask your Honor whether or not the plaintiffs' proofs on the interpleader—I am not interested at the moment in his crosselaim and counterclaim—I am talking about the main complaint, the interpleader, have they put their proof in?

Mr. Brigadier: No, because I have told you what—sorry.

The Court: What was the answer?

Mr. Brigadier: The answer is no.

The Court: You reserve your right to put your proof in at the right time?

Mr. Brigadier: That's right.

The Court: All right. And you can reserve your motion then and make it at the right time.

Mr. Grosman: I know, your Honor, but we are entitled to have them put their claim in, they being the plaintiffs. We are not supposed to put our defense in before they put in their proof on their complaint.

The Court: I am not interested at this time in any trial tactics. I directed that the proof be put in the (692) way it is put in, and that is the way we will proceed.

If I am wrong, there is the Circuit Court of Appeals who can tell me that, if the right time comes.

Mr. Tepper: May I be heard, sir?

The Court: I don't care. If you want to keep talking, go ahead. Now what do you want to say?

Mr. Tepper: I don't just want to keep talking. If your Honor is irritated with me, I will sit down.

The Court: No, you haven't irritated me at all. You haven't said very much. Nobody irritates me.

Mr. Tepper: Thank you.

The Court: Have you ever seen an irritated judge in action?

Mr. Tepper: No, sir.

(Comments off the record.)

Mr. Tepper: May I add to what Judge Grosman has already said, this?

The Court: Yes, sir.

Mr. Tepper: Your Honor will recall that when the

procedure was laid out for this trial, this very argument ensued. The record will so show. And at that point I suggested to your Honor that the orderly procedure requires that the plaintiff, who is the moving party—the moving party, the plaintiff—must go forward with his case (693) in chief on the interpleader suit. Your Honor so ruled. It's in the record. Your Honor said they will go forward with their interpleader suit as plaintiffs.

Now, what we are saying is this—we say so respectfully; I don't know whether we have made our point clear to the Court—but we have only this to say, we, representing a defendant in the interpleader suit, now ask the question: Is the case in chief finished? for if it is finished, we have a motion addressed to this main case.

One is unrelated to the other. The interpleader suit is predicated upon the statements which appear in the moving papers, the complaint. I respectfully urge that we are entitled to know that their prima facie case is in, from their standpoint, and for us to make whatever motion we may make, addressed to this case in chief.

Now, if it should develop even that we prevail in our motion, that doesn't dispose of—and this is all discussed in a previous motion—that does not dispose of these counterclaims, which would go forward, irrespective of any disposition of this interpleader suit. They deposited money in Court. They did so based upon certain theories expressed in their complaint. We are saying now we want to address a motion to this case in chief, and that's all—their case in chief.

(694) And I respectfully urge that we can't make a pudding out of this thing by mixing everything up. One is unrelated to the other. An interpleader suit is an interpleader suit. The counterclaims, with the cross

suits, they are something based upon entirely different theories—one, fraud; money loaned for which we ask credit, and payment, etcetera.

So I respectfully urge to your Honor that we should be permitted at this time, in the interests of orderly procedure, to address a motion to their case. If it is finished, it is finished; if it isn't finished, it isn't finished.

Mr. Brigadier: If your Honor please, as in the past, the best recourse is the transcript of what occurred.

Mr. Grosman: Which transcript?

Mr. Brigadier: The first day's trial, when Mr. Tepper said the Court ruled that we were proceeding on the interpleader suit. Let's read what the Court ruled, because it didn't do anything of the kind.

May I take the liberty of reading that, your Honor?

The Court: Yes, if you don't read it, I will have to read it.

Wait till they find it.

Mr. Brigadier: The first page of the transcript, (695) the first day's trial, as we opened the case.

"The Court: Well, Messrs. Chazin and Chazin, you filed the complaint in interpleader, didn't you?

"Mr. Abraham Chazin: Right.

"The Court: So who shall proceed first to present proof?

"Mr. Brigadier: May I be heard on that, your Honor?

"The Court: Yes, sir.

"Mr. Brigadier: You will recall at the pretrial I pointed out that basically there were two questions; one was the nature of the transaction on September 14; and, secondly, whether or not they are entitled to a rescission of that transaction. I suggested at that time that it seemed to me that logically you would first try the rescission of the transaction, because if it were

to be rescinded, that would be the end of the whole problem. But your Honor thought otherwise, and I adopted your Honor's suggestion, if you recall, and I said perhaps in the interest of clarity it would be the best thing if we went ahead first and established what the transaction was that took place between the parties.

"Now it becomes, it seems to me, doubly necessary that we do that first for another reason. You will find that in the interpleader action Mr. Marcus filed an answer in which he says he is unable to state whether he has any (696) claim to the fund on deposit in this Court until the Court first decides the other questions that have been raised, namely, the nature of the transaction, and as to whether he is entitled to any rescission because he says in that answer whether or not he can assert any claims to the fund on deposit will depend on how you first dispose of these other matters.

"Therefore, I would suggest, for the sake of clarity, and otherwise, and also because I brought Judge Lieberman up from Florida and he is very anxious to go back—

"The Court: I can't blame him for that.

"Mr. Brigadier: —that I proceed to prove what the transaction was by calling as the first witness Judge Lieberman.

"The Court: All right, sir."

Now, there isn't a word in there that says you were going to try the interpleader first. On the contrary, I take it, when you said "all right" that you acceded to my suggestion that we try the nature of the transaction first; secondly, whether or not there is a ground for rescission.

Mr. Grosman: But there is nothing in the—

Mr. Brigadier: Let me finish, Judge.

Mr. Grosman: Sorry. I thought you were through.

Mr. Brigadier: But aside from all of that, they (697) don't answer you the one thing—they themselves filed this answer in the interpleader suit, in which they make this statement—

Mr. Tepper: I wasn't referring to what had transpired immediately before the first witness took the stand in the trial of the cause. I am referring to the procedure that was set forth by your Honor, laid out by your Honor previously, at a previous appearance before your Honor.

But even here there isn't anything which would indicate that there should be any other procedure.

But previously, at a previous conference, your Honor will recall that your Honor said that they were the plaintiffs and that they must go forward with their case.

The Court: I don't remember that.

Mr. Tepper: Well, I will find it.

Mr. Brigadier: As a matter of fact, at the end of the pretrial they wanted you to sign an order. You said, "We don't do that in the Federal Court. The pretrial is for the purpose of the Court, and I will announce at the time of the trial what my decision is as to the order of proof."

So we didn't know until we got here what your decision was, and that's how the decision came about.

The Court: Well, if I decide that the contract (698) was fraudulently entered into, what am I going to do with the interpleader, why would we go into the interpleader, just to waste time?

Mr. Tepper: No, that's something entirely different. Whether or not the interpleader was improvidently brought, whether there was ground for the finding of the interpleader, is something with which your Honor—

Colloquy

The Court: That's generally true in the ordinary interpleader suit. I have had a dozen here and this is the first time I have had a situation like this. I know there is always a first time.

Mr. Tepper: It's the first time I ever had one.

The Court: This is the first time I have had a situation like this. Generally the claimants do all the wrangling, and that's all. Nobody questioned the propriety of bringing the suit.

Mr. Grosman: Your Honor said a moment ago that first things should be done first. Now, ordinarily the plaintiff who brings the suit puts in this proof.

Now, Mr. Brigadier made a long speech about how you said this and how you said that, and therefore he put in his proof on the first and second counts of his counterclaim and his crossclaim. There is nothing in the record to indicate that.

(699) My understanding was that your Honor had ruled that the plaintiff, having brought his action—their action—should proceed to prove that first thing brought, namely, the complaint. And when I tried to ask Mr. Kevelson a number of things that might be applicable more on my counterclaim, or my crossclaim, why, you know how they sprung up and said, "No, this is not the time to bring it. You may bring that sort of evidence in on your counterclaim or your crossclaim."

But we still can't get away from the fact—they brought the interpleader suit. They have a complaint here. They are the plaintiffs and they should prove their complaint.

The Court: The main thing in issue here is the contract of September 14, 1948.

Mr. Grosman: Yes, your Honor.

The Court: And everything depends on how the Court rules on that particular phase of the case. So

why shouldn't I address myself first, in the interest of efficiency in trials, to the proof on that, for if I do find that Mr. Marcus was, in fact, fraudulently induced into entering into this contract, the rest becomes very simple, indeed.

Mr. Brigadier: I will concede that the interpleader suit will fall.

(700) The Court: Absolutely, and there is no basis of an interpleader.

Mr. Grosman: Now, if your Honor please—

The Court: I am not going to hear any more argument, because this will go on till 5 o'clock. We will proceed now with evidence concerning the contract on the fraud claim. You may have an exception to my ruling.

Mr. Grosman: I, of course, can't make a motion addressed to the complaint.

The Court: You can reserve your right. Because if you do make a motion, I will reserve it, anyway, and you will be in the same position.

Mr. Grosman: All right.

The Court: I know all about tactics, too.

Mr. Grosman: But there are orderly procedures.

The Court: Yes, but this is an unusual case. This is not the usual case of interpleader, believe me. It is far different from any I have ever heard, or ever been a party to. And I had at least two dozen of them when I was a lawyer.

Have you got a good suggestion, Mr. Tepper?

Mr. Tepper: Yes, I have. Your ruling, of course, sort of took us off our course. And so I think if you would just give us about ten minutes, or so, to (701) adjust ourselves—

The Court: I think you are entitled to a little more than that. Suppose we adjourn for lunch now and give you sufficient time.

Mr. Tepper: Thank you, sir.

The Court: And we will return at 2 o'clock.

(Noon recess.)

AFTERNOON SESSION

ELSIE BERGLER, called and sworn for the defendant, Samuel Marcus, testified as follows:

The Clerk: May we have your full name and address, please?

The Witness: Elsie Bergler, 10 Massitoa Road, Tuckahoe, New York.

Direct examination by Mr. Grosman:

Q. What is your occupation? A. I am a secretary, sir.

Q. To whom? A. Sam Marcus.

(702) Q. And how long have you been associated with him? A. As secretary, about six years, five or six years.

Q. Now, have you, on occasion, gone with him to Bill Miller's Riviera? A. I have.

Q. And do you know Bill Miller? A. Yes, I do.

Q. Now, I show you Exhibit DME-1. Have you ever seen that before? A. I wrote it.

Q. You wrote it. Now, when did you write it?

Mr. Brigadier: May I ask whether the word is "write" or "typewrite," because there is both on there.

The Witness: Both.

Q. Now, when did you do that? A. Well, I assume I did it August 27, 1948. That's the date on it.

Q. Where was this writing drawn, at what place? A. At the Riviera.

Elsie Bergler—for Defendant Marcus—Cross

Q. And who dictated the contents of this writing to you? A. Al Bierman.

Q. The words in ink, "Received two checks at $5,000 each" signed what? A. That's initialed "SM."

(703) Q. "SM"? A. Yes.

Q. Do you know who inserted that? A. The initials?

Q. No, no. A. Oh, I wrote the writing.

Q. You wrote the writing? A. Yes, sir.

Mr. Grosman: Cross examination.

Mr. Brigadier: May I have the document?

(Document handed to counsel.)

Cross examination by Mr. Brigadier:

Q. You say that you are now the secretary of Mr. Marcus? A. That's correct.

Q. And you have been his secretary for the past six years? A. Approximately.

Q. And for the last six years have you lived at Tuckahoe, New York? A. No, sir.

Q. How long have you lived at 10 Massitoa Road, Tuckahoe, New York? A. It will be three years July 1 of '55.

Q. And where did you live prior thereto? (704) A. Also in Yonkers at another address.

Q. Would you let us have that address? A. 223½ West Delano Avenue, Yonkers.

Q. Now, in 1951 you were living at this last address that you spoke of? A. Yes, I think that was the year I sold that place.

Q. I am referring now to February of 1951. A. I believe so.

Q. And were you at that time in the employ of Mr. Marcus' secretary? A. I was.

Q. Now, as such secretary did you report at an office to perform your duties? A. I did.

Q. And was that Mr. Marcus' office? A. That was the Cineque Colorfilm Laboratories.

Q. At what address? A. 424 East 89th Street.

Q. And how often would you report there? A. Daily.

Q. So that during the month of February, 1951, Mr. Marcus had daily contact with you? A. Well, actually, I assume so. I don't know exactly—February, 1951—whether I talked to him every day or not. My being there didn't necessarily mean that he was there.

(705) Q. Well, how often would he come to the office? A. Well, daily, usually. But there were days that he was away.

Q. Then if he testified in the taking of the depositions—strike that out. There is no reason why, during the year of 1951, particularly during the month of—will you hold it a second, please?

In December, 1951, you were in his employ? A. Yes.

Q. As secretary? A. Yes.

Q. And he would come to the office frequently? A. Well, I don't know anything about that date that would make it unusual.

Q. There was nothing that would have prevented Mr. Marcus from being in touch with you during that period to get any records that were required at the taking of the deposition, as far as you know; you were available? A. I believe so.

Q. And he did come to the office? A. Well, there were times that he didn't come. I don't know exactly at that time that he came to the office.

Q. Do you recall—

The Court: Don't start asking a question, please, until this young lady gets through answering the (706) previous question. We are not going to get all jumbled up again. And don't you let him interrupt you.

The Witness: I will try not to.

Elsie Bergler—for Defendant Marcus—Cross

Mr. Brigadier: I am sorry I interrupted your answer. Continue with it.

The Court: Give her what she said.

(Record read.)

Q. Did Mr. Marcus, as far as you know, in December, 1951, where you resided? A. Yes, sir.

Q. Did he know where you could be reached if you were needed? A. Under normal circumstances, yes.

Q. Do you recall whether he came to you in December, 1951, or January or February, 1952, and asked you for records that were needed at the taking of the deposition? A. I don't recall that.

Q. You don't. Now, I show you Exhibit DME-1 and I ask you in whose handwriting the figure ten thousand appears? A. Mr. Marcus'.

Q. And who struck out the figure nineteen thousand? A. Mr. Marcus.

Q. And the handwriting, "Received two checks at (707) $5,000 each"? A. Is my handwriting.

Q. Will you write—

Mr. Brigadier: Let me have a sheet of paper.

The Court: What do you want, a pad?

Mr. Brigadier: Just a sheet.

(Paper handed to counsel.)

Q. Can you tell me with what kind of pen you wrote the words, "Received two checks at $5,000 each"? A. I haven't the slightest idea.

Q. Was it your own pen? A. I believe it was.

Q. What kind of pen did you have? A. I have had many pens and, believe me, I don't know what kind I had at that time.

Q. Was it a fountain pen? A. Yes, it had to be. I always carry one. There is one in my bag right now.

Elsie Bergler—for Defendant Marcus—Cross

Q. Like the one you were using? A. I doubt it. This is a Snorkle, and they didn't make them then.

Q. But you are sure it was a fountain pen? A. Do you mean could it have been one of those other kind?

Q. I am asking you. (708) A. Well, I don't know. I have no idea what kind.

Q. Was it a ball pen? A. That's what I mean, did you mean?

Q. Yes. A. I have no idea, sir. I haven't the slightest—

Q. You don't know whether you used a ball pen or a fountain pen? A. I have used both, and I don't know which—

Q. Do you know whose pen it was?

The Court: Please, Mr. Brigadier, I know you don't mean to be rude, but you always have the next question before this young lady even drops her voice at the last word.

Mr. Brigadier: I am sorry.

Let her finish, please. Most girls are nervous on the stand, anyway.

Nobody is going to hurt you. Just tell the truth as you know it. And if you don't know it, just say you don't remember.

The Witness: Thank you.

Mr. Brigadier: Would you go back to that last answer which I interrupted?

(Record read.)

The Court: Is that the question that was pending?

(709) A. Honestly, I don't.

Mr. Grosman: Do you want a ball pen?

Mr. Brigadier: Yes, I want a ball pen.

(Pen handed to counsel, then to witness.)

Elsie Bergler—for Defendant Marcus—Cross

Mr. Brigadier: Will the record show the witness is using a ball point pen.

Q. Will you write the words, "Received two checks at $5,000 each"?

(Witness writes.)

Q. And put an asterisk in front—I don't know. Did you say you put that asterisk on, or did you say Marcus put it on? A. I don't know.

Q. Who put the asterisk up on top? A. I don't know.

Mr. Brigadier: I wish to mark this for identification.

The Clerk: DME-45 for identification, sample handwriting.

The Court: Yes, of the witness.

(Marked Exhibit DME-45 for identification.)

Q. When DME-1 was typed by you, who was present in the room? A. Al Bierman, and I am pretty sure there was a telephone operator. There was a young lady in the room.

(710) Q. Was Samuel Marcus there? A. No, sir.

Q. Was Samuel Marcus there at any time when this was signed? A. Well, that was done in a different place.

Q. Wasn't it signed in the Riviera? A. Yes, but the letter was typed in the office upstairs.

Q. I see. And you typed it at whose request? A. At Mr. Marcus' request. He asked me would I go upstairs with Mr. Bierman and type something out for him.

Q. So Mr. Marcus knew that you had typed this, right? A. That's correct.

Q. I call your attention to—

The Court: Just a minute. Did Mr. Bierman dictate this receipt himself?

The Witness: I didn't take it in dictation, I took it right on the typewriter.

The Court: As he spoke the words, you took it down.

The Witness: As he spoke the words, I took it down.

The Court: That's a form of dictation. So that's his language in there, Mr. Bierman's language.

The Witness: That's what he said, is what I (711) typed.

Q. And Mr. Marcus knew of it, right? A. Knew that I went upstairs to type the memo for Mr. Bierman.

Q. And that you typed it? A. And that I typed it.

Q. I call your attention to the fact that on February 13, 1952—wait a minute, wrong date—February 25, 1952, Mr. Marcus, on page 267 of the deposition was asked,

"Who typed the paper?

"Answer. I don't know who typed it."

Now, your answer now is that he did know who typed it, is that right? A. At that time he knew.

Q. That's right. And he was there when Al Bierman, as you say, dictated the contents of that receipt.

Mr. Grosman: She didn't say that. A. I said Mr. Marcus was downstairs.

The Court: Well, it's a form of dictation. He said it and she put it down. Is that what happened?

The Witness: That isn't what he asked me, your Honor. He asked me was Mr. Marcus there. And he wasn't, when Al Bierman dictated it.

The Court: I'm sorry. I thought you said Bierman again.

(712) What was the question?

(Question read as follows: "And that he was there

when Al Bierman, as you say, dictated the contents of that receipt.")

The Court: "He" meaning Mr. Marcus?

The Witness: That's right. And he wasn't there.

The Court: You said he wasn't there?

The Witness: That's correct.

Q. Then how did Mr. Marcus know you had typed the paper if he wasn't there; did you tell him? A. He had asked me, and assumed that I did what he had asked.

Q. All right. Now, I call your attention to the fact that Mr. Marcus testified in the deposition, February 25, 1952, page 267, "Where was it prepared?

"Answer: At the bar at the Riviera."

Was it prepared at the bar of the Riviera?

Mr. Grosman: I object to that. It is not up to her to evaluate—

The Court: To account for what Mr. Marcus says?

Mr. Brigadier: But I am asking this on cross examination for the purpose of seeing whether or not—

The Court: But she told you where it was typed, in the office where there was a girl that she thinks was a (713) telephone operator. Wasn't that what you said?

The Witness: That's what I said.

The Court: She said nothing about it being done at the bar.

Mr. Brigadier: But this is cross, sir. I have a right to find out whether it is so. That is what she said on direct. I have the deposition of her employer.

The Court: I know what you are reading from. Obviously, if she is telling the truth, then the most charitable interpretation is that Marcus was mistaken.

Mr. Brigadier: That's what I want to find out.

The Court: She shouldn't have to characterize what he said.

Elsie Bergler—for Defendant Marcus—Cross

Mr. Brigadier: I didn't ask her, sir. I simply asked—

The Court: Are you going to prolong it, too?

Mr. Brigadier: No, I won't.

The Court: The woman said it was done in the office, or the telephone room, whatever it was.

Mr. Grosman: Now, if your Honor please, I don't think that we get her testimony straight. She prepared the document upstairs. Marcus was not there. Bierman was there, dictated the thing on a machine, and then I assume they brought it downstairs where Marcus was.

The Court: Well, we will find out where Marcus (714) was. She hasn't told us.

By Mr. Brigadier:

Q. Now, you say that after this had been dictated to you, upon the machine, by Mr. Bierman, you handed this Exhibit, DME-1, to Mr. Bierman? A. I did.

Q. And he took it downstairs? A. I handed it to Mr. Bierman and we both went downstairs.

Q. I see. And Mr. Marcus was there? A. Not immediately. We went back to the table at the—I was going to say bar. There are no tables at the bar. We went back to the table in the cocktail lounge, near the bar, that we had been sitting at prior to going upstairs. And while there Mr. Bierman read what had been written, and he said, "I would like to add to this." And I said, "Can I do it in longhand or do I have to go upstairs and type it in?" And thereupon I wrote what you just asked me about.

Q. Well, you wrote in originally, "Received two checks at $5,000 each," and the other words that were thereafter stricken out, isn't that right? A. That's correct.

Q. What were the words that were there before the striking out? A. It says, "and $9,000 in cash."

(715) Q. And those were in your handwriting? A. They were.

Q. Now, they were striken out at what point? They were stricken out by you, were they not? A. I am not sure whether I did the actual striking out, but they were stricken out in my presence.

Q. I see. Will you tell us how it came to be stricken out? A. I had started to say that Mr. Bierman read this and asked me would I add to it, and I was writing this in longhand at the time Mr. Marcus came along. One copy had been written on, I was finishing the other, when Mr. Marcus read the other copy and he said, "No cash." And with that he grabs the pen out of my hand and I believe he struck out the line and added—and put in the ten thousand up on top and initialed it.

Q. Did he state why there was to be no cash, did he give any reason? A. I don't recall.

Q. All right. Now, you say that you were his secretary during all of this time?

The Court: I am going to tell her not to answer that again. So you don't have to answer that any more, you have been his secretary since when?

The Witness: I said about six years.

(716) The Court: And up to and including today you are his secretary, is that right?

The Witness: That is correct.

The Court: Don't ask that again, please.

Q. When you attended the Riviera on this particular occasion, it was at night, was it not? A. It was.

Mr. Brigadier: May I ask whether she was attending in the capacity of secretary, sir, since it was at night? That is what I was trying to bring out.

The Court: You can bring it out. I don't care whether she was or wasn't.

Elsie Bergler—for Defendant Marcus—Redirect

Q. Were you attending in the capacity as secretary? A. No, sir.

Q. As his guest? A. As his guest.

Q. Had you attended there as his guest on other occasions? A. Yes, sir.

Q. How frequently? A. Quite frequently.

Q. Hade you met his wife there on these occasions? A. I don't recall if it was there I had met her, but I have met her.

Q. Well, on the various occasions that you went (717) to this place with Mr. Marcus for social reasons, did you meet Mr. Marcus' wife on these occasions?

Mr. Grosman: May I object to that? It has no bearing. It is not cross examination.

Mr. Brigadier: I think it has a great deal of bearing on the credibility of whether she was there and under the circumstances under which this came to be typed. If your Honor feels I shouldn't pursue it, I will drop it.

The Court: Well, I would much prefer if you don't, because I don't think it will help me decide the issue.

Mr. Brigadier: I have no further questions to ask.

Mr. Grosman: Now, may I have a sheet of white paper similar to the one you had?

(Paper handed to counsel.)

Redirect examination by Mr. Grosman:

Q. Miss Bergler, will you write your name with a fountain pen, please? You have a fountain pen in your bag? A. I do.

Mr. Grosman: May I have Exhibit DME-1, please?

(Document handed to counsel.)

Elsie Bergler—for Defendant Marcus—Redirect

Q. Will you write on this paper, "Received two (718) checks at $5,000 each"?

(Witness writes.)

Mr. Grosman: Does your Honor wish to see this?

The Court: I saw it. I have a copy of it.

Mr. Grosman: I ask that this be marked.

The Clerk: For identification?

Mr. Grosman: No, in evidence.

You have no objection to this going into evidence?

Mr. Brigadier: No. I couldn't put evidence in in your case, so I marked mine for identification.

The Clerk: DM-10, in evidence, sample handwriting of witness.

(Received and marked Exhibit DM-10.)

Q. Did Mr. Marcus have more than one secretary? A. He did.

Mr. Grosman: That is all.

Mr. Brigadier: That is all.

(Witness excused.)

Mr. Grosman: Now, if your Honor please, I am expecting a witness from out of the state tomorrow, and with your permission I would like to reserve the right to put him on and interrupt Mr. Marcus' testimony tomorrow. It will only take a few minutes and this man is extremely busy. He is coming here at great sacrifice to himself. And if there is no objection I would like to reserve the right to interrupt (719) Mr. Marcus' testimony tomorrow to put this man on.

The Court: You want to accommodate this gentleman by getting him in and out right away?

Mr. Grosman: Yes.

The Court: I have no objection at all and I am sure the other gentlemen don't.

Samuel Marcus—Defendant—Direct

(720) SAMUEL MARCUS, defendant herein, called as a witness in his own behalf, being duly sworn, testified as follows:

The Clerk: May we have your name and address for the record?

The Witness: Sam Marcus.

The Clerk: Is that Samuel Marcus.

The Witness: Samuel Marcus.

The Clerk: And your address?

The Witness: 685 West End Avenue, New York City.

Direct examination by Mr. Grosman:

Q. Mr. Marcus, you are one of the defendants in this action? A. Yes, sir.

Q. You have been described by Mr. Miller as a Bronx lawyer, whatever that means. Now, you are not a lawyer, are you? A. I don't think so.

Q. In the Bronx or anywhere else. A. No, not at all.

Q. What schooling have you had? A. I had a public school education.

Q. And how far in public school did you go? A. I finished the eighth grade.

(721) Q. Did you go to high school? A. One year.

Q. Now, what is your business? A. At the present time?

Q. Yes. A. At the present time I have a photographic retail store at 136 West 32nd Street. And I have a motion picture laboratory on 424 East 89th Street.

Q. When did you first make the acquaintance of William Miller? A. That was, I believe, in January of 1946.

Q. And during that period were you in business from January of '46 down to the present time? A. Yes, sir.

Q. What business? A. Well, I had a retail photographic store at 18 East 42nd Street, employed about fifty people.

I had a retail photographic store on 136 West 32nd Street, employed about forty people. I owned and operated a photo finishing laboratory, employing about thirty people. I had a half interest in a concern called the Peace Light Company where we manufactured novelties. And I had a third interest in a company called Duane Products, where we manufactured electric irons, electric cameras and slide projectors.

(722) Q. Now, that was since January of 1946? A. January of 1946 I had those operations.

Q. And you continued to have them until when? A. I continued—Peace Light I discontinued in 1948. Duane Products I discontinued, I believe, in 1948. The Marcus Photo Laboratories I still have. I sold my retail store on 42nd Street. I still have my retail store on 32nd Street. And I now have a motion picture laboratory called Cenique Colorfilm Laboratories, Incorporated.

Q. Now, before it slips my mind, Miss Bergler, who testified here, is your secretary? A. She is my secretary at my—

Q. Wait a minute. How long has she been your secretary? A. About? A. About six—five or six years.

Q. And where is she employed, actually employed? A. At the Cenique Laboratories, 424 East 89th Street.

Q. Now, during the period from January, 1946, down to the date when you testified—December, 1951—did you have more than one secretary? A. Yes, I did.

Q. How many did you have? A. I had two.

Q. Where was the other one employed? (723) A. The other one was employed at my retail photographic store on 42nd Street, 18 East 42nd Street, where I kept my offices at those days.

Q. Did you change secretaries from time to time? A. No, I didn't change secretaries during that period. My secretary at the 42nd Street store, when I sold that store, she discontinued working and she went and had a baby instead.

Q. Yes. Now, when did you sell that store? A. I sold that store in 19— 1950, I believe it was.

Q. Now, how did you come to meet William Miller. A. I worked very hard. I put in twelve, fourteen hours a day in work. And after I get through a day's work I enjoy stopping into a night club, having a drink or two at the bar, and I enjoy dancing. Dancing is one of my vices, and I find—

The Court: Who said it's a vice?

The Witness: Some people think so.

The Court: It couldn't be as bad as that in this country.

A. (Continuing) And I enjoy dancing. And I find it very relaxing. I can work fifteen twenty hours a day. Instead of going to sleep I prefer to dance for three hours instead.

Q. All right. Now, how did you meet Miller— (724) A. I went to—

Q. —did you dance with him? A. I went to the Embassy Club some time early in January.

The Court: Of '46?

The Witness: Of '46; yes, sir.

The Court: Nine years ago.

The Witness: That's right.

Q And is that where you met Miller? A. That's where I met Mr. Miller, yes.

Q. Now, did he interest you in the Embassy Club? A. While I was there, socially, Mr. Marcel—he was the maitre de at the door, he knew me quite well—he used to be at the St. Moritz Hotel, and I have known him for years there—and he brought Mr. Miller over and introduced him to me.

Q. What did Miller say to you?

The Court: Was this the very first night you met Mr. Miller?

The Witness: That's correct, sir.
The Court: All right.

A. (Continuing) Mr. Marcel brought Mr. Miller over and said maybe I'd like to meet Mr. Miller, the owner of the place. He sat down with me and I congratulated Mr. Miller on a very, very lovely room. It was really (725) charming, well fixed.

Q. All right. Get down to the financial end of it, will you? A. And Mr. Miller sat there. We chatted for a while. And then he said to me would I be interested in buying out his partner, that he had a partner that was aggravating him, a partner that wouldn't let him do—partner wouldn't let him do what he wants to do, a partner that isn't helping him financially any more, he has got a partner that's—he's obnoxious, nobody likes him around the place, and wouldn't I be interested in buying out his partner.

Q. Well, did you agree to buy out his obnoxious partner? A. I told Mr. Miller I have enough ventures of my own without going into the night club business.

The Court: By the way, did he name his partner who was so obnoxious and so uncooperative?

The Witness: No, he didn't name him. He didn't name him that night.

Q. Well, did he ever name him? A. I can't recall. Yes, he probably did name him at some future date.

Q. Well, do you know his name? A. Well, there was two people there, I believe. There (726) was one person by the name of Phil Black and there was another by the name of Friedlander, who lived—this Friedlander, by the way, lived down South Carolina somewhere.

Q. The same place that Bierman comes from? A. I really don't know. I am not quite sure of his address. I know it's south somewhere.

Q. South of the Mason and Dixon line? A. That's right.

Q. All right. What happened? A. I told Mr. Miller I was not interested personally in night club ventures, but I did have a close associate of mine, whom I had been in business with, and had done business with in the printing business during the War years, and that he had just given up his printing plant, was looking for a new business venture, and that if things were all right in this Embassy Club I might talk to Mr. Parris and he might be willing to go into it.

Q. Now, was Parris your dummy? A. Was Parris my dummy?

Q. Yes. A. No, sir.

Q. Did Parris go into the Embassy? A. He did.

(727) The Court: Let's get this straight. This all happened the first night you met Mr. Miller?

The Witness: No. The conversation was the first night.

The Court: I mean all this about Mr. Parris coming in, when did that happen?

The Witness: Well, the first night, when he asked me, am I interested in going into a night club, and I said no, but I had a friend of mine, a close associate, and a person I had known for years, who had just sold out his business and looking for a new venture who might be interested in going in.

The Court: So the very first night you mentioned about Mr. Parris might—

The Witness: I don't know whether I mentioned his name or not. I merely mentioned the fact that I had a close associate who might be interested.

Q. Now, what happened? Tell us as quickly as you can. A. I spoke to Mr. Parris and brought him over to the Embassy Club one night.

Q. Did you introduce him to Miller? A. I don't think I introduced him to Miller the first night. I showed him the place. He said he thought he would like a business of that type. I then—Mr. (728) Hoffman was my accountant during the year of '46—

Q. Jack Hoffman? A. Jack Hoffman. My regular accountant had taken very ill and had given up practice for a while and Mr. Hoffman happened to come around—I had connection with him in the Peace Light, this person I was connected with in Peace Light knew him—and I asked Mr. Hoffman would he go up to the Embassy Club and examine the books of the Embassy Club and tell me what did he think of the venture.

Mr. Hoffman came back to me—as far as I can recollect the figures he told me, he said—

Q. Now, wait a minute. Did you make any investment in the Embassy? A. Personally?

Q. Yes. A. I did not.

Q. Did Parris make any investment? A. He did.

Q. What happened to his investment? A. Parris lost his entire investment.

Q. Did you reimburse him for it? A. Not wholly, no. I didn't reimburse him for it, no, not at all. We had some other business connections later on which we worked out something on it.

(729) Q. Now, did anybody else become interested in the Embassy Club as a result of your efforts? A. Yes, they did.

Q. Who? A. Mr. Binder.

Q. Mr. Binder: And what happened to his investment? A. He lost his entire investment.

Q. Did he sue you? A. He sued me as an agent in handling the transaction.

Q. And he got a judgment against you? A. The jury awarded a judgment. The judge on the bench dismissed

the verdict as contrary to the evidence, but on appeal the jury's verdict was reinstated.

Q. Now, what happened thereafter, did Miller continue to remain in the Embassy? A. Miller continued to remain in the Embassy, yes.

Q. Incidentally, how much did that Binder deal cost you? A. It cost me close to thirty thousand dollars, with legal fees, and costs and everything else.

Q. And to what extent did you reimburse Parris? A. Well, Parris merely lost his original investment of twenty thousand dollars. I didn't reimburse him. We went into future deals, which we worked out something (730) to our mutual satisfaction.

Q. Now, did Miller remain in that venture? A. Miller remained in the Embassy until some time, I believe, in February, '47.

Q. Did you take the Embassy over at any time? A. Not as the Embassy Club, no.

Q. Or as any other club? A. In October or November of 1947, when the Embassy Club had been put through bankruptcy, and I was the mortgagee, I—and I had a very large mortgage there which was worthless, unless the club ran—I attempted to salvage my mortgage and I hired a manager and tried to open the club. But after three months I found that I wasn't a night club operator and I gave up the enterprise and paid off all bills to everybody, walked out of the place clean.

(731) Q. Now you say you had a mortgage on there? A. That is correct.

Q. How much? A. The mortgage was about $52,000—no, let's see, now. No. There was a fifty— There were two mortgages. There was one mortgage of $15,000 and one mortgage of $32,000.

Q. Held by you? A. By me, yes.

Q. Given to you by whom? A. Given to me by Bill Miller for moneys loaned to the Embassy Club.

Q. Now, did you foreclose your mortgages? A. Yes, I did.

Q. When? A. Golly, I can't remember whether it was in '48. '48, '49, sometime around that time.

Q. Now, did Miller ever take over that club again? A. He did not.

Q. After he turned over the management to you? A. Miller never turned the management over to me.

Q. What is that? A. Miller never turned the management over to me.

Q. How did you acquire management. A. Miller—

Q. How did you acquire management? A. I didn't acquire management. I acquired ownership. That is I didn't acquire ownership. Only by foreclosure did I receive ownership of the club.

(732) Q. That is what I want to know. A. You said management. I didn't understand what you meant by management.

Q. There seems to be a difference between management and ownership? A. Yes.

Q. Did Miller turn over the management to you in April of '47, or thereabouts? A. April, '47?

Q. Yes. A. No, Miller had sold the club to a party by the name of Schwartz in February of '47. Miller had sold his stock interest, and, I think, Parish joined in with him. The club was in a bankrupt condition. They owed about $200,000, couldn't exist. They had no money to continue, and Mr. Miller asked me, wouldn't I try to find some customer that might realize some few dollars that way. I told Miller I had had a very bad experience acting as agent for Binder and before I do any more acting would you please give me a letter in writing authorizing me to act for you.

Q. Did he give you such a letter? A. Yes, he did.

The Court: Who is the man that sued you, you said?

The Witness: Mr. Binder. I went into a—

The Court: That is all.

The Witness: I thought maybe you wanted an explanation.

The Court: You were telling why; you got burned once (733) and were careful this time. This happened before the incident you are talking about now, the Binder judgment?

The Witness: The Binder judgment was before this, that is right, yes. That is, Binder didn't have the judgment yet. Binder was suing me at that time.

The Court: You thought you should have a written authorization from Mr. Miller to take this on?

The Witness: That is right.

Q. Now, you say that Miller gave you such a letter? A. Yes, sir. I think it was produced in evidence, if I am not mistaken.

Q. I did not ask you that. I know. Don't volunteer. A. I am sorry.

Q. Did Miller ever give you any stock in Embassy? A. He gave me his stock as collateral on the loan that I made to him.

Q. When? A. That is during January. I think he gave it to me about February or March—February or March of 1946.

Q. Did he retain any stock? A. No, he gave me whatever stock he had as collateral.

Q. You told me he sold some stock to somebody? A. What time are you asking me about? I don't know when.

Q. You said he sold some stock. A. I didn't say he sold. I said he—when the room closed I let him have the stock to dispose of it to these new people, (734) because I knew to me it was valueless completely.

The Court: What room is that?

The Witness: The Embassy Club when we had this Schwartz—

Mr. Grosman: I will find it a little later and show it to him. I don't want to hold up these proceedings.

Q. Now, when did that Embassy venture wind up? A. As Embassy or the club itself or the Embassy or Macombo?

Q. What difference does it make? A. Well, the Embassy continued under different management, under different ownership at a later date.

Q. When was the ownership turned over to someone else? A. The first time ownership was turned over to somebody else was, I believe, sometime in February when Miller—

Q. What year? A. February, '47.

Q. Who was it turned over to? A. It was turned over to a party by the name of, I believe, Schwartz.

Q. Yes. Then what happened? A. Then Schwartz operated it several months and walked away from the proposition.

Q. Then what happened? A. Then I continued paying rent on the premises because I was trying to salvage my $47,000 mortgage which was worthless unless the room was operating. I continued paying rent on the premises for the next six months.

(735) The Court: Was the club closed?

The Witness: The club was closed during all that time, and I tried to advertise the club and tried to sell it, and finally in desperation when I could find no customer I hired a manager, a man with experience in night clubs and asked him could he operate the club and we would take a flyer at it, and I formed a new corporation called the East 57th Street, an amusement corporation.

Q. Was Miller in that? A. He was not.

Q. When did Miller cease to have any connection with Embassy? A. February, 1947.

Q. Now, thereafter did he turn over any stock to you? A. Thereafter?

Q. Yes. A. He had no stock thereafter.

Q. Did he turn over any stock to you? A. No, he did not. He did not.

Q. Did he turn over any stock to you in connection with his investment or supposed investment in the Milmar Estates? A. Macombo stock you mean?

Q. Yes, Macombo. A. He did not.

Q. When Miller stepped out of Embassy or the Macombo—

The Court: Let's get this straightened out. Did Macombo succeed the Embassy?

(736) The Witness: No. Macombo owned the Embassy. Macombo corporation owned the Embassy Club.

The Court: The club was known as the "Embassy?"

The Witness: That is right.

Q. When Miller stepped out of Macombo Club or Macombo Corporation, the Embassy Club, you say was in February, 1947? A. I believe that is the date, February, 1947.

Q. How much was your investment in Embassy then? A. Well, I had a mortgage of $47,000.

Q. Can you give me an answer? A. About $60,000 to $70,000.

Q. Did you salvage anything of that? A. $1,000.

Q. Thereafter did you go into other ventures with Miller? A. I was already in a venture with Miller.

Q. What was that? A. I was in the Milmar venture with Miller.

Q. How did you come to go into that venture with Miller? A. I guess I am a little bit gullible, but some time in March of 1946, I believe that is about the time it was, Miller just came up. He was down for a visit in Florida, and he came up and he told me that he had just heard the most terrific, the hottest band in the country, a band by the name of Morales. At that time it was the most famous mumbo-rhumba band in the country, and we were going to do the hottest business in town, (737) and I believe Morales came up about a few days or a week later and opened up at the Embassy Club, and the Embassy Club was doing a terrific business, jam packed every night of the week. At the same time he also told me about meeting Ben Marden down in Florida. Ben Marden was a close buddy of his, had known him for years, and that he discussed the Riviera with Ben Marden and that he thinks a deal can be made with Ben Marden. Was I interested? I said to Miller at the time, "I am not interested in night club ventures, but it appears to me that the property over there on that bluff there, that lot there could make a fine real estate development," so I said, "Let's go over and take a look at it."

We went over there and I looked at the size of the lot. I think it contains about three or four acres and I was highly enthusiastic at its possibilities.

Q. As what? A. As a real estate development for possibly putting up some nice, tall apartments or something.

Q. Did you agree to go into that venture with Miller? A. Yes, I agreed to go into it.

Q. Did you discuss with him or he with you the money price? A. I asked him, Miller—

Q. Did you? A. Yes, I did.

Q. What did he say about what it would cost to take this venture over? (738) A. He said in his conversations with Marden, Marden had told him that he had been offered as high as $700,000 for that property but the type of peo-

ple that had been offering that money—he doesn't particularly like their type, and they weren't responsible enough, that if a nice guy like Bill wanted it, and if he could get a responsible business man that would join with him, Marden would give him a very attractive offer for the property.

Q. How much? A. I believe he told me at that time it could be gotten for under $500,000.

Q. Now, did you agree to go in with him on that? A. I told Miller at the time that that was way out of my pocketbook. I had a fairly nice business but I didn't have that kind of money to go into ventures of that kind and to forget me about the thing.

Q. Now, did you finally go into the venture with Miller? A. Yes, sir, I did.

Q. At what price? A. I believe the final price we arranged with Ben Marden—frankly I have not been able to definitely get my figures together. I thought it was more but the contract—according to the contract it recites $425,000. I had an idea that I paid more somewhere along the line and I was rather confused about it.

Q. Please, Mr. Marcus. I asked you how much was the purchase price of the Milmar property from Marden. A. The contract called for—

(739) Q. That is what I am talking about. A. The contract called for $425,000.

Q. Now, did you and Miller discuss how the purchase of that property was to be financed? A. Yes, we did.

Q. How was it to be financed? A. We each were supposed to put up $100,000 apiece.

Q. Did Miller say he had a hundred thousand dollars? A. Miller said—

Q. Did he? A. He did not say—

Mr. Brigadier: I don't mind leading the witness, but I object to interrupting the witness. I said I wouldn't object to leading questions and I won't be-

cause I promised you I wouldn't but when he starts answering, I think, he should be permitted now to give his answer.

The Court: He wants a responsive answer. He is trying to keep him to the subject matter of what he is asking him. He will be all over the map if he doesn't.

Q. I will change the question. We are taking up too much time. How much money was Miller to put up? A. $100,000.

Q. Did he say whether he had $100,000? A. He told me he owned Luna Park, that they had just recently had a fire there, that he was making arrangements with—I think the name was Prudence Bond Company, who were the agents, and he (740) expected a monetary settlement from the company, the Prudence Bond Company, that would net him $50,000 to $75,000.

Q. What did that have to do with this Milmar deal? A. He was going to turn over—as soon as he got this money he would turn this money over to me for this.

Q. Was there a deposit put up in the purchase of the Milmar property? A. I put a deposit up, yes.

Q. How much? A. I believe the deposit was $25,000.

Q. Did Miller contribute anything toward that deposit? A. Not a nickle.

Q. Did he agree to contribute anything? A. He agreed to put up $100,000.

Q. I am talking about the deposit. A. He was supposed to put up 50% of the deposit.

Q. When it came time to put up 50% did he put it up? A. He did not.

Q. Did he say why he didn't put it up? A. He said he didn't have it.

Q. Did he say when he would have it? A. He told me again he expected an early settlement with his Luna Park

property and as soon as he got that settlement he would give it to me.

The Court: Did you take his word for that statement without checking it?

(741) The Witness: I did, sir.

Q. You put up the $25,000 deposit. A. I did.

Q. How much more cash was to be put up in order to take title? A. We had to put up additionally $100,000.

Q. Now, was title taken to the Marden property? A. It was.

Q. In whose name? A. It was taken in Miller's name and my name.

Q. Where did the closing take place? A. I believe the closing took place in Mr. Winne's office, here in Jersey.

Q. You were there and was Miller there? A. I was there and Miller was there, yes.

Q. Did Miller have any money to put up? A. Miller gave me a check from a Mr. Berman for $20,000.

Q. How much was put up on that occasion altogether? A. $105,000—$100,000, I believe.

Q. And who put up the remaining $80,000? A. Mr. Robert Schwartz gave me a check for an interest.

Q. How much? A. He was to get a 10% interest, 125 shares.

Q. How much? A. A 10% interest.

(742) Q. That would be what, $10,000? A. The total amount was somewhere around $11,000. I forget the exact figure.

Q. That Schwartz gave you? A. That is correct.

Q. That accounts for $30,000. A. That is right.

Q. You were supposed to put up $100,000. A. I put up the balance.

Q. Were you supposed to put up $100,000? A. What is that, sir?

Q. Were you supposed to put up $100,000? A. I was supposed to put up $100,000.

Q. Now, you had $30,000, $20,000 from Berman, ten or eleven thousand from Schwartz. A. That is right.

Q. Who put up the balance? A. I put up the balance.

Q. How much? A. The balance that was due, somewhere about $75,000 or $80,000, some where in between there. There were a lot of extras pertaining to the title, taxes and things like that. I put up an additional $70,000 or $75,000. i don't remember the exact amount.

Q. Did Miller put up any of his own money? A. Not a nickel.

Q. Did you ask him for his contribution? (743) A. I did.

Q. What did he say? A. He told me he didn't have any money. He is expecting momentarily this money from Luna Park and he will turn it over to me.

Q. Now, title was taken in your name and Miller's name? A. That is correct.

Q. And it was turned over to a corporation? A. It was.

Q. That is the Milmar Corporation? A. That is correct.

Q. Who holds it this very day? A. That is correct.

Mr. Brigadier: The State of New Jersey holds it.

Mr. Grosman: I stand corrected. I am sorry. The state of New Jersey now owns it.

The Court: No they don't. It is the Palisades Interstate Park Commission.

Mr. Brigadier: I stand corrected.

Q. Now, did Miller give you anything by way of security for the money that he was supposed to put up? A. Miller said to me, "Marcus, I want a piece of this. I will give you a note as some evidence of my intentions. Now, I want to have an option to buy—" I think the deal was at the time thirty-seven and a half percent for the amount of money. The option was 37 and a half percent if he was to pay $50,000 (744) additional.

Q. Did he give you a note? A. He did.

Q. For how much? A. $50,000.

Q. Did he ever pay that note? A. He did not.

Q. How long was that note to run for? A. The note was a demand note.

Q. May I interrupt just a moment and show you DM-4, marked for identification (showing). Is that the authorization given you by Miller to act as agent in the Embassy transaction? A. Yes, sir, it was.

Mr. Grosman: It is offered in evidence. Do you want to see it?

Mr. F gadier: No, I have seen it. What was the date?

Mr. Grosman: December 16, 1946.

The Clerk: DM-4, formerly marked for identification, now marked in evidence.

Q. I show you a photostatic copy of a note marked DM-5. Is this the photostatic copy of the note that Miller gave you originally? A. Yes, sir.

Q. To cover his investment in Milmar Estate venture? (745) A. That is correct.

Q. Now, did you call this note? Did you present it for collection? A. I did.

Q. What happened? A. It was protested and not paid.

Q. Do you remember when you presented that for payment? A. It was sometime in '47, whether it was April, May or June I don't recall.

Q. Now, did Miller give you a new note? A. He did.

Q. How much was that note for? A. $50,000.

Q. And how long was that note payable? A. I believe that note was supposed to be due sometime in '48 and then there was an agreement there that it should be paid on the basis of $500 a week.

(746) Q. I show you Exhibit DME-16 and ask you if that is the second note that Miller gave you? A. Yes, I believe this is. Yes, this is the second note.

Q. Did he ever pay that? A. He did not.

Q. Did he pay anything on account of it? A. Not a nickel.

Q. That brings us down to June 1, 1947. Now, did you loan, or give, Miller any more money in addition to the $50,000 which he owed you? A. When the Riviera first opened they needed a lot of money to get started, and knowing that I had to depend upon the income of the Riviera in order to pay the mortgage obligations, I went all out and got all the money I—I loaned Miller all the money I could possibly loan; which was possibly, I think about that time I passed about $30,000 toward the helping of the Riviera.

Q. Now, did you give him that by check or by cash? A. The majority of these items are all by check. There may have been one or two small items when he sent somebody over to my office, he needed a quick 500 or a thousand dollars cash to meet a pressing bill, and I would give it to him in cash. I would get that from the cash register, myself.

Q. I show you checks totalling as nearly as I can make out $46,000, plus a check for $49,000. Can you tell me (747) what those checks were used for? A. I believe that these are some of the checks that were used towards the purchase of Milmar property.

Q. You keep saying you believe. A. Well, do you want me to check them again? I will make sure about it.

Q. Now, wait a minute, let the Judge see these. A. These are Milmar Realty.

Q. Do you know how much they total? A. Frankly, I don't know the total amount of these right now.

Q. There is one check for $49,000 and there are additional checks.

(Checks handed to Court.)

The Witness: There is a Cashier's Check from the bank. I borrowed that money from the bank.

The Court: Yes, I see it.

Do you want the record to show these checks, Judge?

Mr. Grosman: Yes, sir, your Honor.

The Court: All right.

Mr. Grosman: This is to verify the statement of this witness that he put up this money.

The Court: All right, the date, bank and amount.

He is the maker of all checks?

Mr. Grosman: There is one that is a bank check.

(748) The Witness: One is a bank check, a loan from a bank.

Q. A check dated April 5th, is it? A. That is April 5th, yes.

Mr. Grosman: 1946, Corn Exchange Bank & Trust Company, 181st Street Branch, Michael Realty Co., $25,296.53, signed "Sam Marcus."

Q. Now, Michael Realty Co. is what? A. That is the corporation that owned the Riviera property.

Q. The Marden property? A. The Marden property.

Q. That was sold to you and Miller? A. That is correct.

Mr. Grosman: A check dated April 5, '46, Corn Exchange Bank & Trust Company, 181 Street Branch, Michael Realty Co., $1,709.

Same bank, April 5, 1946, $496.57.

Mr. Brigadier: Payable to the order of Michael Realty?

Mr. Grosman: Michael Realty.

Check dated April 10th, 1946, same bank. Michael Realty Company, Photoshop, 136 West 3.. Street, signed by Sam Marcus, $20,213.75.

Photostatic copy of a check, Bank of Commerce, dated April 6, 1946, to the order of Sam Marcus, $49,703.47, (749) endorsed by Sam Marcus.

Q. What is that first endorsement on there? A. It is Samuel Marcus and Sam Marcus, both.

Mr. Grosman: "For deposit, Michael Realty Co." I ask that they be marked.

The Court: Have you any objection to marking them as one exhibit?

Mr. Brigadier: No.

The Court: Now, those are the checks that you say you turned over at the closing of the title?

The Witness: That's right.

The Court: And prior to that you made a $25,000 deposit?

The Witness: Yes. I forget just how the whole thing was handled. I know there was a deposit paid first. Frankly, I don't carry the records of my personal business.

Q. Will you just answer the Judge's question?

The Court: You know I am getting so I am afraid to ask you a question.

The Witness: I don't recall just which one of those are deposits and which ones the closing, and whether I gave a different check for deposit.

The Court: Well, those are all about the same time, Mr. Marcus?

The Witness: Same time, yes.

(750) The Court: You say you paid the deposit long before that?

The Witness: Yes, we paid the deposit before that.

The Court: Sure. You had the title searched, didn't you?

The Witness: I don't recall whether we had the title searched or not.

Mr. Brigadier: If your Honor would like to know, and I think the record should show, instead of waiting for the title search to be made, they took Mr. Marden's personal guaranty as to the title.

Isn't that right, Mr. Marcus?

The Witness: I believe something like that was done.

Mr. Brigadier: And they actually closed the title a few days before the time fixed in the agreement for the closing of title.

The Clerk: DM-11 in evidence, series of 5 checks, one a photostat.

(Received and marked Exhibit DM-11.)

Q. Do you recall the date on which the title was closed? A. I believe someone said April 2nd; I am not sure whether that is the correct date.

Q. What year? A. 1946.

Q. Now, you gave Miller additional sums of money, did you? A. That's correct.

Q. Did he give you checks for it? A. Sometimes, sometimes I got a note from Mr. Hoffman for the amount and sometimes there was no note given me.

Q. Did you get any checks? A. Yes, I had some repayments made.

Q. I show you a check, Bill Miller's Riviera, dated October 10, 1947, for $2,000, signed "William Miller, President. Payment Stopped." Did you receive that check? A. Yes, I received that check.

Q. Did you give anybody cash for it? A. I gave Mr. Miller cash for that.

Q. Were you ever reimbursed? A. I don't think I was, no.

Q. (Continuing) For the amount of that check? A. No, sir, I don't believe I was.

Q. All right.

The Court: Well, didn't you remonstrate with him for stopping payment?

The Witness: I went down there but what can I do with a man who just stands there and tells you he ain't got it? I can't hit him over the head and take it away from him.

Q. I show you another check, Bill Miller's Riviera, October 10, '47, signed Bill Miller, President, to Milmar (752) Estate, Inc., $500. What was that check for? A. That was one of the payments Miller had to make to Milmar when Milmar guaranteed payment for the concessionaire who advanced Miller $50,000. In order to help Miller get started I, as Milmar, I guaranteed payment of that money so Miller would have some working capital to get going, and help him along. I took it upon myself, as the owner of Milmar, and Milmar guaranteed payment to this concessionaire. After the season closed in 1946 he owed $19,500 to the concessionaire. The concessionaire sued Milmar, and naturally Milmar had to make good. It was arranged with Miller to pay off $500 a week when the club reopened the next year. Miller was supposed to repay those amounts.

Q. He issued his check to Milmar? A. That is correct.

Q. Did you advance the money represented by this check? A. Milmar advanced the money for that.

Q. Where did Milmar get the money? A. I loaned Milmar money to take care of those items.

Q. Was this check ever paid? A. I don't know. It may have been paid. This may have been paid, I don't recall at this moment. I am not sure whether it was paid or not, direct.

Q. All right. How about the $2,000 check I showed you before, was that paid? (753) A. I am not certain whether that has been paid or no' I mean the books of Milmar would reflect whether it has been paid or not. It would show the income coming to Milmar.

Q. Now I show you six checks—there seems to be five checks here, issued by Milmar Estates, Inc., one, No. 1009, August 12, '46, to the Hackensack Water Company for $448.12, signed by you as President, J. V. Hoffman, Comptroller. Did you issue that check? A. Yes, I issued that check.

Q. Now, will you look at all these checks in order to save time.

The Court: Are they all Milmar checks, Judge?

Mr. Grosman: Yes.

The Witness: These are corporation checks.

A. Yes, I issued those checks with Mr. Hoffman's signature.

Q. Where did the money come from for which these checks were paid? A. A great deal of the money—some of the money came from Riviera rent and a great deal of the money came from my advance, when Milmar didn't have the money I would put the money into Milmar to meet those bills.

The Court: Did you keep track of all this?

The Witness: Well, Mr. Hoffman had assured me that all these records were being kept by him. Mr. Hoffman was my accountant in '46.

(754) The Court: Well, did you rely on Mr. Hoffman?

The Witness: I relied strictly on Mr. Hoffman as my accountant and as Milmar's accountant.

Q. I show you a check, or a note dated December 4, 1947, to the order of Milmar Estates, signed by Bill Miller's

Riviera, Inc., Bill Miller, President, in the sum of $6,000, marked "Payment Stopped." What about that? A. Well, there again, it is a promise to pay some money and he didn't pay it.

Q. Have you in mind that transaction? A. Frankly, I can't recall just what it is, but the books of Milmar should reflect the transaction.

Q. I see.

Mr. Grosman: I would like to offer these checks in evidence, these checks and notes.

Do you want to see them?

Mr. Brigadier: Yes. I haven't been able to figure out what your evidence is. This witness says he doesn't know, and doesn't know whether it has been paid or hasn't been paid.

The Court: He says he needs access to the records of Milmar; he relied on Mr. Hoffman, who was his accountant, originally.

Mr. Brigadier: I have no objection.

Judge, you spoke of a check there of October 10, (755) 1947. Have you excluded that?

Mr. Grosman: A check for October 10th?

Mr. Brigadier: Yes.

Mr. Grosman: No, you must have it there.

Mr. Brigadier: A stop-payment check.

Mr. Grosman: Sir?

Mr. Brigadier: A stop-payment check for $2,000.

Mr. Grosman: Whatever was stopped payment on you have there.

Mr. Brigadier: Judge, did your man look at the check when he testified about it? I think you ought to call that to his attention.

Mr. Grosman: Well, I read off the dates of the check.

Mr. Brigadier: He said he thinks it is money loaned; it tells you what it is for on the check, "Rent instalment."

Q. Did you say it was all for money loaned? A. No, I didn't say it was all. I said some of it could be for money loaned. I wouldn't know without referring to the books of Milmar exactly what they are for.

Mr. Brigadier: I suggest he looks at the check.

The Court: Is there anything on it that says what it is for?

Mr. Grosman: I showed him the signature there, (756) there is a notation under the protest notice.

The Witness: This appears to be for rent, week ending October 5th.

Q. But payment was stopped on it? A. Payment was stopped on it.

Q. And the check was protested? A. That's right.

Q. All right. A. I don't know whether it has been paid or not. The books of Milmar will reflect that.

Mr. Brigadier: I haven't any objection to any of these instruments going in.

Mr. Grosman: All right.

Mr. Brigadier: Are you going to number them as one exhibit? You will give them letters?

The Court: If it becomes necessary to separate them by letters, then we will do it.

The Clerk: DM-12, series of 8 documents, marked into evidence.

The Court: Checks and documents.

Mr. Grosman: Checks and notes.

The Court: Promissory notes.

Q. Now, Mr. Marcus, I show you what purports to be a closing statement on transfer of property at Fort Lee,

New Jersey, dated April 5, 1946, entitled "William Banda, (757) Counsellor-at-law, 210 Main Street, Hackensack, New Jersey," and ask you to look at it and tell me whether that is a closing statement involving the Milmar property? A. Well, I wouldn't be enough of a legal man to know whether it is a closing statement. It looks like a statement of the property.

Q. Well, read it. A. "Closing adjustments on transfer of property." That's right, yes, sir.

Q. Does it show a purchase price of how much? A. Purchase price of $425,000.

Q. And paid? A. Paid on signing of contract and closing in cash, $125,000.

Q. All right. A. And plate glass insurance.

The Court: Well, those are adjustments, what they call minor adjustments.

Mr. Grosman: I offer it in evidence.

The Clerk: DM-13, closing statement on Fort Lee property, dated April 4, 1946, in evidence.

(Received and marked Exhibit DM-13.)

Q. Now, Mr. Marcus, have you any idea how much money in addition to the original investment you made in this Milmar property you paid over to William Miller, either in connection with loans to him, personally, or to Bill Miller's (758) Riviera? A. The Riviera only and not the Milmar?

Q. Well, you separate it any way you can. A. Well, do you mean the total amount I loaned or the total amount due.

Q. The total amount of loans that you made to William Miller. A. Well, I would say between Miller and Milmar, I advanced approximately $100,000.

Q. Was that in addition to the investment that you made in the Milmar property? A. That is correct.

Q. Was any of that money returned to you? A. There was.

Q. About how much? A. Oh, I believe my last tabulation —the figures that I had, the checks that I had unpaid, I believe there was about 35 to 40 thousand repaid.

Q. Now, can you tell exactly without seeing the books of these various corporations? A. I could not. I could not.

Q. Do you think you could tell if you saw the books? A. Oh, definitely. Mr. Hoffman is a certified accountant and no doubt he made proper entries in the books.

Q. Now, as time went on did friction develop between (759) you and Miller? A. It did.

Q. Over what? A. Over trying to get some rent money out of him.

Q. Rent for what? A. Rent for the use of the premises, the Riviera.

Q. I didn't ask you— The Milmar Estates was a corporation formed to take over the Marden property from you and from Miller? A. That is correct.

Q. And you both, you two gentlemen, conveyed the property to Milmar? A. That's right.

Q. Now, was that property leased to a corporation? A. It was leased to Bill Miller's Riviera, Incorporated.

Q. And were they to pay rent? A. Yes, sir.

Q. Now, did Milmar Estates have any income outside of the rental from Bill Miller's Riviera? A. None whatsoever.

(760) The Court: Milmar also owned the chattels?
The Witness: Owned the chattels and all.
The Court: The chattels, too.

Q. Now, was Milmar Estates, Inc., dependent upon Bill Miller's Riviera for its income? A. They were wholly dependent upon it.

Q. What were the obligations of Milmar on the mortgage, monthly? A. I believe it was five thousand dollars a month on principal plus interest.

Q. Now, and what rent was Milmar supposed to receive from Bill Miller's Riviera? A. Sixty thousand dollars a season.

Q. That would be five thousand dollars— A. Five thousand dollars a month.

Mr. Brigadier: Now, at this point, I think the Court ought to be told the kind of difficulty we are running into. I have as yet not tried to make any kind of objection. Are you talking of '46, because at one time it's sixty, another time it's forty. Documents are available, with leases, which contain the terms of the rentals. And it is not true, as you know, that—it isn't sixty throughout.

Mr. Grosman: I didn't say throughout.

Mr. Brigadier: At what point are you talking (761) of now, at the very inception?

Mr. Grosman: If you give me a chance, I will develop it.

Mr. Brigadier: All right. Don't say that I didn't alert you to the fact of what is happening. I think the documents ought to be referred to. They are the best evidence.

The Court: I am sure they are better than Mr. Marcus' memory.

Q. Now, was there a time when the monthly amortization payments on account of the real estate was reduced? A. There was.

Q. When? A. Some time, I believe, during '46, when we had difficulty obtaining rent from Miller, I went to Ben Marden and Mr. Schimmell, I believe, who was Ben Marden's accountant, and told him of the difficulty we were having and—

Q. Let me ask you at this point. Did William Miller know about this conference that you were having? A. I believe he did.

Q. Well, did he or did he not? You keep saying, "I believe." A. He did, yes. Mr. Miller knew about that, surely.

(762) The Court: He just has a habit of saying, "I believe." Even when he states a fact he says, "I believe."

Mr. Grosman: Well, I just wanted that to appear of record.

Q. Now, were the monthly amortization payments reduced? A. They were reduced for a period of one year.

Q. To what? A. To thirty thousand instead of sixty thousand?

Q. Was there any change there after in the monthly amortization payments?

The Court: You mean after it was reduced to thirty thousand a year?

Mr. Grosman: Yes.

A. I believe the following year we received another concession from Mr. Marden.

Q. To what? A. To reduce—

Mr. Brigadier: I have to interpose an objection. Since there are documents for all this, I think that they should produce the documentary evidence.

Mr. Grosman: I will produce it.

Mr. Brigadier: I have tried not to interfere with the flow of his examination. I think you (763) have noticed that I have leaned back—

Mr. Grosman: You have been very nice.

Mr. Brigadier: We are dealing now with documents. Why not produce the documents? I think you have photostats of them. They speak for themselves.

The Court: Do you really think we need this to determine the main issue in the case?

Mr. Brigadier: I don't think it has anything to do with the final issue, but I can't anticipate what use is going to be made of this, and since it is documentary, why not let the documents speak for themselves.

Mr. Grosman: Do you want me to take the time out now to find—

The Court: No, don't do it now, Judge. Do it later.

Mr. Grosman: I have the documents and I intend that at some time along this examination to produce them.

Mr. Brigadier: All right, then I withdraw my objection for the time being, if you intend to put the documents in eventually.

Mr. Grosman: I have the documents. You have photostatic copies of the documents. We have used them on the depositions.

Mr. Brigadier: But his statement is not (764) accurate. That is why I am getting up and objecting.

Mr. Grosman: All right. If he is not telling the truth, that's to your advantage.

Mr. Brigadier: I didn't say he wasn't telling the truth. I said he wasn't accurate.

Q. Now, after the $30,000 arrangement was made, was there any change in the amortization payments? A. The following year we had a continued--following in '47 we had a continued arrangement for the amortization.

Q. With the reduced amortization? A. That's correct.

Q. Now, why was it necessary to ask for a reduction of the amortization payments? A. Because Miller wasn't meeting his rental payments.

Q. What did Miller say in that connection to you, if anything? A. Miller kept repeating to me that business is bad and they are losing money and he hasn't got it.

Q. Were you a stockholder, originally, in Bill Miller's Riviera? A. I was not.

Q. Did you ever become a stockholder in Bill Miller's Riviera? A. By virtue of default.

(765) Q. What do you mean by that? A. In 1947 we entered into—we entered into a lease and an agreement, at the time of the renewal of the note, and in that lease and agreement it was agreed that Bill Miller would deposit 51% of his Riviera stock in escrow, plus the resignations of officers of Bill Miller's Riviera. So that in the event—we had had some difficulties and we wanted to dispossess him, and so forth—and in the event he gave us those difficulties again we could quickly remove him from the premises. So those papers—those papers were deposited with Mr. Robert Schwartz in escrow, I believe on July 23 we entered into an agreement, of 1947.

Q. Do you recall exactly what was escrowed with Robert Schwartz in that connection? A. To the best of my recollection, I know there was 51% of Bill Miller's Riviera stock, there was the resignations of officers and directors of Bill Miller's Riviera, and other papers and documents, leases, that were prepared, I believe, on that day.

Q. I show you a lease, photostatic copy of a lease—I show you a lease marked DME-28 in evidence and ask you if that is one of the leases that you refer to, July 23rd? A. July 23rd, yes.

(766) Q. '47. A. Yes, that would be the lease.

Q. Now, did Bill Miller's Riviera, Inc., default on this lease? A. They did.

Q. When? A. They defaulted, oh, practically immediately.

The Court: You don't mean on August 1st they defaulted.

The Witness: Well, no, not on August 1st. Frankly, I can't recall the exact date, but whatever the terms were of this lease, he didn't carry out at all. I know he made—oh, yes, one other part of that lease, I just

recall, part of that lease was the repayment to me of five hundred dollars a week on that note. That was part of the lease. Well, he immediately—he didn't pay any payment on the note, so it was immediately in default on the notes, and he didn't make certain other payments to the concessionaires, I believe, that he was supposed to pay, and Milmar had to go ahead and pay. So I don't know the exact date of that default.

Q. Do you know the amounts that Milmar had to pay to the concessionaires? A. Milmar paid—

(767) Q. Now, without reference to the books. A. I think I know the rough amount. Well, I don't know exactly, it's somewhere in the thousands. It could be somewhere between fifteen and twenty thousand dollars.

The Court: That Milmar paid the concessionaires?

The Witness: Milmar paid the concession of—

The Court: Of Bill Miller's Riviera.

The Witness: Of Bill Miller's Riviera, yes.

The Court: Hold it there. We are enough in a hole already for today. We will resume tomorrow.

Mr. Brigadier: Is the hour 10:15 again?

The Court: I generally start at 10.15 because I have got to help out with Judge Smith now that he is ill.

Mr. Grosman: May I again renew my application for the production of the books of Milmar, and, of course, of Riviera?

Mr. Brigadier: Wait a minute. They have had photostatic copies of the books of Milmar up to September 14 in their possession, sir, for more than a year.

The Court: That's all he needs to answer his questions.

(766) Mr. Brigadier: We still have not reached the proposition as to whether he is entitled to anything

after September 15th until your Honor decides whether or not he is entitled to a rescission.

Mr. Grosman: It is my understanding, your Honor, that we were not given all the books.

Mr. Brigadier: Of Milmar?

Mr. Grosman: Yes.

Mr. Brigadier: I say to you that we gave you everything we have up to September 14th.

Mr. Chazin: I made an appointment for them to come to see the books.

The Court: And they didn't come. I know. I heard that about a half dozen times.

Mr. Grosman: And the reason we didn't come is because there was a misunderstanding. We didn't know that the books had been deposited, so we didn't show up. We wouldn't ask for the books and not show up.

The Court: Well, have you got the photostats of their books up to September 14th?

Mr. Tepper: Of Riviera?

Mr. Brigadier: We are talking of Milmar.

The Court: Of Milmar.

Mr. Brigadier: I saw with my own eyes that they had photostatic copies of our books up till (769) September 14th. You have exactly what we have.

Mr. Marcus: I have them right here.

The Court: Look at them tonight so that you can try to allocate these funds that you spent for Milmar. 10:15 in the morning.

(Whereupon the hearing of the above entitled matter was adjourned until 10:15 o'clock A. M., Wednesday, February 2, 1954.)

Samuel Marcus—Defendant—Recalled—Direct

(770) Newark, N. J., Wednesday, Feb. 2, 1955.

(The parties met pursuant to adjournment.)

(Appearances as before noted.)

SAMUEL MARCUS, resumed the stand.

Direct examination by Mr. Grosman (continued):

Q. Mr. Marcus, when we terminated yesterday's hearing, there was some talk about that you had photostatic copies of the books of Milmar Estate in your possession. You remember that? A. That's correct.

Q. And the Judge suggested that you look at them overnight so that you could try to allocate these funds that you spent for Milmar. A. I did.

Q. Now, what photostats of what books, for what period, of Milmar do you have in your possession? A. They were the books that Mr. Hoffman turned over to us, I think about a year ago, to photostat. There are some ledger sheets and some journal sheets. I believe is what they are. I am not too familiar with them.

Q. Will you take them, please, and tell me for what periods—what periods those records cover. A. Yes, I was up in Mr. Dobkin's office last night, (771) Mr. Herman Dobkin, a certified public accountant—

Q. What period do they cover? A. I believe the period was from the commencement—from April, '46.

Q. Well, have you those records with you? A. I believe you have them there, Judge. I left them with your records there.

Q. Suppose you take a look at them and tell us, without guessing, what records you have and what periods they cover.

(Documents handed to the witness.)

A. Well, this says here Milmar Estates, Incorporated, April 1, 1946.

Q. To? A. Fiscal year ending March 31, '49.

Q. And they are photostats of what? A. Photostats of the books that Mr. Hoffman turned over to the photostat people. He was present at the time, when they were being photostated, and we had these copies given to us.

Q. Wait a minute. You say 'books', you are familiar with books. A. Sheets.

Q. What are they, ledger sheets? A. Ledger sheets is what they are.

(772) Q. Ledger sheets? A. That's right.

Q. Then you call them by name. A. I see.

Q. General ledger and cash book is how they are described. In whose handwriting is that, if you know? A. Well, it appears to me like Mr. Hoffman's handwriting. Though I wouldn't definitely make the assertion.

Q. Now, these—general ledger journal and cash book sheets—cover the period from— A. April, '46.

Q. To—what is the last date in this book? A. This states March, '49, in here, although the top—

Q. Now, please. You are looking at something entirely different. Will you please look at the record that I have? A. Where do you want me to look? I don't know too much about books. What do you want me to look at?

Q. I am trying to ascertain the last date of this general ledger journal and cash book—the last date that it covers. A. Well, on what particular page?

Q. I don't know. You looked through them, did you? (773) A. I looked at them with the accountant. I don't know anything about books.

The Court: Well, don't tell me the first time you looked at them was last night, when they were in your possession a whole year.

The Witness: I turned them over to—they weren't in my possession. I had turned them over to our accountants and they had made some figures from them and I went there last night to find out completely what they had ascertained.

Mr. Grosman: All right. Now, these records, your Honor, indicate, as nearly as I can tell, on the first sheet—or the second sheet, after the cover page, May 31, 1946 seems to be the first entry. And the last entry that I can find, offhand, without examining every page, seems to be—

Q. Can you tell me from which of these two books this sheet that I am now handing you comes? A. No, I don't. Page 6 that is.

Q. Page 6. A. Do you have that page 6. Here is a page 6 here.

Q. Well, it can't come from this book. We have a page 6 in the one I am speaking of. All right, that will do now.

Mr. Grosman: The latest date that I can find (774) on the sheet marked General Expenses, sheet marked 45, and is September 30—of November 31, 1949.

Q. Now, have you examined every sheet of this Milmar Estate general ledger journal and cash book? A. Mr. Dobkin and his associate examined them and I was with them when they were being examined.

Q. Are all the pages in this book? A. They tell me there are pages missing.

Mr. Brigadier: I object, your Honor, to what they tell him. The best evidence would be the accountant to come in and interpret the books. He just said he doesn't know anything about books. Now he is going to tell us what they tell him is missing.

Mr. Grosman: Well, what has one to do with the other?

Samuel Marcus—Defendant—Recalled—Direct

The Court: Just a minute, Judge Grosman. Do you have to waste time objecting to that. Don't I know that is hearsay?

Mr. Brigadier: I withdraw the objection.

The Court: Are the pages numbered, even in chronological order?

Mr. Grosman: They are numbered, your Honor, 1, 1A, 2, 3, 4—there is page 6 and then there is nothing between that and page number 10.

The Court: That's all I want to know.

Mr. Grosman: There are two pages marked 11, (775) then there is an 11A, then from page 13 we have nothing in between to page 20.

The Court: That's enough. I don't want to hear any more about how they are set up.

Mr. Grosman: I ask that this be marked in evidence.

The Court: It may be marked.

The Clerk: DM-14, photostatic copies of Milmar Estates, Inc., general ledger journal and cash book sheets.

(Received and marked Exhibit DM-14.)

Q. I show you photostatic copies of what is designated thereon as Journal, April 1946, Milmar Estate, Inc. Where did you obtain those photostats? A. This is also some sheets that Mr. Hoffman brought over to the photostat people and we had them photostated. Supposedly the books of Milmar.

Q. And were these photostated in pursuance of an order made by the Court giving you the right to examine the books of Milmar? A. That's correct.

Q. Now, have you checked what purports to be the journal of Milmar and are all the sheets in this account in numerical order? A. Mr. Dobkin told me there were sheets missing.

(776) Q. Well, did you, yourself, check these? A. I checked them together with Mr. Dobkin.

Q. Can you tell me, from your own observation, not from what Dobkin told you, whether or not all of the sheets in this book are numbered in series? A. They are not consecutively.

Q. Were you familiar with the books of Milmar? A. Never.

The Court: What was the answer to that?

(Answer read.)

The Witness: Never.

The Court: Never.

The Witness: By familiar, do you mean did I have them, or did I have knowledge of them, or—

Q. I asked you whether you had knowledge of them, whether you had occasion to look at them and knew the contents of them. A. I never saw the books of Milmar.

Q. Why not? A. Mr. Hoffman had them in his possession.

Q. Jack Hoffman who testified here? A. Jack Hoffman, that's correct.

Q. Did you ever ask him for the books? A. In May—

Q. Did you ask him? (777) A. Yes, I did.

Q. What was his answer? A. He told me that Bill Miller wouldn't leave the Milmar books out of his possession.

Mr. Brigadier: When was this? May we have the time fixed?

Q. When was this, Mr. Marcus? A. This was a period of—approximately April or May of 1947.

The Court: Did you hear Mr. Miller testify that you had the books in your possession all the time and he never saw them?

The Witness: Yes, sir; I did.

The Court: And you say that is not so?

The Witness: Yes, sir; I do.

The Court: Now you say, in contradistinction to what he said, that you never had them.

The Witness: Yes, sir; I do.

The Court: That makes it nice. I am sure Mr. Bierman didn't have them. Where were they kept, do you know?

The Witness: They were kept in the office of the Riviera.

The Court: Well, didn't you have access to them?

(776) The Witness: No, sir; I did not.

The Court: You were told Mr. Miller said what?

The Witness: Mr. Hoffman—I asked Mr. Hoffman—

The Court: He told you that Mr. Miller told him—

The Witness: Told him he would not let the books of Milmar out of his possession.

The Court: Meaning who, Miller's possession or Hoffman's?

The Witness: They were in Miller's possession over at the Riviera. And I asked Mr. Hoffman—we were having difficulties with Miller—I said, "Mr. Hoffman, I want the Milmar books returned to me." Mr. Hoffman came back and said, "Sam, Miller won't let me take these books." But to placate—here is what I have done—

The Court: Just hold that a minute. "I want the books returned to me." That indicates to the Court, as a fact finder, that you must have had them at one time.

The Witness: Well, I am using the word—I said, "I want the books turned over to me," is what I said to him, sir.

The Court: All right.

(779) Q. Now, you say that you never had these books in your possession? A. I did not. That's what I said.

Q. And that you did not have access to them on the premises of Bill Miller's Riviera? A. That's correct.

Q. Now, you say that in this journal, photostat, of April, 1946, the pages do not run in numerical order? A. I believe that is so.

Q. But the photostat in its entirety was made under your supervision and that of Hoffman? A. No, I wasn't there. I believe—Hoffman was there, I know. I don't know who went to the photostat people, whether it was Mr. Dobkin went there, I don't recall just who it was. But Hoffman was present, I know. I wasn't there.

Mr. Grosman: I offer these in evidence.

The Clerk: DM-15, photostatic sheets of journal, Milmar Estate, Inc., April, 1946.

(Received and marked Exhibit DM-15.)

Mr. Grosman: Now, I would like to point out, your Honor, that these pages apparently are supposed to be numbered. Some bear numbers, some do not. The numbers that appear are as follows: 1, 3, there is a sheet without a number headed 'May', then another sheet entitled (780) No. 3, 4, 5 is missing, 6, unnumbered sheet, entitled Milmar Estate, Inc., Cash Book, April 1, 1946 to March 31, 1950—1950 is struck out and the numbers '49 inserted; then it's 1, 2, blank sheet—unnumbered sheet, rather, 5, 6, 7, 7 again, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 21, 22; 1, 2, 3, 5, 6 and 7.

Q. Now, Mr. Marcus, you looked at these photostatic records, did you? A. I did.

Q. Marked DM-14 and DM-15. Did you find your own loan account there? A. Yes, sir; I did.

Q. Will you turn to it, please? You are now looking at an account entitled "Loan Payable, S. Marcus," in DM-14. Does that represent loans made by you to Milmar Estates? A. That's correct.

Q. Anything else inserted there other than loans? A. The sheet says, "Loans Payable." I don't know what you mean by "anything inserted."

Q. Well, were all these loans made by you to Milmar? A. No, there is something in there that is not my loan.

(781) Q. What is that? A. Well, there is an item here—it says here, "Capital Stock, $62,500." I didn't loan them that money. And there is a transfer here of something about $65,818. I don't know what that means.

Q. Now, other than that, the items represent loans made by you to Milmar? A. On the credit side, I think—it represents all loans, yes.

Q. What is that total? A. The total here shows—well, frankly, I can't tell, these figures—there is so many bunched up.

Q. All right. If you can't tell, you can't tell. A. I can't tell anything about these figures over here at all. There is so many intermingling figures there I couldn't tell anything.

Mr. Grosman: I'm sorry, Judge. Were you looking at this?

The Court: He says he can't tell.

The Witness: On the credit side. There is something on the debit side I can tell.

Q. Well, what about the debit side? A. On the debit side there are several glaring discrepancies.

Q. Namely. (782) A. Well, there is one item here of five thousand dollars that Bill Miller had loaned to Mocambo from the Milmar Corporation account. And they have charged it up to my loans payable account. There

is another item here of five thousand dollars charged to my loans payable account which, by examination of the books, was credited to Bill Miller's Riviera rent.

Q. Now, what do you mean by that? A. In other words, I paid Bill Miller's Riviera rent with my money.

Q. According to that record. A. According to the books, that's correct.

Q. Now, did you? A. I did not.

Q. Did you authorize anyone to make that entry in your account? A. I did not.

Q. Now, you say Bill Miller loaned five thousand dollars to Mocambo? A. He did.

Q. How do you know that? A. Well, I received a canceled check. I saw the canceled check of Milmar to Mocambo.

Q. And did you talk to Bill Miller about that? A. I did.

(783) Q. What did you say to him and what did he say to you? A. I said to him, "What right did you have to draw a check to Mocambo without my authorization?"

Q. And what did he say? A. Frankly, I don't recall his answer at the time.

Mr. Brigadier: Did the witness fix the date of this, the date of the check that he is talking about?

Mr. Grosman: Wait a minute. I will try to find it for you. Apparently this is March 31, 1948.

The Court: Do you hear that, gentlemen, March 31, 1948.

The Witness: That's incorrect, Judge. The check to Mocambo?

Mr. Grosman: Yes.

The Witness: That would be in '46.

The Court: Let him pick it out himself.

Mr. Grosman: I am trying to read the item—

(Document shown to witness.)

The Witness: The charge on the—I'm sorry.

Samuel Marcus—Defendant—Recalled—Direct

Mr. Grosman: Will you please wait?

Q. Take a look at this sheet. This is the sheet you were looking at before? A. That's right.

Q. Loans payable, S. Marcus. (784) A. That's right.

Q. Now, there is an entry there showing a payment of five thousand dollars to Mocambo? A. This is not the payment to Mocambo. This is where they are charging me for that payment.

Q. What is the date of that? A. That is March 31, 1948.

Q. All right. That's what the record shows? A. That's correct.

Q. Do you know when the check was actually turned over to Mocambo? A. I believe it was right at the inception. It must have been the first few days that bank account was opened. I don't recall—

Q. What bank account? A. The bank account of Milmar.

Q. And did Miller have access to it; did he have authority to sign checks? A. Through an error that both bank accounts were opened at the same time, the Riviera and Milmar, and through an error on somebody's part—whether it was Mr. Hoffman's—I believe he—

Q. Never mind, go ahead. What happened? A. Miller's name was included in the Milmar account signing.

(785) Q. He was given authority to sign? A. Yes.

The Court: Alone?

The Witness: Him and Mr. Hoffman.

The Court: Well, why didn't you protect yourself before you put the money in?

The Witness: I was—

The Court: You put in all this cash. How is it you didn't protect yourself on the account?

The Witness: The account of Milmar was supposed to have been Sam Marcus, or Sam Marcus and Hoffman, or Hoffman. But through an error the both ac-

counts, I believe, were opened at the same time, and Miller's name was included without my—Miller's name was included in that bank account without my instructions or knowledge at the time. It was merely a mistake—an overlooking on my part.

The Court: When did you find out that that was so, that Miller and Hoffman alone could sign checks and give your money away?

The Witness: When I saw the canceled checks of Mocambo coming through the first month.

The Court: And what did you do about it?

The Witness: Immediately corrected it and took Miller's name off the signing of the Milmar account.

(786) The Court: So that this happened before you knew about it.

The Witness: That's correct; yes, sir.

The Court: All right.

Mr. Grosman: Now, if your Honor please, Mr. Loew is here and I would like to withdraw Mr. Marcus.

The Court: All right, Mr. Loew.

ELIAS M. LOEW, called and sworn for the defendant Samuel Marcus, testified as follows:

The Clerk: May we have your full name and address?

The Witness: Elias M. Loew.

The Clerk: And your address for the record?

The Witness: 435 Brush Hill Road, Milton, Massachusetts.

Direct examination by Mr. Grosman:

Q. Mr. Loew, what is your business, please? A. Theater executive and nightclubs.

Q. And how long has that been your business? A. Since 1917, in theaters.

Q. And what particular theaters and nightclubs are you actively associated with? A. In New England and New York, Latin Quarter, Miami Latin Quarter.

Q. In New York and Miami— A. Yes, sir.

Q. —the Latin Quarter? A. Latin Quarter, New York, and Latin Quarter, Miami Beach.

Q. And anything else that you are associated with in the entertainment line? A. Well, theaters, restaurants.

(788) Q. What theaters? A. New England Theaters.

Q. Is that the name of them, New England Theaters? A. E. M. Loew Theaters; yes, sir.

Q. Now, do you know William Miller? A. Beg pardon?

Q. Do you know William Miller? A. Yes, sir.

Q. Do you know Samuel Marcus? A. Yes, sir.

Q. Are you familiar with what was formerly known as Bill Miller's Riviera? A. Yes, sir.

Q. A nightclub? A. Yes, sir.

Q. And are you familiar with the building? A. Yes, sir.

Q. Did Samuel Marcus ever talk to you about buying the building—or the buildings that were occupied by Bill Miller's Riviera some time in July of '48? A. Some time in the Summer of 1948; yes, sir.

Q. Now, after Marcus talked to you, did you talk to Miller about it, or did Miller talk to you about it? A. No. I went over to Miller.

Q. Now, did you talk to Miller? (789) A. Yes, sir.

Q. And did you tell him what Marcus had told you? A. Well, I had a chance to buy the property and—

Q. No, pardon me. A. Yes, sir.

Q. Did you tell Miller what Marcus had said to you? A. Yes, sir.

Q. Now, what did Marcus say to you which you, in turn, repeated to Miller? A. Well, Mr. Marcus had his property

for sale, or subject to a first mortgage. He gave me the price there of $250,000.

Q. And did you agree— A. Well, then if I—

Q. Pardon me. Let me finish my question. —to purchase the property occupied by Bill Miller's Riviera? A. Yes, sir.

Q. For two hundred and fifty thousand? A. That was the price he quoted.

Mr. Brigadier: If your Honor please, I object. I didn't mind the leading of Marcus, but this is a witness who is sprung on us, and I think the witness should be permitted to testify according to the normal rules of examination. He should tell what happened and not have it (790) suggested to him by Judge Grosman.

Mr. Grosman: All right. I am merely directing his attention to what we are interested in.

Mr. Brigadier: Let him tell it.

Q. Now, will you please tell us what you and Marcus agreed on, if anything.

Mr. Brigadier: I object. He can only tell us what he told Bill Miller.

The Court: Which was related to Bill Miller, as I understand, later.

Mr. Brigadier: Ask him what he said to Bill Miller and what Bill Miller said to him.

The Court: All right, now, you want to be technical with him, but you don't want him to be technical with you.

Mr. Brigadier: I was not technical with Marcus, and you know that I am not. You know that I have sat back—

The Court: Are you going to bawl me out now?

Mr. Brigadier: No.

The Court: I am telling you there is no jury here, either. Let's get the whole story as quickly as possible. And we will do it a lot faster without a lot of objections.

Mr. Grosman: That is just what I am trying to do.

(791) The Court: I know what you are trying to do.

Q. Now, Mr. Loew, will you please tell me, tell the Court, what you and Marcus agreed on with respect to the purchase price of the properties occupied by Bill Miller's Riviera which you, in turn, mentioned to William Miller? A. Well, Mr. Marcus quoted $250,000, I remember, subject to first mortgage. And it appeared to be reasonable to me, but we did not make any deal at the time. I mean I accepted the price as favorable. And before I do any business with Mr. Marcus I thought I would go over and see Bill Miller, which I did.

Q. Now, what was said by you to Bill Miller and by him to you, with respect to this subject? A. Well, I told him that I have got a chance to buy the property, and how he feels about it, because the Latin Quarter was in competition with the Riviera, so I thought it fair to go over and talk to him first.

He kind of objected and he says, "Don't buy it, if you can." He says, "I will buy it and I will give you half interest. Let me buy it and give you half interest."

Q. Did he say why he wanted you to permit him to buy it and give you a half interest instead of your buying it direct? A. I think he mentioned he can make a better deal than (792) I can.

Q. Now, did you agree to let Bill Miller buy it direct and declare you in? A. Well, I left him that night in the nightclub and he was supposed to let me know.

Q. Did he ever let you know? A. No.

Q. Did you tell Miller that you were prepared to pay $250,000 over and above the mortgage for these proper-

ties? A. Yes, I told him the deal that Mr. Marcus gave me. And he thought he could make a better deal.

Q. With whom? A. With Mr. Marcus.

Mr. Grosman: Cross examination.

Cross examination by Mr. Brigadier:

Q. Mr. Loew, when you spoke to Mr. Miller, did Mr. Miller make any statement to you as to what his interest was in the Riviera property? A. As I understand, he controlled it. There was some money that he owed to Marcus, or somebody, at that time. It was some involvement of a note, that I remember.

Q. Well, now, look. Your conversation with Marcus was about the purchase of this property, right? A. That's right.

(793) Q. You weren't purchasing stock.

The Court: Was he going to buy the property or Marcus' interest?

Mr. Brigadier: That's what I want to find out. That's the purpose of my cross examination.

Q. Were you going to buy stock from Marcus or were you going to buy title to the real estate? A. Well, what Marcus had in his possession, subject—I know it was subject to a mortgage.

Q. Now, you are a businessman, you know something about property, and the purchase of property, do you not? A. That's right. Yes, sir.

Q. And you said you were talking about purchasing something subject to a mortgage, right? A. That's right.

Q. Now, what did you understand was subject to the mortgage, the real estate and buildings, right? A. Real estate and buildings, right.

Q. So that you were planning to purchase the real estate and buildings. A. That's correct.

Q. For the sum of $200,000, subject to a mortgage—two hundred and fifty. I am sorry. A. Two-fifty.

Q. Subject to a mortgage? (794) A. That's right.

Q. So that was the transaction, right? A. Correct.

Q. It wasn't the purchase of stock? A. I don't remember the stock. It was title to the property.

Q. Do you recall any discussion about any number of shares of stock?

Let me withdraw the question.

Mr. Grosman: Please.

A. I think there either was 80 or 90 per cent, or something. Some little loophole down there was on the stock.

Q. Well, how did the discussion of stock come about, if you were purchasing the title to real estate? A. Well, I cannot recall exactly on that stock, but I know there was controlling interest, with a little small percentage which was not included.

Q. Were you told who had the outstanding percentage? A. No, sir; I don't remember that he did.

Q. Was the name Robert Schwartz mentioned to you in any way? A. I couldn't recall the name.

Q. Do you know the name Robert Schwartz? A. No.

(795) Q. Was the name Al Bierman mentioned to you in any way? A. I know Mr. Miller may have mentioned some names to me, but I wouldn't recall them right now.

Q. Mr. Miller? A. Bill Miller, when I talked to him he mentioned some names there, and some note, and some little mix-up there.

Q. Well, the subject of stock was first brought up by whom, Marcus or Miller? A. Mr. Marcus.

Q. Mr. Marcus? A. Yes, sir.

Q. You don't remember in what connection? A. No, sir.

Q. Of what percentages? A. No, sir.

Q. Now, I suggest to you, Mr. Loew, that when you spoke to Mr. Miller that Mr. Miller stated to you that

Marcus can only sell a half interest in the property, and that he owns the other half, is that right? A. Well, I don't recall. Mr. Miller had some interest there.

Q. Just answer my question— A. I don't recall.

Q. —do you recall whether Mr. Miller ever stated (796) to you in the conversation with you, that Marcus couldn't sell all of this, that Marcus only owned a half, and that Miller owned the other half? A. Well, I don't recall. I know there was some default in payments, that by purchasing that stock or title, you would get the whole—you would get the whole club.

Q. Who is "he"? A. I mean Mr. Marcus. I think he controlled the stock that would give you title, and also give you the club, at the same time. I think there was some default, either in payments, or rent. I don't remember exactly what it was.

Q. Now, I am questioning you not about what Mr. Marcus said, I am questioning you about what Mr. Miller said, you understand that? A. Well, I understand that Mr. Miller did have some interest, and I don't know whether in the real estate—either in the real estate or in the lease. I don't remember exactly. But he had some interest there.

Q. Did Miller state to you that Marcus would not be able to sell the entire property because Marcus didn't own it all?

Mr. Grosman: Now, if your Honor please, that question was asked three times.

Mr. Brigadier: He hasn't answered it yet.

The Court: Yes, he did.

(797) Mr. Brigadier: Each time—I don't want to argue with your Honor—

The Court: Ask him again and get the answer. Repeat the question, Mr. Bremer.

(Question read.)

A. He did mention something to that effect, but I do not know—I don't remember what the incident was. He had an interest, Mr. Miller claimed he had an interest. As to what extent, I do not remember.

Q. But did he state that Marcus couldn't sell it all because he had this interest? That is what I want to know, in answer to that question, whether you can answer it. A. I don't think—because I was interested to purchase lock, stock and barrel, and Mr. Marcus agreed to deliver. Now, whether there was any dispute between Miller and Marcus, I don't know. There may be some, but I wouldn't know that at that time.

Q. But you ended up the discussion with Mr. Miller on his statement to you that if you let him handle the situation, he could get it cheaper, isn't that right? A. That's right.

Q. And he would take you in with him for half? A. That's right.

Q. Now, in connection with that, I suggest to you, (798) Mr. Loew, that what Mr. Miller stated to you was that Marcus could only sell one-half and that that half could be gotten for $125,000. A. I don't think there was any money mentioned. He says he can make a better deal and let him make the deal. I don't remember anything about a hundred and twenty-five.

Q. Did you agree with Mr. Miller that he should go ahead and make the deal? A. Yes, I left him with that understanding.

Q. I see. Now, you later found out that a deal was made, didn't you? A. That's right.

Q. And that you were not included in it, right? A. That's right.

Q. Did you present any claim to Mr. Miller? A. No.

Q. Did you threaten to sue him? A. No.

Q. You never brought any suit? A. No, sir.

Mr. Brigadier: That's all.

The Court: What could he bring a suit on?

Mr. Brigadier: What did you say?

The Court: What would he bring a suit on?

Mr. Brigadier: He said he had a deal whereby (799) he was to get a half interest with Miller.

The Court: Do you call that a deal, those few words that were exchanged?

Mr. Brigadier: That's the impression I got from his testimony, that he had this arrangement. If your Honor agrees—

The Court: Did you ever go back and tell Mr. Marcus what Miller did?

The Witness: No. When I found—

The Court: Now, hold it. You didn't?

The Witness: No, sir.

The Court: Didn't you think it was your duty, since Marcus spoke to you first about it?

The Witness: No, I didn't want to—if that's the way they wanted, I just let it go at that. I didn't talk to Mr. Marcus. I expected from Mr. Miller to hear something. While I didn't hear it, I just let it go.

The Court: Did Marcus communicate with you later and ask you what happened after you spoke with Miller?

The Witness: No, sir.

The Court: That's a fine deal, like buying a pair of shoelaces. You wouldn't think you were talking about buying a valuable parcel in a nightclub. What are you trying to do, kid me?

The Witness: What?

(800) The Court: Here is a big nightclub and a valuable parcel being sold. Mr. Marcus was good enough to ask you whether you were interested in buying it. You spoke to Miller. Miller wanted to double-cross

Marcus, and you never said a word to Marcus about it. And he never asked you about it. I am supposed to believe that.

The Witness: What am I going to do?

The Court: I am supposed to believe all that?

The Witness: Well, that's the truth.

The Court: They do say the truth is sometimes strange.

Mr. Brigadie : May I ask just one question?

The Court: You finish with him.

Mr. Brigadier: Just one question.

Q. Who acquainted you, or first spoke to you about this proposition? A. Mr. Marcus.

Q. Who introduced you to Mr. Marcus? A. A friend—one of my friends that know him recommended him to me.

Q. The name? A. I don't know. He mentioned a fellow from Boston.

Q. You don't know the name. A. He did tell me the name at that time.

Redirect examination by Mr. Grosman:

(801) Q. Now, Mr. Loew, as I understand it, you left Miller with the understanding that he was going to try to make a better deal than $250,000 with Marcus, is that right? A. That's right.

Q. And that you and he would go into this thing together, is that correct? A. That's right.

Q. And that thereafter you heard nothing more from Miller? A. That's right.

Q. And you discharged the whole thing from your mind? A. That's right. I understand that some deal was consummated at that time. Of course, I was sore, but nothing I could do. If that's the way they wanted it, so let it go.

Q. Now, the Judge seemed to be kind of startled about your apparent indifference about this thing. Would you

tell us—I didn't want to ask you this, but I think you better tell the Judge—what your financial interests in these various companies, in the Latin Quarter here and Miami, and the theaters up in New England, amount to. A. Oh, amounts to millions of dollars.

Q. So that a deal of $250,000 was not a world-shaking deal to you? (802) A. Not to me, no.

Q. Now, you have a partner named Walters? A. Yes, Lou Walters.

Q. Do you know whether Marcus spoke to Lou Walters about the proposal he had made to you with respect to the purchase of the Riviera property? A. Lou Walters knew about it, yes.

Mr. Brigadier: I'm sorry. The only reason I am objecting is unless Judge Grosman gives me some assurance that he is going to bring Walters in—if he tells me yes, I will not object. If he is not going to bring him in, I think this hearsay should be excluded.

Mr. Grosman: All I asked him is if he knows. I have no intention now of bringing Walters in.

Mr. Brigadier: Then I press my objection.

The Court: I think he had answered it already.

Mr. Grosman: I merely asked him whether he knows whether Marcus spoke to Lou Walters after he had made a proposal to Mr. Loew with respect to his decision.

The Witness: Well, Mr. Marcus—

The Court: Just yes or no.

A. Yes, sir. When Mr. Marcus talked to me—

Mr. Brigadier: I object.

The Court: Hold it.

Q. Did Mr. Marcus communicate with you after he had (803) made that proposition to you that you described, and after you had spoken to Bill Miller, did Mr. Marcus

communicate with you directly or indirectly? A. I haven't heard from him, so unless he may have talked to Walters—but I haven't heard from him at all. I understood there was a deal went through. As a matter of fact, Mr. Walters called my attention first—

Mr. Brigadier: I ask that that be stricken out, if your Honor please, whatever Mr. Walters may have told him, unless—

The Court: It will be stricken unless Walters is going to appear.

Mr. Grosman: All right.

Q. Did you receive a message from Walters with respect to Marcus? A. That's right.

Q. Now, Mr. Lou Walters is where? A. Mr. Lou Walters is in Miami.

Q. Is he there permanently or on vacation? A. Well, he is down the Latin Quarter there now.

Q. Is he expected back in New York within the reasonable near future? A. I don't know, I think you can get him, but he is taking care of the Latin Quarter in Miami now.

Q. Now, did I understand you to say that Sam (804) Marcus agreed to turn over to you 90 per cent of the stock of this Riviera nightclub property? A. Yes, I think—I would say it was 90 per cent.

Q. And you told that to Miller? A. Yes, sir.

Mr. Grosman: That's all. Thank you very much.

The Court: We will take a short recess.

SAMUEL MARCUS, resumed the stand.

Direct examination by Mr. Grosman (continued):

Q. Now, you told us, Mr. Marcus, that you had submitted this proposal of selling your interest, I believe, in Milmar Estates to a man named Loew, right? A. That's right.

Samuel Marcus—Defendant—Recalled—Direct

Q. Is the gentleman who preceded you on the stand the man to whom you spoke? A. I did.

Q. Now, did you reach a tentative understanding with Mr. Loew concerning the sale of your interest in Milmar Estates? A. I did.

Q. What was that deal? A. The deal was I could produce for him approximately ninety percent of the Milmar stock and fifty-one percent of the Riviera stock.

Q. For how much? A. For two hundred and fifty thousand dollars.

Q. Did he agree to take up that offer? A. He did.

Q. Now, were you in a position to produce ninety percent of the Milmar stock at that time and fifty-one percent of the Riviera stock? A. I was.

(806) Q. And how do you figure you were able to do that? A. Well, Miller—I had Miller's—Miller was in default on the entire agreement and everything that Mr. Schwartz had was mine, when he was in default. I notified Mr. Schwartz that Miller was in default and that whatever papers he had in his possession were now mine.

Q. Well, now, you say Schwartz—you notified Schwartz of a default. Why did you notify Schwartz? A. Schwartz was the escrowee agent on all the papers for July 23rd.

Q. You are now referring to that lease that was marked in evidence yesterday? A. Yes, the lease—

Q. The terms of the lease.

The Court: You don't have to go over that again. I remember what he said about it yesterday.

Mr. Grosman: I just want to identify the exhibit number, your Honor.

Q. I show you Exhibit No. DME-28 and ask you whether this is the lease under which you say the default was declared and fifty-one percent of the stock of Bill Miller's

Riviera was escrowed with Schwartz? A. This lease and some other agreements with this.

(807) Q. There were other agreements? A. Other agreements with this, yes.

Q. Now, what other agreements are you referring to? A. Well, there is another agreement there pertaining to this $50,000 note should be paid at five hundred dollars per week and— Oh, I don't know what the other papers contained. I just recall these—

Q. Wait a minute. There was a note for $50,000 given to you by whom? A. By Miller.

Q. And that note was to be paid at the rate of— A. Five hundred dollars per week.

Q. Five hundred dollars a week. A. That's correct.

Q. That note is in evidence? A. That's right.

The Court: Yes, it is.

Mr. Grosman: May I refer to the exhibit number of that note, your Honor, in order to keep the record straight?

The Court: The one that provides for weekly payments.

The Witness: That's right.

Mr. Grosman: It's Exhibit DME-16.

(808) Q. Is this one of the documents that you are referring to, under which you say that fifty-one percent of the stock of Bill Miller's Riviera had been defaulted on? A. Yes, sir; that's one of the documents.

Q. Now, are there any other documents under which you declared a default under which you claim that you became the owner of fifty-one percent of the stock of Bill Miller's Riviera? A. Well, I believe, together with the lease there was some memorandums and papers, I don't recall what— I never had them in my possession. Mr. Schwartz always

had them and I don't know what they contained. But I know there was two or three other papers together with the lease.

Q. Now, can you tell us, without wasting too much time, just what provision of this lengthy lease, DME-28, pertained to the subject you are now talking about? A. Well, here is one item—

Q. The page, you are now reading from what— A. On page 9.

Q. Of exhibit? A. On page 9 of Exhibit 28, there is one item, I think, that was in default. And that was where, "The tenant (809) shall be required on February 1, 1948, to pay to the landlord the sum of $4,000, representing rent. And it shall be a condition of this lease that such payment shall be made on the date herein specified. This sum shall be deducted from the last payments due to the landlord in each year."

Q. Now, I am not asking about that, I am asking about the default clause. A. Oh, the default clause.

Q. Yes. A. Let me see where it was.

The Court: Do you know where it is, Judge? Show it to him.

Mr. Grosman: He is more familiar with it than I am.

The Witness: No, I am not. I just looked at this thing once. I know there is something in here somewhere. A. (Continuing) There may be another paper in connection with this.

Q. You can't find it for the moment? A. I believe there are other papers part of this agreement and lease.

Q. All right, pass it for the moment. I direct your attention to the note, DME-16. What is the meaning (810) of that writing at the bottom there? Read it, please. Read

it out loud. A. "Subject to agreement dated July 23, 1947."

Q. Now, that agreement is what? A. Is the lease and other papers that were prepared at the same time.

Q. I show you DM-2, in evidence, and ask you to look at that and tell me whether that was one of the writings incident to—or referred to in the lease and in the note? A. Yes, sir; this is one of the other papers.

Q. Does that contain the default clause? A. It mentions here the "$50,000 note, which is presently in default, will be destroyed and a new note for $50,000, due June 1, 1948, payable five hundred dollars weekly thereafter, every seven days, interest at four percent, acceleration and default clause will be executed by Miller in favor of Marcus. The said note will be dated June 1, 1947."

Q. Was such a note given? A. It was.

Q. With an acceleration clause and all that business you referred to in there? A. I believe there is, sir.

Q. Is this the note, DME-16; is that the note? (811) A. Yes, sir; it is.

Q. Now, did Miller pay that note or did he default on it? A. He defaulted on it.

Q. Now, in connection with this transaction that we are now talking about, the lease and the $50,000 note, DME-16, DM-2, were certain papers escrowed with Robert Schwartz? A. They were.

Q. Do you recall what they were? A. Fifty-one percent of Bill Miller's Riviera stock, the resignations of directors and officers of Bill Miller's Riviera.

Q. Yes. Anything else that you remember? A. And whatever papers were executed as of that day.

The Court: How about Milmar stock?

The Witness: Milmar stock?

The Court: Miller's Milmar stock.

The Witness: I held Miller's Milmar stock. They were not put in escrow. I owned that. Miller didn't own that stock. I owned it. I had it. Always had it in my possession.

The Court: You always had it.

The Witness: Always had it in my possession; yes, sir.

(812) Q. I was going to ask you: Did Miller ever have physical possession of that stock? Milmar stock. A. He never did. The books are—

Q. No, don't say anything now. Now, are these the documents on the basis of which you represented to Mr. Loew that you could deliver the Riviera stock? A. I believe there should be another document together with that.

Q. Fifty-one percent of the Riviera stock? A. There is another document which mentions more fully the stock and the resignations of officers.

Q. There is another document? A. There is another document; yes, sir.

Q. And is it here? A. It should have been turned over to you in Bob Schwartz's file. He should have them in escrow. It's part of the escrow arrangement. I believe I have an unsigned copy.

Q. Well, will you produce it, please?

(Witness leaves stand.)

The Court: I hope we don't have to go on another treasure hunt now.

Mr. Grosman: No.

Mr. Brigadier: All right, we will help them.

The Court: Have you got it?

(813) Mr. Brigadier: They have it. They gave us a photostat of it. It's their Exhibit P-25 for identifica-

tion in the taking of the deposition. This is the photostat they furnished us and it is signed.

(Witness returns to stand.)

Q. Is that the additional document you are referring to? A. I believe it is.

Mr. Grosman: P-25.

The Court: Has this been put in evidence?

Mr. Grosman: On the deposition.

Mr. Brigadier: No, this is something from their file, Judge. Something that they offered at the time of the taking of the deposition, but only marked for identification. But I have no objection to it going into evidence.

The Court: Well, suppose we mark it in evidence and then— Did you ever see it before, Judge?

Mr. Grosman: Yes, I have seen it before.

Mr. Brigadier: Do you have your original document from which you made this photostat? Use this till you find the original.

Mr. Grosman: Then we can substitute.

Mr. Brigadier: Then we can substitute, because that is my only copy.

(814) Mr. Grosman: All right.

The Clerk: DM-16, photostatic copy of a document dated 23rd of July, 1947, in evidence.

(Received and marked Exhibit DM-16.)

Q. I don't think I asked you, Mr. Marcus, when was it that you spoke to Mr. Loew and made him the proposal that has been described here today? A. The best that I recollect, it would be some time late in July, the latter part of July of 1948.

Q. Had Miller defaulted on his note at that time? A. Miller didn't make his first payment on the note.

Q. He didn't make the first payment? A. Didn't make the first payment.

Q. Your answer then is yes, he had defaulted? A. Yes, he had.

Q. And you notified Schwartz? A. And I notified Schwartz.

Q. The escrowee. A. That's right.

Mr. Brigadier: You said July, 1948.

Mr. Grosman: No, no, no.

Q. Did you say July, '48? A. July, 1948, would be correct.

Q. Yes. A. That's right.

(815) Mr. Brigadier: I understood yesterday when you asked him when did he default on the note he said the very—

Mr. Tepper: No, no.

Mr. Brigadier: Please. Maybe I am mixed up here. Didn't you understand him to say the very next—when you said, "You mean the first week, didn't he wait till August?" And he said, "He waited till August?"

The Court: Then he changed it. September, October—

Mr. Brigadier: But this is a year later. The note is in '47.

All right, I'm sorry. I didn't mean to do this. I just didn't understand what you were examining about.

Q. Now, how many notes did Miller give you for $50,000?

The Court: Two notes.

A. Two.

Q. Did he default on both?

The Court: Right. He never paid either one. It would be lovely if we could get dov to the facts leading up to the famous agreement o. September 14, 1948.

Mr. Grosman: I'll get to that as soon as I (816) possibly can, Judge.

Q. Now, did you ever follow up the offer you had made to Mr. Loew by talking to him or his representative? A. I called the Latin—after I didn't hear from Mr. Loew, several days later, I called the Latin Quarter, inquired for him. The telephone operator told me Mr. Loew was out of town and couldn't be reached. I asked her when was he expected back and the young lady told me she didn't know. I said, "Is Mr. Lou Walters there?" She said he wasn't in, either, but when he come back she would call me or—would have him call me.

Q. Did you speak to Mr. Lowe? A. I did not.

Q. With respect to the offer—did you speak to Mr. Walters with respect to the offer you had made to Loew? A. I did.

Mr. Brigadier: Just a moment. Oh, I tried to object—I said before that I would object to any conversations with Mr.—

The Court: Unless Mr. Walters is produced.

Mr. Brigadier: Unless he promises that he will bring him in.

The Court: I heard you.

(817) Did you contact Mr. Miller and ask him whether Mr. Loew had been up to see him?

The Witness: I did.

The Court: What did Mr. Miller say?

The Witness: Mr. Miller told me he killed the deal for me with Loew.

The Court: He, Miller, killed the deal.

The Witness: He, Miller, killed the deal. What right did I have trying to sell out Milmar to anybody else?

Q. What did you say to Miller? A. Frankly, I don't recall what my answer was. I was rather angry about it. First I thought he was kidding me. He sort of said it with a smile on his (818) face. He said Mr. Loew was down to see me the other night. Frankly, I thought he was kidding at the time. I didn't take him too seriously. I said, "What did he say?"

"Oh," he said, "He wants to go partners with me, but I don't want no part of him. I don't want to work for Loew like Walters works for Loew. I want to be by myself," and frankly, I didn't take his remarks about killing the deal with Loew too seriously. I thought he was just joking with me.

Should I continue?

Q. Was that the end of the transaction? A. No, there was more to the conversation than that. Do you want me to continue with that?

The Court: Let's hear what Miller said to you after you spoke—or what he is supposed to have said to you.

The Witness: Miller said to me, "Say, Marcus, if you are really serious about wanting to sell your stock in Milmar, give me a ten-day option. I will get somebody to buy your stock."

I said, "O. K., Bill, you got an option."

He said, "Give it to me in writing," and on July 27th I sent Bill Miller a letter giving him a ten-day option to purchase my stock for $125,000, this option to expire ten days from date.

Samuel Marcus—Defendant—Recalled—Direct

Q. Have you a copy of that letter? A. You have it, judge.

(819) The Court: This all had to come out after I asked him a couple of questions. Of course, it would only be natural that Mr. Marcus would certainly speak to Mr. Miller. What happened to Mr. Loew, the most natural thing and nobody asked about it.

Mr. Brigadier: I might say we have no copy of this document. It has never been given to us.

The Witness: It would be on a yellow sheet of duplicate paper.

Q. A yellow sheet of paper? A. A yellow duplicate sheet.

The Court: I suppose you gave the original to Mr. Miller?

The Witness: The original was mailed to Mr. Miller.

The Court: You had a copy?

The Witness: I had a copy. My secretary wrote it.

Q. Do you have it in your file? A. No, sir, judge, I turned it over to you.

Mr. Brigadier: While you are looking for it, judge, would you permit me to ask the witness when he discovered this document in view of the fact that during the depositions we called for all documents and that one was never furnished to us.

Mr. Groeman: Go ahead.

Q. When did you first find this document? A. We were just dispossessed from a building on 12 Duane (820) Street. The city is taking the building over, and we were moving.

Mr. Brigadier: Just give me the date.

The Witness: This is about two months ago. We began moving all our things out of there, and as we are moving I have got somebody going all over the papers for anything that might be necessary. I have got papers going back to 1916, and we are going over and I had two people going over every paper, every file to pick out anything that might pertain to Bill Marden's Riviera or Milmar and they found a number of sheets of paper that might be important so I turned them over to—

The Court: How long ago was that?

The Witness: About two months ago.

Mr. Brigadier: You have not furnished us with a copy.

The Witness: I don't know. I turned them over to Judge Grosman.

Mr. Brigadier: You know that in the course of taking depositions you promised to give us a copy.

Mr. Grosman: Now, if your Honor please, this is merely a colloquy between counsel.

Mr. Brigadier: I am just going to lay the foundation for objecting to its going into evidence.

The Court: I didn't ask you—

Mr. Brigadier: And another thing you served no notice to me to produce because if I have the original which (821) I am supposed to have, the least I would expect would be a notice to produce.

Mr. Grosman: I have served so many notices on you I have lost track.

Mr. Brigadier: No, you have not served any on me, judge, none whatsoever.

The Court: You have not been able to find it?

Mr. Grosman: I have not been able to find it up to now, your Honor.

Samuel Marcus—Defendant—Recalled—Direct

The Court: Suppose we go ahead.

Q. So your deal with Loew fell through because of the reasons that you have stated. Miller told you he killed it. A. Well—that is he said—

Q. All right, now please. Now, in addition to the moneys which you invested in Milmar Estates, I think you told us that you loaned Miller personally some money? A. Yes.

Q. I show you a number of notes. I show you a note dated January 18, 1948. A. That is a check.

Q. That is a check? A. That is right. It is a blank check.

Q. To Bill Miller for $2,000. That is a check you say. A. That is a check.

Q. Did you give him that check? A. Yes, I did.

Mr. Brigadier: There is no count here against William Miller individually. The claim belongs to Bill (822) Miller's Riviera Corporation and against Milmar. There is no claim asserted against William Miller, and, therefore, I assert at this time that it is irrelevant to any issue.

Mr. Grosman: Your Honor, I am not offering this for the purpose of establishing a claim against William Miller. I am offering it for the purpose of showing to what degree this Miller took this man over, how much money he got out of him, so you may evaluate his statement when he said he had an obnoxious partner whom he wanted to get out of his hair, whom he never wanted to see again, and for that purpose I am offering these checks.

Mr. Brigadier: And for that purpose I press no objection.

Q. You gave him $2,000 on January 18, 1948? A. That is right.

Q. Did that check clear through the bank? A. That is right.

Q. I show you a note, March 11, 1946, "on demand pay to order of Sam Marcus $4500," signed "William Miller." Did you give him the money for this note? A. I did.

Q. Was this note ever paid? A. No.

Q. I show you another note for $500, dated January 7, 1947, William Miller, president—I don't know what—did you give Miller the money for that? A. I did.

(823) Q. Was it ever repaid to you? A. It was not.

Q. I show you a note given to you by William Miller, January 29, 1946, payable on demand for $4,000. Did you give Miller the money for that? A. I did.

Q. Did you ever get any part of it back? A. I did not.

Mr. Brigadier: I would like to hear what he just stated.

Mr. Grosman: He said these checks are part of those notes.

Q. I show you a check dated January 24, 1946, made out to Sam Marcus, signed by Sam Marcus four thousand dollars, endorsed by Sam Marcus. Pay to order of whom? A. Pay to the order of— This is Frederick Ballen who was representing this Phil Black. That is the time when Mr. Miller needed some money to buy out this other obnoxious partner, Phil Black.

Q. Did you give this money to Miller? A. To Miller to give to Ballen.

Q. I show you a check for $4500 made by Associate Photo Products to order of Mr. Evan Anton. What was this check for? A. Mr. Miller asked me for some money at one time which I didn't have available, and I asked Mr. Anton to loan me this $4500, so that I could give it to Miller.

(824) Q. Did you give it to Miller? A. I gave it to Miller, yes, sir.

Q. Did it clear through the Macombo? A. It cleared through the Macombo, yes.

Mr. Brigadier: What is the date of that, judge?

Mr. Grosman: February 18, 1946.

I would like to offer all of these checks in evidence as one exhibit.

The Court: They will be marked if there is no objection.

The Clerk: They will be marked DM-17.

Mr. Grosman: Checks and notes.

The Court: Evidencing money advanced by Mr. Marcus, as he says, for Mr. Miller.

The Clerk: Six in number.

Q. Can you tell us whether Bill Miller's Riviera paid the rent regularly thereafter? A. They did not.

Q. To Milmar? A. They did not.

Q. Did you have any talk with Mr. Miller about that subject? A. Constant talk and numerous letters written to him.

Q. Now, what did you say to Miller and what did he say to you with respect to the payment of the rent?

Mr. Brigadier: Can you fix the time.

Q. To Milmar? (825) A. Well, it would be constant. There wasn't a time that I would go out to the Riviera that I didn't ask Miller for the rent money. He was always in default, always behind.

The Court: You mean he never had the rent for the first of any month?

The Witness: The arrangement was the rent was weekly, $2,000 per week. He never had the rent on time, not once, and it was a constant badgering on my part, a constant going after him, trying to draw out

rent money out of him by one way or another, so the time would be constant, any visit to the Riviera, and I have numerous letters where I wrote him demanding that he must pay his rent.

Q. And his answer to that was what? A. "Business is bad. I can't pay it."

Q. Do you know whether business was in fact bad? A. Frankly, my impression is—I was out to the Riviera often, the Riviera was doing the most bang up business in the country. They were making cafe history. They were grossing the greatest income of any night club in the country, I believe. The newspapers were full of it. The columnists were writing about it, what a wonderful business the Riviera was doing, greater than when Ben Marden had it.

Q. Was that the time when Miller was telling you he couldn't pay the rent? A. That is correct.

Q. What finally happened between you? What final understanding (826) was there between you and Miller with respect to your remaining as a stockholder of Milmar Estates? A. What finally happened?

Mr. Brigadier: When was this? Would you fix the time now?

The Court: I was hoping you were getting beyond the point when you were giving the ten day option, because we are almost up to September 14.

Q. Was there some talk between you and Miller about your getting out of Milmar? A. He did nothing by August 6th.

Q. What year? A. Of '48.

The Court: That was when that ten day option expired?

The Witness: That is right.

The Court: Now, we are getting it.

The Witness: A few days later he did come to me and tell me, "I have got a man who will buy your stock. I think we have got a deal. If you are interested in selling your interest in Milmar we can work out a deal. Me and Bierman will pick up our option. Al here says he can get some money, and I will dig up some money, and me and Al will pick up our option, and I got a fellow here who wants to buy 50%."

Q. Did he give you the name of this man? A. No, at that time he did not give me the name of the man.

Q. Did he give you the name later? A. He never gave me the man's name. I merely heard the man's (827) name mentioned around by the captains when I visited there. I heard the name Al Kevelson mentioned.

Q. That name was mentioned? A. It was mentioned. That is right.

Q. Now, what did Miller tell you about this deal? Did he say what would happen if you didn't go through with the deal? A. Then we had other conversations when Miller was trying to persuade me to give him physical possession of his stock. He wanted to have physical possession—and what could he do with reference—so he could lay his hands on the stock that I was holding. He had to have it for some purpose or other. I don't recall. We had numerous ideas that Al Bierman would give me his note and Al Bierman would endorse this, and he would get this guy to give me some notes and part cash—

Q. Are you listening to me? I am trying to shorten this thing. I asked you the question, did Miller tell you what would happen to your investment in Milmar if you did not accept this offer being made to you by Kevelson or on behalf of Kevelson? A. Yes.

Q. Will you answer? A. I had written Miller a letter, I believe, on August 27th, telling him he was $17,000 in default.

Q. On what? A. On his rent and his notes.

(828) And he said to me, "Sam," he said, "this place

is ready to fold up. We owe tremendous amounts of money. We cannot pay you the rent. We can't pay our bills. We are practically—we are washed up. Now, here is what I would suggest to you, Sam, I don't want to see you get hurt. You know I am a cafe man. I can always go out and get a good job. I have got actors working for me. I am an agent on 10% commission, an agent, and you know I don't have to worry about myself. My friend, Al Bierman, I will take care of him personally, but I don't want to see you get hurt here, and this place is ready to fold up. I would suggest to you, Sam, take what you can get and run fast because we are all washed up. Now, I have this man Kevelson, he will pay you $125,000 for your stock. Now, the rest of the stock you can keep, but this fellow here is ready to put in $125,000. Take my word for it, Sam, I am your friend. Take it and run."

Q. Did he say what he was going to do? A. Yes, he said he was going to lam and he had his actors to take care of. He was managing two or three acts.

Q. You use the expression "lam," what do you mean by that? Is that the word he used? A. That is the word he used, "lamming it." I think it means something like running away or "packing in" or so forth. It is probably a—

The Court: A slang expression.

(829) Q. Now, did you finally agree to sell your interest to Kevelson for $125,000? A. I did.

Q. Did you rely upon what Miller told you with respect to the condition of the Riviera? A. I did.

Q. If those facts were otherwise would you have agreed to sell for $125,000? A. Definitely not.

Q. What happened thereafter? Can you fix a time please when he told you this about Kevelson, the bills and all that? A. This would be sometime in late August. Late in August.

Q. Of what year? A. 1948.

Samuel Marcus—Defendant—Recalled—Direct

Q. What happened thereafter— Let me ask you this, did rent continue in default? A. He didn't pay any rent thereafter, after this last conversation. There was a default of about $17,000.

Q. Did you start negotiating for the making of a contract? A. Yes, we did.

Q. At that time did you know that Mr. Al Kevelson was to be the buyer? A. I did not know. I knew a buyer was in the offing. I still did not know who the gentleman was.

Q. Did Miller tell you? (830) A. Miller did not tell me.

Q. You said you heard something from the help? A. I heard the help mention Al Kevelson.

Q. Did you associate that with the purchaser? A. I associated that with the purchaser, yes.

Q. Well, what happened? When was the first time— Oh, let me ask you this point, did Judge Lieberman have anything to do with this transaction or when did you first meet Judge Lieberman? A. I first met Judge Lieberman at the beginning of the season of 1947.

Q. Where did you meet him? A. I met him at Bill Miller's office at the Riviera.

Q. How did you meet him? A. Bill Miller introduced him as, "Now, I have got an attorney. Meet Judge Lieberman."

Q. And how did you and Lieberman hit it off together? A. Well, Mr. Lieberman hated my guts from the beginning, from the first word he opened his mouth.

Q. Why do you say that? A. His attitude.

Q. What did he say if anything? A. He said to me, "Marcus, I am Miller's lawyer now. You have got to quit pushing him around. I am here to look after his interests. You cannot be bluffing him like you have been doing in the past. I am going to take care of Bill Miller from now on. All your business dealings are going to be with (831) me." I didn't quite understand.

The Court: Is that the first time you met Judge Lieberman?

The Witness: The first two minutes I spoke to him, yes.

Q. Did you say something to him then? A. I said to him, I said, "Wait a minute, Mister, who the hell are you?" That was the expression I used, and one word led to another, and we almost came to fist blows. If I was a younger man I would have wiped the floor up with him. I didn't feel I could handle him so I kept it to myself.

Q. Was Mr. Miller there? A. Mr. Miller was there, yes.

Q. From that time on I assume that relations between you and Mr. Lieberman continued on that same basis? A. Judge Lieberman on every occasion humiliated me, slighted me, insulted me any time and fashion I was at the Riviera. On one occasion I was having dinner. He came stamping in to my table and said, "Is that your car parked out there in my parking spot?"

And I said, "What do you mean, your parking spot?"

"Well, that spot where that car is is mine. Now get it out of there."

I said, "Who the devil do you think you are talking to?"

Q. You didn't throw the soup at him? A. And he said, "If you don't get that car out I will put (83?) four flat tires in that car."

I said, "You put four flat tires in that car and," I said, "I will break the soup dish over your head."

Q. Now, all right. Your relationship with Judge Lieberman continued on that basis? A. On the same vein. Any time we met there was what would have been a fist fight but somehow or other—

Q. Had you been younger? A. Had I been younger.

The Court: You mean he was always unfriendly toward you?

The Witness: Always unfriendly towards me, and every time—I don't know what his purpose or motive

was but he was just out to irritate me to pieces.

The Court: Did he ever permit you to state your side of the controversy to him?

The Witness: What controversy?

The Court: The trouble that you had been having with Mr. Miller that you have been speaking of for days.

The Witness: He never listened to me. He was Mr. Miller's lawyer. Everything, Mr. Miller has a very fine way of confiding to people, and people who have never met me before call me a damn liar as soon as they see me.

The Court: You mean he poisons people against you before they met you?

The Witness: Yes, Mr. Kevelson called me a liar before Mr. Kevelson ever saw me.

(833) The Court: I understand. Go ahead.

Q. Now when was the first meeting between you or your representative and Miller, Bierman and their representative? When you got down to business? A. As I recollect now Miller arranged for a meeting at my office and present was Mr. Miller, Judge Lieberman, Mr. Schwartz and myself.

Q. Was Bierman there? A. Bierman was not there, and Miller came there wanting to buy all the stock of Milmar, and I said, "What is happening. I thought you were lamming it?"

"No, I think we could work out a deal. I think we stay." I think Lieberman said he can get some money. "I think I got a fellow that will pay $125,000 for half of it, and I think—and I will buy mine."

Q. He will buy what? A. He will buy his stock.

Q. From whom? A. From me, and he suggested other various means of how he would buy it with hundred dollar notes and more notes and different kinds of notes, pink notes, yellow notes, and red notes. I said to him—

The Court: Doesn't he ever use money?

The Witness: No, I don't think he does. I have never seen any of his money.

I said, "Miller, I have had all your promises and all (834) of your notes that I want. You cannot get this stock. You cannot buy this stock unless you put up green money. We cannot make no deal here." So Miller got mad and stormed out the door. During that conversation when he said—we turned to another proposition. The other proposition was that this guy would buy 50% and Bierman would buy 12 and one-half percent so that between this new guy and Bierman they could own the controlling interest, so a suggestion was made whereby 62 percent— I said that is perfectly all right. "I don't mind staying here as a minority stockholder. I have perfect confidence in the ultimate value of the piece of real estate. If you can get your man to pay me $125,000 for my stock I am certain I can get Bob Schwartz to sell his stock on the same basis." Bob was there and probably heard it, and a sort of semi-understanding was arrived at as a basis of 62 and a half percent of stock was going to go into a deal.

Again he didn't like that. You know, he had to have possession.

The Court: Who was that?

The Witness: Miller.

Q. Did all this happen the first time? A. Frankly, I may have some of these conversations mixed up.

Q. Now, try to keep these as nearly as you can to the various dates when you met— A. Something happened five years back—you cannot always (835) be definite about what happened at one meeting and what happened at the next.

The Court: As a matter of fact it is seven years back, not five years.

The Witness: All I know is this, that Miller wanted to get hold of physical possession of his stock that day at my meeting. I refused it. He got mad. He ran out the door. He said the hell with it. He said, "Now you are going to lose everything," and he ran out the door.

That is the last I remember of that particular meeting. "The hell with it. You lose everything," and he stormed out the door.

The Court: Hold it right there a minute. At this very first meeting in your office when you say Mr. Miller was present, his attorney, Judge Lieberman, and you with your attorney, Mr. Schwartz—

The Witness: And my secretary was present.

The Court: The young girl?

The Witness: No, Miss Patiniti.

The Court: All right. At that very first meeting was there some mention of the purchase of your interest in Milmar Estates for $125,000?

The Witness: I had given Mr. Miller on July 27th an offer for my stock for $125,000, payable $30,000 down, $4,000 a month.

(836) The Court: What was the price?

The Witness: $125,000.

The Court: Did you ever offer to sell it to him or anybody else prior to that time? You shake your head—

The Witness: No, no, I am shaking something off my ear.

The Court: Prior to that time did you ever offer your interest in Milmar Estates for the sum of $90,000?

The Witness: I never did.

The Court: Do I understand that the option that you gave Mr. Miller, which we can't find yet, that the price set in there was also $125,000?

The Witness: $125,000, payable $30,000—

The Court: I am concerned with the price right now, not payable—

I suggest you find that option if possible in view of some testimony here, $90,000.

Does that mean that first meeting broke up by Bill Miller walking out?

The Witness: That is it.

The Court: And then did Judge Lieberman go?

The Witness: I think Judge Lieberman and Schwartz stayed a while to discuss something between them before they left, if I am not mistaken. They dictated something to my secretary at the time, I think. My secretary, in a conversation with her said she recalled some incident and that they dictated (837) some notes to her for that purpose.

The Court: After Mr. Miller had left?

The Witness: After Mr. Miller had left, that is right.

The Court: On that day was there any arrangement made to meet again?

The Witness: None whatsoever. It ended up with complete discord. We reached no agreement on anything.

The Court: All right. That is the first date. Did we set a date for that meeting?

Q. When was that meeting approximately, Mr. Marcus? A. I believe that meeting was a couple of days before I accepted that receipt from Mr. Bierman.

The Court: A few days before that date?

Q. That is the first meeting you are talking about? A. I am not definite but my recollection is that would be about the time.

Q. Well, now, you got nowhere that first meeting. A. There was absolutely nothing. It was merely an exploratory meeting to see what could be done.

Q. You got nowhere? A. Nowhere at all.

Q. Did you meet again after that? A. The next meeting was on September 14th in Mr. Schwartz's office.

Q. How many meetings in all did you have? A. Two.

Q. Two meetings?

(838) Q. Now, you are talking about meetings with whom? A. Meetings with Miller, Lieberman, Schwartz and myself.

Q. Now, was there a meeting with Bierman? A. Yes, there was.

Q. Is that included in these two meetings or is that an extra meeting? A. No, that was a chance meeting with Mr. Bierman when I was at the Riviera one night.

Q. Did you reach some sort of agreement with him? A. I did.

Q. With Bierman? A. I did.

Q. What was the agreement you reached with Bierman? A. Mr. Bierman—

The Court: The substance of it.

The Witness: Well, Mr. Bierman said to me, "Sam, why don't you go through with some deal with Miller here. You know things are pretty rough. If you don't do something this place is finished. You are a very foolish boy"—not boy—"You are a very foolish man being stubborn about it. You know Miller is your friend and I am your friend, and Miller means well by you, and he doesn't want you to get hurt."

Q. Did you believe him when he said that? A. I did.

Q. You were surrounded by friends? A. Well, I didn't feel they were enemies.

(839) Q. All right. Go ahead. A. And I always liked Mr. Bierman. I always thought him a perfect gentleman, and we conferred and he offered to sit at our table. We had dinner and I had no cause to dislike him, and he continued, "Sam, do something now before— You can't afford to lose all the money you have invested here. You know Miller and me don't care. Miller is an agent. He has got big acts and he can always make big money away from here, but you can't. I know you are pressed for money and I know you want your way out. Don't get hurt, Sam. I have got some deposit money up in the office for you. Why don't you take a deposit now so we can hold this guy we got because this guy is getting very impatient. He wants a deal."

Q. This guy you are referring to is whom? A. Mr. Kevelson. I believe he said this guy is getting impatient and "If we don't do something fast we will lose him. Then everything is washed up."

So I said to Bierman, "Well, Al, I think your suggestion is not too bad." I said, "Al, I think you got something there. If I sell my stock and get $125,000 that would give me some liquid capital to carry on the building in the event Miller cannot pay the rent, and I might even be able to help Miller a bit, and then the balance of the stock— Well, hell, you, Miller and I will sometime get together and work out something. I will give a continued option on the balance of your stock," I said. "That way there I could take (840) a load off me." I said, "I think you got something. Go ahead and get that receipt, Bierman, and you can tell your man you got a deal."

Q. Did you agree with Bierman to sell your stock, your personal stock in the Riviera? A. The entire conversation with Mr. Bierman was my stock.

Q. Did you agree to sell your stock? A. I did.

Q. For how much? A. For $125,000.

Q. Payable how? A. There was no mention made of how payable.

Q. Were you offered any money? A. Yes, I was.

Q. Was a writing drawn up? A. There was.

Q. Who drew the writing? A. Mr. Bierman.

Q. Was there anyone present besides you and Bierman? A. Yes, I am completely forgetting myself as I did before. I didn't recall it previously but recently here in court quite accidentally my secretary reminded me that she was present with me at the night this receipt was made.

The Court: That is a receipt on Riviera stationery?
The Witness: That is correct.

Q. I show you Exhibit DME-1, is this the writing that (841) was prepared by you and signed by you on the night you refer to, August 27, 1948? A. That is correct.

Q. That was signed at the Riviera? A. That was signed at the Riviera.

Q. Do you know who actually typed this document? A. Miss Bergler typed the document. I believe she did. I asked her to.

Q. How do you know? Did you ask her to do it? A. I asked Miss Bergler would she go up with Mr. Bierman.

Q. Did she go up? A. She left the table and I left the table. She left the table with Mr. Bierman and went upstairs and I left the table.

Q. When you met Bierman again was she with him? A. When I came back to the table she was downstairs with Bierman.

Q. Did you type this document on the night of August 27, 1948, or any other time? A. I didn't.

Q. You personally? A. I didn't.

Q. Were you present when it was actually typed? A. I was not.

Q. Now, I notice there is a figure which appears to be $19,000 stricken out and the figure $10,000 inserted, and some initials placed alongside. Are those your initials? (842) A. That is my initial.

Q. I point to the initials S. M. and a circle. A. That is my initial.

Q. Whose are the other initials that appear alongside of that? A. That is Al Bierman.

Q. Were they affixed in your presence? A. They were.

Q. Why was the figure changed from $19,000 to $10,000? A. When Mr. Bierman brought these papers there he had an envelope in his hand. In the envelope were a couple of checks and a bunch of cash, and as soon as I saw the cash, I said to Bierman, "No cash," and immediately as I saw the receipt I just changed the items where it says cash, crossed them out and took the two checks.

Q. Do you know who wrote in ink, "received, two checks of $5,000 each?" A. I believe Miss Bergler wrote those.

Q. They are initialed S. M. and A. L. B. Al Bierman is it? A. Yes, that is Al Bierman.

Q. There was something else stricken out. Do you know what that was? A. $9,000 cash, I believe.

Q. And initialed by you and Bierman, is that correct? A. That is correct.

(843) Q. Why did you refuse to accept cash? A. I don't like to do any business with cash transactions.

Q. Now you received two checks. A. I received two checks.

Q. How long after the writing of this receipt, DME-1, did you and Miller and your respective representatives meet again? A. We didn't meet until we met in Mr. Schwartz's office in New York.

Q. Let me ask you at this time, you were asked about this receipt, DME-1 on deposition—on your deposition examination. Do you recall whether you didn't say anything

about Miss Bergler having prepared the receipt? A. Frankly I hadn't the slightest idea that Miss Bergler was there that night.

Q. You had forgotten about her? A. I had completely forgotten that she was with me.

The Court: That was a chance meeting, that night?

The Witness: Miss Bergler and I came there for a social evening.

The Court: I mean with Bierman.

The Witness: Oh, Bierman. Strictly by chance. I wouldn't have brought Miss Bergler with me if it was going to be a business meeting.

The Court: Suppose we hold it. It is about a quarter to one and we will recess for lunch.

(Noon recess.)

AFTERNOON SESSION

(844) SAMUEL MARCUS, resumed the stand.

Direct examination by Mr. Grosman (continued):

Q. Now, Mr. Marcus, you spoke this morning about an option, written option which you had given Mr. Miller. I show you a copy of a letter dated July 27, '48, and ask you whether that is the copy of the option which you gave Mr. Miller to buy your stock? A. Yes, it is.

Mr. Grosman: Now, Mr. Brigadier, do you have the original of this letter?

Mr. Brigadier: May I see it?

(Document handed to Counsel.)

Mr. Brigadier: I do not have the original of this letter. I have no objection to that going in, except that

I think again I should be permitted to ask when he discovered it because he never furnished us with a copy of it.

The Court: Well, he told you this morning.

Mr. Brigadier: Not this one. That was the other document.

The Court: Oh, that was another one.

Mr. Brigadier: When did you discover this document?

The Witness: This was all discovered within (845) the last five or six weeks, seven weeks, when we were moving out of our Duane Street building.

Mr. Brigadier: And you know that we have not been furnished with a copy.

The Witness: I turned it over to Judge Grosman. I don't know what he did with it.

Mr. Brigadier: I have no objection to it going into evidence.

The Court: It may be marked.

Mr. Grosman: I ask that it be marked.

The Clerk: DM-18, carbon copy of a letter dated July 27, 1948, marked in evidence.

(Received and marked Exhibit DM-18.)

Mr. Brigadier: May I ask that it be handed up to the Court.

The Court: Yes, I would like to see it.

(Document handed to the Court.)

Q. Now, was the original of that letter mailed to Mr. Miller? A. Yes, sir.

Q. By ordinary mail? A. Yes, sir.

Q. Now, did you discover other records pertaining to your transaction with Bill Miller at the same time you discovered that letter? (846) A. I did.

Samuel Marcus—Defendant—Recalled—Direct

Q. Are these carbon copies of letters sent to Bill Miller? A. They are. They were in the same file.

Q. And do you know whether or not these letters were sent? A. They were.

Q. I notice one is registered, return receipt requested. Do you have that receipt? A. I believe you should have them amongst your effects.

Mr. Grosman: All right. I want to offer these.

(Documents handed to Counsel.)

Mr. Brigadier: I would like the record to show, one, that we were served with no notice to produce the originals; two, that—I take it your testimony again is that you have discovered these only in the last few weeks?

The Witness: In the last weeks, that's right.

Mr. Brigadier: And that we had not been advised thereof. I have no objection to their going into evidence.

Mr. Grosman: Now, Mr. Brigadier, while we are talking about it, do you want me to serve you with (847) a formal notice. It is merely a matter of form to do it. We are going to be here long enough.

Mr. Brigadier: You will notice that I have not objected on that ground to their going into evidence.

The Court: The only objection is that you didn't inform him that there were additional documents discovered, of which you didn't furnish him copies.

Mr. Grosman: All right. You don't make a point of the fact that I didn't serve you with a notice.

Mr. Brigadier: No. I mentioned that we weren't even alerted through a notice that you had discovered these documents.

Mr. Grosman: Do you have the originals of these letters?

Mr. Brigadier: No, I have given you every paper we have.

Mr. Grosman: All right. I offer these two letters in evidence.

The Clerk: DM-19, carbon copies of two letters, one dated August 26, 1948, the other dated September 3, 1948, marked in to evidence.

(Received and marked Exhibit No. DM-19.)

Mr. Tepper: Which is registered mail, please?

The Clerk: The one dated August 26, 1948, has on the top, "Registered, return receipt requested."

(848) Q. Now, Mr. Marcus, I show you carbon copy of a letter addressed to Bill Miller's Riviera, attention Mr. William Miller, dated July 1, 1947, with a return receipt signed Nicki Morin, M-o-r-i-n. Did you send the original of that letter to the addressee? A. Yes, I had these sent.

Q. I show you another letter addressed to Mr. Bill Miller, dated June 30, 1947, special delivery, registered, return receipt requested, dated June 30, 1947. I ask you did you send the original of that letter to Mr. Miller? A. I did.

Q. And is that the receipt, post office receipt you— A. Yes, sir; it is.

Q. Signed Bill Miller's Riviera, L. Gaillard. Do you know who he was, or she was? A. No, I don't.

Mr. Brigadier: Judge, will you save time and just ask him when he discovered them. Then we won't have to go through that each time.

Q. When did you discover these papers? A. These were all in that several files that we found in our Duane Street store.

Q. Within this period you speak of, six, seven (849) weeks? A. Yes, all these past six, seven weeks. Five weeks, anyhow.

The Court: These copies merely tend to corroborate

what Mr. Marcus claims, that he demanded the rent many times, and demanded this many times.

Mr. Grosman: That he declared a default.

The Clerk: DM-20, carbon copy of a letter dated June 30, 1947, with a return receipt affixed, marked in evidence.

DM-21, carbon copy of a letter dated July 1, 1947, with a return receipt attached.

(Received and marked Exhibits DM-20 and DM-21.)

Q. Mr. Marcus, will you tell us again, please, when the second conference was had with respect to the final contract drawn between you, Miller and Bierman? A. Well, there was no second conference. The second meeting was the signing of the papers.

Q. Now, how many meetings do you say there were with respect to the final contract? A. There was just that one meeting in my office and then the meeting on September 14th.

Q. And you place the time of that first meeting about when? A. I believe I said a day or two prior to meeting Mr. (850) Bierman at the Riviera.

Q. When that receipt, DME-1, was signed? A. You mean that receipt with Mr. Bierman?

Q. Yes. A. Yes, that's right.

Q. Now, what happened at the final meeting; where was it held? A. The final meeting was held in Mr. Schwartz's office.

Q. Mr. Schwartz, your attorney? A. That's right.

Q. Who was present? A. Mr. Miller, Mr. Lieberman—Judge Lieberman and myself, and Mr. Schwartz.

Q. Who was there first? A. When I arrived there Mr. Schwartz, Mr. Lieberman and Mr. Miller were all seated.

Q. Do you know when the papers that were used to effectuate whatever deal was finally concluded between you were prepared? A. I wouldn't know.

Samuel Marcus—Defendant—Recalled—Direct

Q. You wouldn't know whether they were prepared that day or prior thereto? A. I wouldn't know. There were a few papers prepared that day.

Q. I show you what purports to be an agreement (851) made the 14th day of September, 1948, between Milmar Estates, a New Jersey corporation, hereinafter referred to as the seller, party of the first part, and Al Bierman, William Miller, hereinafter referred to as the buyer, party of the second part. Now, is this contract the contract that you referred to as having been signed on September 14, 1948? A. Yes, this is.

Mr. Grosman: I ask that it be marked.

Mr. Brigadier: Just a moment.

Mr. Grosman. The deposition number is P-8 for identification.

Mr. Brigadier: May I see it, Judge?

Mr. Grosman: Sure.

(Document handed to Counsel.)

Mr. Brigadier: I object to it going into evidence, if your Honor please, on the ground that it is contrary to the pleadings that they have made in this case, and contrary to the position that they have taken in this case. This happens to be a very important point and I will ask your patience to enlarge upon it.

You will recall at a number of stages during the trial accusations were made that the agreement which is in Mr. Marcus' possession had been altered, that somebody came along thereafter, after execution, and (852) inserted the words "up to fifty percent." You have heard a great deal of this "up to fifty percent" business.

The one produced purports to be the original of that agreement, apparently, judging from the typing, and does not have in the fifth paragraph, nor in the tenth paragraph, the inserts.

Colloquy

If your Honor will examine the answer and counterclaim filed by this party in this proceeding, he has annexed as the writing that took place on September 14th the one with the inserts in it. You will find that he has so pleaded.

May I have it from the Court's file—it is the answer and counterclaim filed on behalf of Mr. Marcus.

Mr. Grosman: Well, now, if your Honor please, may I be heard?

The Court: Wait till I see if what he says is true.

Mr. Brigadier: It is Exhibit A, annexed to the answer and counterclaim of Mr. Marcus.

The Court: Yes, I have it.

Mr. Brigadier: Now, on page 2 of that exhibit you will notice paragraph five, what they have alleged.

The Court: Stock up to 50%, it says.

(853) Mr. Brigadier: Am I right, sir?

On page four of that exhibit, sir, in paragraph ten, the parties—

Mr. Grosman: Will you speak up so I can hear you?

Mr. Brigadier: —that at least fifty percent—has your Honor found it?

The Court: Yes, I see it.

Mr. Brigadier: Now, this answer and counterclaim alleges that this is the writing that was executed on that day and annexes it and incorporates it in the pleading.

We are now confronted with this, which is the one that doesn't have it.

Mr. Grosman: Now, if your Honor please, if there is an error in there, it is my fault. I relied upon the copy of the contract furnished to me by Mr. Brigadier, or by Mr. Chazin, I don't know which, which had the insertion in. Now, after we went into this thing a little more carefully, we examined Mr. Marcus' copy, and

we found this discrepancy, and I think we raised the question and fully informed the other side a long time ago.

Now, that has nothing whatever to do with the question which I am now asking Mr. Marcus. Of course, (854) I assume that they would like to have this contract ruled out. But this is the basis of—one of the bases of the fraud that we claim was practiced upon Mr. Marcus from the very outset, that there was nothing said concerning any fifty percent limitation at the time and that it was inserted afterwards by somebody.

Now, it is admitted—there is no question about it—that the insertion was made after the contract was executed, about a week or ten days afterwards. Judge Lieberman said so and I think Mr. Schwartz said so. But they claim that they did it by understanding between the two of them.

Now, there is no question about it, that when the parties left Mr. Schwartz's office on September 14, 1948, this was the contract as it then stood and remained in that position for a week or ten days thereafter, when Judge Lieberman says he suddenly realized that there was an omission.

Now, certainly there is no reason why Mr. Marcus should be barred from identifying this instrument as the instrument signed on that day.

Mr. Brigadier: I would like to be heard briefly in reply. If your Honor will look at the filing date of this answer and counterclaim you will find that it was filed either last November or December of 1954. I think (855) you will find it is approximately that time.

The Court: October 25, 1954.

Mr. Brigadier: Then I was off a few days. Now, for more than a year prior thereto this subject of the insertion has been argued before you, presented before you. I have minutes, for example, dated January 25,

1954, in which the charge is made of an insertion. Thereafter extensive depositions were taken of Mr. Schwartz for a period of over two days in which a great deal of the time was devoted to trying to establish that Marcus did not know anything about it. And Schwartz kept repeating, "I did it only after I called Mr. Marcus on the phone and he ok'd it."

Then we get served, months later, with an answer and a counterclaim, in October. And, of course, we looked at the exhibits annexed thereto and we saw this. Now, the only conclusion that we could possibly come to—we are here to try a case on the pleadings—was that after they heard Schwartz's deposition that they concluded that there wasn't any question about it that Marcus knew of this transaction.

And we came in, frankly, prepared on the basis that they were conceding that that was the writing. Not that they were conceding the effect of the paper, but that they were conceding that Marcus knew that this (856) had been left out and that this insertion was then put in by arrangement with Lieberman, Schwartz —Schwartz first having gotten the ok of Marcus.

That's why I, frankly, am taken aback. I don't want you to think that this is something I am pulling out of thin air. I am taken aback, because I assumed this issue was no longer in the case.

Now, if Judge Grosman tells me that it's his mistake, I think that—because of the importance of this, because of the fact that they have used it so much throughout this case, the least I have a right—I must urge on behalf of my client is that it is inconceivable to me that after they took all the trouble to raise all these issues that they would then sit down and serve an answer and counterclaim in which—Mind you! Look what they do. They don't merely type this in here, they insert it in ink, the way it appeared in the

exhibit that we offered. That is how far they have gone.

Should they be permitted at this stage to go back of their pleadings? I submit that they should not. I think they are foreclosed by their own admission in their pleading.

Mr. Tepper: May I be heard briefly on this point? This is the first time during these proceedings (857) that I take such sharp issue with my good friend, Mr. Brigadier. I am amazed at his contentions.

There can be no doubt in his mind but what throughout these entire proceedings, from the very beginning of the taking of the depositions, down to the present time, that one of the real important issues in this case was whether or not this was the contract that was signed on September 14, 1948, and whether or not this was the contract which was given to Mr. Marcus on the date of its execution.

Now, when the depositions were taken they went through this matter for hours, I would say, on end, to such an extent that your Honor will recall that we came to you and asked for relief, we wanted to terminate these depositions, we wanted to curb the taking of these depositions. And our application was a little premature, as I realized after your Honor had ruled upon it. And so we went back and continued to go through with it.

Now, the exhibit which was attached to the pleadings was attached in error by counsel and was a photostat which was furnished to us by Mr. Brigadier or Mr. Chazin as being a photostat of all the papers that they had in their possession.

And when some—I would say two or three years—under the order of your Honor we finally (858) filed our answer we took, inadvertently, this photostat and

attached it to that as being the contract. True, there was an interlineation put in there to conform with the photostat. That was done—I don't know by whom, it may have been done by a clerk or by somebody else.

Frankly speaking, we—and I am speaking now for Judge Grosman and myself—were only two handling this thing as against all of these eminent gentlemen with all of their assistants.

Now, we had our hands full, plenty, to get these pleadings into shape and so on. And I don't believe that Mr. Brigadier can be serious at all about trying to object to this. And so I say to your Honor now, since we are in Equity, since your Honor understands the entire situation, if the record must be formalized, I hereby respectfully make a formal application to amend by attaching this instead of that photostat. And there wouldn't be anything unusual in doing it. There is no surprise there. There can't be any surprise. This is the contract. And we offer it in evidence.

Mr. Brigadier: I don't know how you can say there can't be any surprise. I am surprised.

The Court: Did Mr. Marcus in his deposition deny that he ever authorized Mr. Schwartz to make these (859) amendments?

Mr. Brigadier: Yes. Don't forget, the only deposition we took of him was in '51. He said yes, that he knew nothing about the insertion. He went further and filed affidavits that he knew nothing about the insertion. All I am saying is that since October 25th we assumed that because of the deposition that had been taken of Mr. Schwartz that it was decided to drop that issue from the case.

I just want to add one other thing. In case you are under the impression that they only had our photostat with the insertion, as far back as December 19, 1951,

they offered in evidence this one that is here today. So that they had both.

If this is a mistake, that is their position. They will have to take it. I simply say, I relied on the answer as it was filed.

The Court: Well, you had a right to, too.

Mr. Tepper: Mr. Brigadier just admitted as far back as 1951 we offered this document in evidence, meaning the one without the interlineation.

The Court: But how there could be such gross negligence in view of the bitter feeling between these parties, and in view of the fact that you know there is this bitter dispute about which one is the contract, (860) that you attach to your pleading the very contract that this man, your client, repudiates—how does that happen?

Mr. Grosman: Well, I can tell you, your Honor. We relied upon the copy that was furnished us by the defendants.

The Court: But you had a copy of the other one, too, he tells me, without the interlineations.

Mr. Grosman: We made a mistake. It is not a mistake that is of any—any fatal mistake.

When Mr. Brigadier tells you that he assumed that we had dropped this point—why, I don't know who he thinks he is fooling.

The Court: I wouldn't have assumed it, if I was in Mr. Brigadier's position as a lawyer.

Mr. Grosman: Well, I don't think so, in view of the fact, your Honor, that through all our depositions, in our answer, in our depositions, we took the position that this contract had been altered after it was made.

Now, there is no question about it that it was altered somewhere between seven or ten days later. They say it was altered with our permission. We say that we

knew nothing about it, it was altered without our permission.

(861) The Court: So you say it was just gross carelessness on the pleadings, is that it?

Mr. Grosman: It is not gross carelessness. These copies were bandied back and forth, and in the preparation of this answer, some three or four years after the complaint was filed, we took one of their copies and made a copy of it.

Your Honor, if we said that this contract had been altered once, we have said it fifty times, in our depositions, in our various pleadings filed with this Court, and in our conversation with the other side. And for him to say that he assumed that the heart of this case was dropped—well, I don't want to characterize it.

But, at any rate, this contract should go in as part of the transaction which took place on September 14, '48.

And we offered it in the depositions. It is marked as an exhibit for identification on the deposition on December 26, 1951. So I don't know where the surprise comes in.

Mr. Brigadier: Now I can prove it beyond any question. He not only doesn't read his own exhibit, apparently, he doesn't read my answer. My answer admitted that the writing which he had annexed to the (862) complaint was the correct writing. If he knew that this dispute has been going on for three years, shouldn't that have alerted him that there was something wrong, that I had filed an answer admitting that the contract as he has set it up is the correct contract?

I not only didn't fool him, I put in my pleading an admission. So that now is he going to say he not only didn't check his own pleading, he didn't check my answer?

Colloquy

The Court: Maybe he didn't, I don't know.

Mr. Tepper: I saw that, your Honor, and I assumed—very honestly I make this representation to your Honor—I saw that admission and I thought at that point they were going to admit this contract. I had no notion that there was anything wrong with the photostat that was attached to it.

Mr. Brigadier: Well, I won't make any comment about that one.

The Court: You need not.

Mr. Tepper: They admit it was executed and then changed.

Mr. Grosman: Well, now, if your Honor please, may I call your Honor's attention to the rules of the court, that there are no stated form of pleadings in (863) this court and we can move to amend them at any time.

And, of course, if they plead surprise we will put the thing off long enough for them to get over their surprise.

The Court: And if the Court doesn't grant it, that settles it, too, doesn't it? Don't forget about the Court's power when these things happen at the last minute.

This is an incredible situation. If it were a couple of young lawyers at the Bar I could understand it.

Mr. Grosman: Well, have you any idea, your Honor, of the pleadings that have been filed in this case? The pleadings are voluminous.

The Court: They are about as voluminous as any I have ever seen in any case I have had in the five years I have been here.

But here was such a critical point in the whole case, like a man pleading guilty in a criminal case, then after he's sentenced says, "Oh, wait a minute, i made a mistake. I wasn't guilty."

Colloquy

Mr. Grosman: Well, it isn't quite as desperate as all that, your Honor, because, as I say, throughout all these examinations they knew the position we took. The depositions are replete on that subject. And (864) they cross examined Schwartz on that subject. They cross examined Marcus on that subject. They knew the contention we made, that the contract had been altered, and they admit that the contract has been altered. The only question is whether or not it was altered with Mr. Marcus' consent or without it.

The Court: And that is the finding I have to make, whether either contract is to be ruled on, the one with or the one without. Now, there is no doubt that that particular contract is the one that was handed to you, is that right, Mr. Marcus?

The Witness: It wasn't even handed to me. It was in Mr. Schwartz's possession. I never—

The Court: Did he give it to you?

The Witness: He didn't give it to me; no, sir.

The Court: How did you get it?

The Witness: I got it when we were first—when we were first served with some legal papers, Mr. Roth—I called Mr. Roth, and Mr. Roth says, "You go to Schwartz's office and pick up the file." And I went to Schwartz's office, picked up the file and brought it down to Mr. Roth. I never saw the paper, after signing the paper.

Mr. Brigadier: How long ago?

The Court: When did you get that from Mr. (865) Schwartz?

The Witness: I got that from Mr. Schwartz about the time when it was delivered to Mr. Grosman. I don't recall the exact time. They would have to refresh my memory as to the exact year and time when I got it. Shortly before it was delivered to Judge Grosman.

Colloquy

The Court: And that's the way you got it from Mr.—

The Witness: I got this complete file. I didn't see the contract, your Honor. I merely took a file from Mr. Schwartz and gave it to—

The Court: Is this another case now where Mr. Schwartz is going to claim that he neglected to make the alteration after he authorized Abe Lieberman to make it? Is that what I am going to hear next?

Mr. Brigadier: He testified in the deposition that he had a number of copies in the file, that he made the correction on one, but didn't make it on all. And he insists that he delivered to Mr. Marcus, not one, but a number of copies, and one of them was a conformed copy.

The Court: I certainly think, in the interests of justice, if this man swears under oath that that's the copy he got, it's going to go in. I am not going to punish him, if his lawyers did make a mistake. I have never hung a client for what his lawyers did yet, (866) in civil or criminal cases. Sometimes you ought to hang the lawyers.

I don't see why I should punish this man, if he swears under oath that's the copy he got from his client and—and it's not denied that that was the one that was signed on September 14th—and I understand the claim is made, and proof will be offered that Mr. Schwartz was authorized by him—that's different, I am the judge of the facts. I will determine that.

I think this man has a right to offer that copy as the one he signed on September 14, 1948.

Mr. Brigadier: Let me just say, what will we do about the pleadings? I go along with you on this. I am not going to press my objection.

The Court: You know that in the interests of jus-

tice I can disregard the pleadings, I can disregard the rules of court, too.

Mr. Brigadier: You see, I am concerned that my admission in my answer to his counterclaim should not be—

The Court: Are you going to suffer? If I let him do it, do you think I am going to hold you to that?

Mr. Brigadier: Will it be adjusted—

The Court: Of course it will.

(867) Mr. Brigadier: I mean for the record. That's what I am talking about now.

The Court: Yes. What kind of justice do you think I hand out?

The Clerk. DM-22, agreement dated 14th day of September, 1948.

(Received and marked Exhibit DM-22.)

Q. Now, Mr. Marcus, is this the contract that was signed by you and by Mr. Miller, and by Al Bierman by William Miller, Attorney, and by Milmar Estates, Inc., by you as President of Milmar, on the 14th of September, 1948. A. Yes, it is.

The Court: Now, as I understand it, the only difference between that one and the one we now have in evidence are those crossings off and additions put in, is that right?

Mr. Grosman: The fifty percent addition is not in this contract.

The Court: That's right.

Mr. Brigadier: I think that is so, the fifth paragraph and the tenth.

Mr. Grosman: The fifth and the tenth, yes. In your fifth paragraph you have "up to fifty percent," haven't you?

Samuel Marcus—Defendant—Recalled—Direct

(868) Mr. Brigadier: That is what I stated to the Court.

Mr. Grosman: And the tenth, the same thing.

Mr. Brigadier: Yes, the words that appear in ink in your exhibit, annexed to your—

Mr. Grosman: Is it understood, your Honor, that we move to amend our answer to—

The Court: To conform to the proof here?

Mr. Grosman: To conform with the proof.

The Court: Yes sir.

Mr. Grosman: All right.

Mr. Brigadier: And I move to amend my answer to his counterclaim so as not to admit now the paper which he has amended.

The Court: Yes, sir.

Q. Did this contract, DM-22—was that the first plan that was submitted on September 14, 1948? A. Well, on September 14th this contract was all prepared when I arrived.

Q. In your negotiations with Mr. Miller, how many plans were suggested? A. Oh, there were numerous plans.

Q. How many, about? A. Oh, five, six, seven.

Q. Now, do you recall what the first plan was that (869) was suggested by Miller?

Mr. Brigadier: I would like a time fixed on all these things. The time is very important.

Mr. Grosman: I'll fix the time, if you give me a chance.

Q. (Continuing) —by Miller or by Judge Lieberman, his attorney; do you remember the first plan, and when the offer was made? A. Do you mean the time with Judge Lieberman at my office, or prior.

Q. I don't care where it was. A. Well, I didn't meet with Judge Lieberman at any time other than the meeting

in my office. The only conversations I had would have been with Miller or Bierman.

Q. All right. Now, did either Miller or Bierman submit a plan for the sale of your interest in Milmar Estates, Inc.? A. Yes, we had this.

Q. Other than the final plan? A. Yes, sir; we did.

Q. Who did? A. Mr. Miller.

Q. When? A. His first conversation with me was shortly after Mr. Loew had been in to see him.

(870) Q. And can you fix a time when that was? A. I imagine that would be roughly about the time of the expiration of the option, possibly around the 6th, or 7th or 8th of August.

Q. 1948? A. 1948, that's right.

Q. Incidentally, Mr. Miller never offered to take up that option? A. He did not.

Q. What was the first proposal that Miller made to you for the sale of your stock, sale or purchase of your stock, if you remember?

The Court: This is after that option expired.

Q. After the option had expired. A. The first meeting with Miller after that was continued on the same vein, that he had a man who was ready to buy—who wanted to buy a fifty percent interest in the real estate, and was willing to pay $125,000 for it, was I interested? And I said I was. Further conversation was—well, he wanted to obtain—"How can I get my stock from you, Marcus?" I says, "How can you get your stock? By paying for it."

Q. Let me ask you, did you have Miller's stock in your possession at the time? A. In my possession?

(871) Q. Yes. A. No, I didn't have it in my possession.

Q. I didn't mean on your person.

The Court: Not in your pocket.

A. Oh, yes, I owned the stock issued to Miller at all times.

Q. Well, what was said about his taking up his stock? A. Well, I said, "Miller, the only way you can get possession of your stock is if you pay me for it with cold, green cash."

Q. What did he offer you, if anything? A. He said, "Marcus, this man wants to buy a half interest. He wants me as his partner in here with—with me. Now, unless I can be his partner he doesn't want to go in the deal. Now, what can we do; what arrangements can I make with you about picking up my option?"

Q. What did you say to him? A. I said again, "The only arrangement that you can make with me is cash, Mr. Miller. Get somebody to put up the money, give me the money and you can have your stock—or the stock issued in your name."

Q. What was said about the note, if anything? A. I told Mr. Miller at the time, "Mr. Miller, you have no right to any stock; you understand that, don't (872) you? Your stock is in complete default and I am the owner of all that stock".

Q. What did he say? A. He didn't say anything particular to it. But he said, "Supposing I get Al Bierman—supposing I get Al Bierman to give you—to endorse a note, or supposing I get Al Bierman to buy some of this stock?" He offered me numerous suggestions—I can't remember—into some fashion how he could lay his hands on physical possession of that stock. And we had several conversations pertaining to that running through—well, whenever I reached the Riviera Bill Miller would approach me on the same subject, "Marcus, I got a man who—"

Q. Yes, all right, don't tell us that again. And you said you wanted cash, right? A. That's right.

Q. I think you said he wanted to give you pink notes, red notes— A. That's right.

Samuel Marcus—Defendant—Recalled—Direct

Q. Now, was there any discussion between you and Miller with respect to the $50,000 note that he gave you and which you held? A. Mr. Miller—yes, we did.

Q. What was said in that connection? A. Mr. Miller said to me, "I know, Sam, I haven't (873) any more right to that stock. I've defaulted. It's yours. But, still in all, don't forget, Sam, the welfare of Milmar, or this whole thing can crumble down here, fall on top of you, if the Riviera isn't operating. Now, after all, a man—you have got to have a man like me to operate this thing. No one else can operate it but me," or words to that effect, "and unless the Riviera is in operation, why, Milmar has no rent. And you know damn well you haven't got the money to carry this building yourself. So you had better work out some kind of a deal with me."

Q. Well, now, did you work out a deal with him? Let me ask you this. Did he tell you why he needed his stock that was in your possession? A. Oh, yes. Yes.

Q. Or the note? A. That's right. When I pressed him and said, "Miller, why do you need—why do you need this physical possession of this stock all of a sudden? You are running the Riviera. Nobody is bothering you. You got complete charge of the Riviera." He says, "Well, Marcus, I need this man Kevelson to come in as a partner with me. But I told him I own fifty percent of the stock. I have got to show him some physical possession of stock, show him that I own fifty percent of the stock, or the man (874) will think I am a liar. And I don't want to lose the man and you can't afford to lose the man. Because if we don't get Mr. Kevelson in, this whole Riviera will drop in a nutshell, you get no more rent, and you will be out your $125,000."

Q. Now, did you depend upon the statements made by—A. Definitely. I trusted Mr. Miller expressly.

Q. Now, can you call to mind any other plans suggested to you by Miller?

Mr. Brigadier: Judge, I have no objection if you lead him directly to what it is you are trying to ask him.

The Court: Yes, because otherwise he doesn't seem to get—

Mr. Brigadier: Go right to it. I am not making any objection on leading questions.

Mr. Grosman: All right.

The Court: In fact, the faster we go through this, the better I will like it.

Q. Now, what other plans did Miller propose to you whereby he was to get possession either of his note or of his stock?

Mr. Brigadier: Why don't you ask him? I have no objection. Just ask him.

A. Frankly, there were so many conversations with (875) both Miller and Bierman, it is difficult to pinpoint. I know at one time Mr. Bierman said, "Tell you what I will do, Marcus. I want to buy 12½% of this stock."

The Court: You told us that a couple times.

A. (Continuing) Yes. That was one suggestion. And I just can't—

The Court: Can't think of any other one?

A. (Continuing) Can't think at this time of any others. If my mind could be refreshed on some little thing I possibly could.

Q. Now, were there any other writings passed between you other than those that passed on September 14, 1948? A. You mean prior or after?

Q. Yes. A. Prior?

Q. That's right, before. A. Well, there was that letter of

July 27. And there were several letters there—there were several letters there demanding payment on rent. There was that registered letter telling—

Q. We have been all over that. A. I mean I just don't recall what you mean.

The Court: Any other ones that we haven't referred to already?

(876) A. I can't recall at this time whether there were or not.

Q. Let me show you this writing dated July 1, '47, on the stationery of the Riviera, signed by Bill Miller. Do you recall when that was given to you and in what connection? A. Oh, yes. This was—in the beginning of the season in 1947 Miller came to me and said, "Sam, we ain't got the money to open up. Have you got any money to loan me?" I said, "I am just as broke as you. I am spread pretty thin here, Miller. I don't have any more money to put into this venture." So he says, "Well, I have a concessionaire here that's willing to give me some money. Will you guarantee this?" This is the second concessionaire. I said, "Sure, I'll go out that far for you. I will guarantee the concessionaire's money." And I did that. Then he said to me, "Sam, I've got a suggestion to make to you. You know the Riviera stock is worthless. You know we lost $150,000 last year. And—Oh, hell!—there's no hope of making that money back for a good long time. Your friends have a good bit of stock in the Riviera. I've got several people who want to invest some money into the Riviera. If you can get your friends to give you back that stock which they have of the Riviera I feel (877) sure I can get some friends of mine with money that will buy that stock."

The Court: What were you supposed to give your friends who gave you back the stock in the Riviera?

The Witness: What was I supposed to give my friends? They were supposed to give it to me back because they were my friends.

The Court: Just hand it back to you?

The Witness: Just hand it back.

The Court: That's nice.

A. (Continuing) And so, knowing the fact, that the Milmar depended entirely upon Riviera being successful and making money, I went to my friends and told them that they can trust me, I will give them personal guarantees. They did have my personal notes on moneys they had advanced me, and they could trust me. "I think it's the best idea, because, frankly, I don't think we ever get an honest count from Miller, anyway, as far as income is concerned. And, what the devil, we may as well give him back the Riviera stock, let him run the Riviera, let him own the Riviera, let him make a lot of money, and let him pay us rent, because if we will get rent, we had a fine real estate proposition. If Miller would pay us the rent we would have that piece of property amortized in five years, free and clear, we had a (878) beautiful piece of real estate business."

My friends saw the logic of that. And I told my friends that they would share with me whatever profits I would make out of Milmar, I would make it to them in giving me back the Riviera stock. My friends agreed with me and they turned over their stock to me.

The Court: Now, who were these friends?

The Witness: Mr. Murray Sass, Mr. Evan Anton and Mr. Dave Parris.

The Court: Did they return the stock certificates to you?

The Witnesses: They gave the stock certificates to me.

The Court: What did you do with the stock certificates?

The Witness: I held them.

The Court: You held them then?

The Witness: I held them and I had a conversation with Miller. I says, "Mr. Miller, I am prepared to turn over these stock certificates to you. I will do that only on one basis, that you permit me, and my accountants, to examine the cash register tapes of the Riviera income, the original cash register tapes of the Riviera income." Mr. Miller agreed he would do that. When I sent someone down to examine the cash register (879) tapes, they were not available for them.

The Court: Was this the first time after he had agreed to let your accountants examine them?

The Witness: Yes, that's right, the first time.

The Court: They weren't available the first time.

The Witness: They just wouldn't show it to them. In other words, they went down to examine them, and Miller was there—

The Court: Your accountant couldn't see them.

The Witness: Couldn't see them.

The Court: All right. Of course, you were very happy about that, weren't you?

The Witness: Yes, sir; very happy.

The Court: What happened? Another argument between you and Miller?

The Witness: No, no argument at all. I went back and I wrote Mr. Miller a registered letter demanding that the cash register tapes—that is, I didn't send the letter, I had the letter sent—but the stockholders, the three stockholders of the Riviera, signed a letter demanding Mr. Miller to preserve for our inspection all the original cash register tapes showing the honest income of the Riviera.

Samuel Marcus—Defendant—Recalled—Direct

Q. Will you stop at this point, please? I show (880) you Exhibit DM-21, copy of a letter, and a registered receipt signed by Nicki Moran. Is that a copy of the letter which you now refer to? A. Yes, sir; it is.

The Court: Let me see it.

(Document handed to the Court.)

The Court: This was signed by those three gentlemen you named?

The Witness: Yes, Mr. Sass, Mr. Anton and Mr. Parris.

The Court: All right. That's July 1, 1947. From September of '48 now we are back to '47 again, July 1st.

The Witness: Shall I continue?

The Court: I don't know whether this is going to have any bearing on the ultimate results.

Mr. Grosman: I want your Honor to have the background of this whole thing.

The Court: I have a good idea of the background now.

Mr. Grosman: I imagine you have.

The Court: If Gilbert & Sullivan had to write this script, they couldn't write a better one.

Q. What happened after you sent Miller this letter? (881) A. Immediately upon receipt of the letter, Mr. Miller delivered to me a letter, by messenger.

Q. What did the letter say? A. The letter said—

Mr. Brigadier: Do you have the letter here?

The Court: Let's put it in evidence and let him read it into the record, if you are going to offer it. We have got the letter demanding, now you might as well give him Miller's answer to it.

Q. Do you have the letter that Miller sent to you? A. Yes, I have, sir.

Mr. Brigadier: May I see it?

Q. That's the letter you sent to Miller? A. This is the letter Miller sent to me.

The Court: And delivered to you.
The Witness: Delivered to me personally.
The Court: By personal messenger.

Q. Is this the letter you received in response to the registered letter you sent? A. Yes, sir.

Mr. Brigadier: May I see it, Judge?
Mr. Grosman: Yes, sir.

(Document handed to Counsel.)

The Court: We'll take a five-minute break.
(Short recess.)

(882) Q. Now, Mr. Marcus, you received from Mr. Miller, in reply to your registered letter, DM whatever it is?

Mr. Brigadier: Let's get that clear, the date, because he referred to the wrong letter. I assume you are going to straighten that out.

Q. In reply to your registered letter, marked DM-20, you received this letter of July 1, 1947? A. Yes, sir; the following day.

Mr. Grosman: All right. I ask that it be marked.
Mr. Brigadier: No objection.
The Court: There are two registered letters now.
Mr. Grosman: Yes, your Honor, there are two.
The Clerk: DM-23, letter dated July 1, 1947.

(Received and marked Exhibit DM-23.)

Mr. Grosman: The first registered letter, dated July 1, 1947, has no reference to DM-23.

Q. Now, Mr. Marcus, this letter received by you from Mr. Miller, DM-23, refers to the fact that you had entered into a written agreement with him on June 9, '47, to extend the note to become due June 1, '48. Did you enter into such an agreement with him? A. I believe the preliminary—the preliminary agreements were drawn approximately that time and held in (883) escrow.

Q. Well, did you enter into an agreement, an out and out agreement, whereby you were extending the due date of the $50,000 note? A. I believe there was some preliminary agreements went into about that date; yes, sir.

Q. Was he right when he said the "note therefore can not be in default at this time"? A. I don't think he was right. I do not believe when I wrote him the letter about the note being in default, I don't believe those preliminary agreements had been started yet.

Q. Well, will you read this letter, please?

(Document handed to the witness.)

A. Can I see the letter the time of default, the date of it?

(Document handed to the witness.)

Mr. Brigadier: May I just make an observation, because I think we are—the note says on its face when it is due and it doesn't become due until a year after. It says "first payment one year after" the date specified. So you are asking him to interpret something where the note says otherwise, Judge.

The Court: Show him that so he doesn't get all mixed up.

(884) Mr. Brigadier: "Payable five hundred dollars weekly commencing June 1, 1948" is what the note itself reads. Maybe I don't understand what is happening.

Mr. Grosman: You do understand, but you haven't read the note. "In the event of a default of any one payment the entire unpaid balance will fall due." Now, I don't know, I suppose he defaulted in the payment of the first installment.

The Witness: This is '48. This is '47.

Mr. Brigadier: But you are referring to a '47 letter.

The Witness: This is the first note, the first note in default.

Q. You are referring to the first note? A. This is the first note in default.

Mr. Brigadier: I didn't know that.

The Court: Neither did Judge Grosman know that.

Mr. Grosman: There are so many notes, as he described them—red, pink and blue—that I can't keep track of them.

The Court: This all refers to '47. That's July 1, '47.

Q. Yes. And this is June 30, '47, DM-20? A. That's right.

Q. Now, you declared a default on which note? (885) A. That was the note that he gave me on April in '46.

Q. All right. Now, have you read this letter, DM-23? A. Yes, I have.

Q. You are familiar now with its contents? A. I think so, yes.

Q. Now, is the statement true that the $50,000 note was not due on June 1, 1948, because you had extended the due date by an agreement? A. It's not true.

Q. Now, with respect to the stock of Bill Miller's Riviera, Inc., were you holding it illegally, as he charges? A. I was not.

Q. Did you receive a letter from Miller dated June 28, '47, relative to this stock? A. I did.

Q. Do you know what that letter said? A. You have it in your possession.

Q. Do you know what it said? A. It said something—

Mr. Brigadier: I object. If you have it in your possession I think we are all entitled to see the letter.

Mr. Grosman: All right. I thought I would (886) save a little time.

The Court: I think Mr. Marcus would like to see it, too. They can't expect you to remember everything.

The Witness: No, that's right.

The Court: Nobody could, either.

The Witness: I do remember what the contents of it were.

Q. Will you please wait now. You said you want to see the letter. A. That's right.

Q. Let me get it for you.

Mr. Brigadier: While you are doing that, Judge, if you will listen a minute, maybe this will help straighten it out. There is further confusion because the agreement they put in evidence, DM-2—that Judge Grosman put in—which is made on July 23, 1947, says that they shall execute a note and date it back to June 1st. So this note wasn't actually made on June 1st. It was made on July 23, 1947.

The Court: And antedated.

Mr. Brigadier: And antedated back to June 1st. That's DM-2 that you put in evidence.

Samuel Marcus—Defendant—Recalled—Direct

Q. I don't find Miller's letter here, Mr. Marcus. A. Well, I think I recall what the letter was about.

(887) Q. You say there was a letter dated June 28? A. That's right. I think it's a few days prior to this other letter.

Q. What do you say was in that letter? A. He wrote something—he itemized—he said to me that I agreed to return his Riviera stock to him and he demands the immediate return before one p.m. today the following shares of stock. And he enumerates the shares of stock of Riviera, and who they own, and demanded them returned by certain o'clock today.

Q. Now, did you return the stock to him? A. I did not.

Q. Now, Mr. Marcus, you told us that Miller represented to you that the business of the Riviera was bad and that he could not pay the rent. Was that representation made to you? A. Yes, sir; it was.

Q. Do you know whether it was true or not? A. I have no way of knowing. I merely took his word for it.

Q. Did you rely upon that representation? A. I definitely did.

Q. Subsequently did you find that that representation with respect to the income of the Riviera was not true?

(888) Mr. Brigadier: I object. I think he could ask him, "Subsequently what did you find?"

The Court: Yes, he could.

Mr. Brigadier: This is the heart of the case.

The Court: Let him tell us in his own words. A. Subsequently—

Mr. Brigadier: When?

The Court: About when did you find out?

A. After this whole deal was made.

Q. After September 14, 1948? A. After September 14, 1948, I started hearing remarks in the trade, from differ-

ent ex-employees that worked there, and it gave me certain suspicions. I started talking to restaurant men, and accountants for restaurants, and told them figures of what had been mentioned to me, the volume of business there—

The Court: At the Riviera.

A. (Continuing) At the Riviera. And they told me that—

Mr. Brigadier: I object to what they told him.

A. (Continuing) And I found out that honest results, or honest profits, could be determined of any operation by checking the books, by checking the purchases of a company, that—

(889) Q. You mean of a night club business? A. Of a night club business. I found out that it's a definite mathematical equation, that by adding up the purchases of liquor, adding up the purchases of food, would give you almost one hundred percent of what the income should be, because there is a definite factor throughout the country—I believe Internal Revenue takes that same factor. They take liquor purchases, food purchases, and work out a mathematical formula that would give them the honest income of the business.

The Court: Well, reasonably accurate.

The Witness: Reasonably accurate.

Mr. Brigadier: I object, if your Honor please, not that there isn't such a formula, but that this man hasn't shown his qualifications to evolve such a formula. In other words, if there is some kind of evidence, let them bring in the man who can qualify and establish what the amount of the business was and what this formula was.

The Witness: If we had the books of the Riviera we could do it.

The Court : Are we going to go into that now, too, the gross business of the Riviera?

Mr. Brigadier: I want him to prove the fraud of the representation that he says was made.

(890) The Court: Well, he will have to prove it, if I am going to rule on it.

When did you find this out, Mr. Marcus, with reference to September 14, 1948?

The Witness: Shortly after—I would say within six months, or possibly a year afterwards, as I would drop into a night club, and have a drink or two, talk to the proprietor, we would have conversations, and I would ask the proprietor, "What is your percentage against this and against that?" And we'd get into interest. And every proprietor I spoke to would tell me they can not understand that Riviera, apparently so successful and still losing money every year. And that they gave me suspicion and I started checking up into Miller's affluence all of a sudden. He didn't have a dime when he went into the Riviera. But all of a sudden he could support three ex-wives, mink coats, cars, a home with a swimming pool, boats, trip—go into a Monte Carlo concession over in France, some picture concession, or something, over in Monte Carlo in France. In other words, living like a man far beyond the normal income that he would be getting from the Riviera, which was $250 a week.

Therefore, I feel that an honest inspection of the books of the Riviera would definitely prove (891) that a fraud has been perpetrated upon me.

The Court: That's all very interesting. When were you convinced that he had perpetrated a fraud—

The Witness: I was convinced on that after I had spoken to all these people.

The Court: About how long did it take you to convince yourself?

The Witness: I'd say, roughly, possibly a year and a half after the sale.

The Court: Very good. Hold it now. So what did you do about it at that time, when you became convinced that you had been fraudulently induced to sign this contract?

The Witness: I went to my attorneys and spoke to them about it.

Mr. Grosman: Who, please?

The Court: Don't let us think that it is Judge Grosman and Mr. Tepper.

The Witness: No, it wasn't them. I went to Mr. Roth, who is my attorney in New York. And I discussed this problem with him. And he told me, "Sam, what you say had good sound logic. But—"

The Court: I knew there was a "but."

The Witness: But it's an extremely difficult (892) thing to prove.

The Court: Well, he certainly gave you good advice when he said that, Mr. Marcus, I will tell you that.

The Witness: And he said to me, "You go ahead and continue and see if you can not get some of the men in that organization that actually know something." I continued and I located a couple of people in the organization.

The Court: Now, if they are not going to testify, don't tell us what they said, because that is not fair to Mr. Miller.

The Witness: I located a couple of people in the organization. I have been trying to convince them to come in and testify. Honestly, your Honor, up to the present moments, I haven't convinced them.

The Court: No success.

The Witness: I haven't had the success. But I have hopes.

The Court: I think you better take him on now, Judge Grosman. He has told me what I want to know about it so far.

Q. Now, what did you say about the books would show?

Mr. Brigadier: I object to what he would (893) say the books would show.

The Court: No, he said—

Mr. Grosman: He made a statement about the books.

The Court: He has made it crystal clear that he feels that the books would show by the purchase what business should have been done with that amount of expenditures, is that right?

The Witness: Yes, sir.

Q. Now, are you prepared to produce expert testimony in line with what you have just testified to, if and when you ascertain the information you require from the books of the Riviera? A. I can. I do.

Q. And Milmar? A. Yes, sir.

Q. Now, why Milmar? A. Well, Mr. Hoffman was handling the books for both corporations there and from what I have gathered he has intertwined a lot of Riviera transactions with the Milmar transactions. And unless you have one—a good accountant can do nothing—he will be groping in the dark unless he can work right together with both of them.

The Court: Wait a minute. If Mr. Hoffman (894) kept the books that way, would the Internal Revenue Department let him get away with that?

The Witness: I don't know sir. I am not the Internal Revenue Department.

The Court: You are making quite a charge now. You are saying that the records of the Milmar Cor-

poration and the records of Bill Miller's Riviera were really co-mingled; you mean entries that belonged in one set were put in the other set?

The Witness: Your Honor, I wouldn't know, but from what my accountant told me, and looking at the Milmar books yesterday, they mentioned—they gave me their opinion, that they can not understand a lot of these entries, and unless Mr. Hoffman, or somebody, could give them a very good explanation for those entries they would be of that opinion, sir.

The Court: I see.

Mr. Grosman: Now, your Honor, I don't suppose I need to renew my application for leave to inspect the books of these two companies. I made the application a number of times. You said that when the proper time came—

The Court: Just a minute. What he is telling me is based on what his accountant told him. That's not proof for me. Certainly if a man skilled in the (895) art of accountancy, and takes that stand, and swears under oath that it's impossible, that from his examination—that will put a different aspect on it. After all, Mr. Marcus—I don't doubt he is telling the truth, but he is telling what his accountant told him, which maybe his accountant wouldn't swear to on the stand himself.

Mr. Grosman: All right, I will bring the accountant here tomorrow.

The Court: There has got to be good cause shown before you can examine him. You know how doctors tell you things, and when you want them to testify in court, "Oh, no. I only told you that for your information, but I am not going to swear to that."

It's almost a quarter of four now. I think we will adjourn now till tomorrow morning.

Mr. Grosman: What time, Judge?

Colloquy

The Court: 10:15. Do you have reason to believe, Judge Grosman, that you will be through with Mr. Marcus on direct tomorrow morning?

Mr. Grosman: I have a lot of these exhibits to go through tomorrow. You want to know tomorrow morning?

The Court: Yes, with the direct?

Mr. Brigadier: I would also like to know, (896) if possible, when he plans to be through with his case. I have to have rebuttal witnesses available, like Schwartz, for example, who would like to know—

The Court: Can you tell us now, Judge Grosman, and Mr. Tepper, how many witnesses you will produce in addition to Mr. Marcus?

Mr. Tepper: We are expecting at least two or three witnesses. As a matter of fact, I went out to make a telephone call a little while ago. Just what happens, I can't say. They are outside the jurisdiction of the Court and we are hopeful and we believe that we can produce these witnesses. Now, they may or may not be here. And I am making no representation that they will be here.

The Court: You are trying to get them.

Mr. Tepper: We are trying to get them. I think it is possible that Judge Grosman may be able to complete his direct examination by recess tomorrow and, if not, shortly after.

Mr. Brigadier: That's of Marcus. Could you estimate generally how long the direct examination of your other witnesses would take? Then I can estimate whether I should have the rebuttal witnesses available Friday or whether it is going to be next Monday.

(Discussion off the record.)

(Adjourned until Thurs., Feb. 3, 1955, 10:15 a.m.)

Samuel Marcus—Defendant—Recalled—Direct

(897)

Newark, New Jersey,
Thursday, Feb. 3, 1955.

Before the Honorable Alfred E. Modarelli, *U. S. D. J.*

Appearances:

(Same as previously noted.)

(Trial resumed pursuant to adjournment.)

The Court: Do you wish to go on with Mr. Marcus?
Mr. Grosman: Yes, your Honor.

Samuel Marcus resumed the stand.

Direct examination by Mr. Grosman (continued):

Q. Mr. Marcus, at the first meeting held in your office was there a definite agreement reached which culminated in the agreement of September 14, 1948? A. There was no definite agreement reached on that day.

Q. Can you tell me approximately how far along in the agreement you and Miller and your respective lawyers arrived on that first meeting in your office? A. There were several suggested plans. The first plan-

Q. Let me ask you: was a price discussed? A. Yes, there was a price mentioned.

Q. By who and to whom? A. I believe—I and Miller discussed the price of $125,000 for 625 shares of stock.

(898) Q. Was there any discussion as to who was to buy the stock from whom? A. Yes, Mr. Miller told me he had this man, and I don't recall at that time whether he told me this man's name or not, and he told me this man wanted to buy 50 per cent of the stock and was willing to pay $125,000.

Samuel Marcus—Defendant—Recalled—Direct

Q. Now, to the best of your recollection, Mr. Marcus, will you tell us exactly what you agreed on, or didn't agree on at that first meeting. A. We didn't agree upon anything.

Q. But you discussed some things? A. Mr. Miller's first desire that he expressed was that he wanted to buy all the stock, that Mr. Bierman—

Q. We are now talking about the first meeting? A. At the first meeting.

Q. All right. A. He and Bierman were going to dig up the money to buy his stock.

The Court: To buy whose stock?

The Witness: To buy the stock issued to him that I was holding.

The Court: To Miller, you mean?

The Witness: That's right.

Q. From who? A. From me.

Q. (899) Q. You held his stock? A. It was never his stock, I held it in my possession.

The Court: We had that, we don't need to have that repeated again. It is running through my mind.

A. (Continuing) He told me Mr. Kevelson was going to $125,000 for 625 shares, that he and Bierman—

Q. Go ahead. A. —will buy his shares.

Q. Did he say how much? A. In other words, pay me the $50,000 note and interest. I said, "If that is in cash it is perfectly okay, but you cannot have it any more on notes." We had a violent argument there, yelling, shouting all over the place.

Q. The first time? A. The first time, too, right in my office. I am an excitable person and I guess Miller is, too, and we went shouting at each other. Miller said he wanted

to make a deal with me, and I said I didn't want to make deal on his stock unless I get cash, no other deals.

We then turned to possibly—well, Bierman will buy 12½ per cent. So in other words, the purchase idea came along to 62½ per cent.

Q. Wait a minute now, let me get this straight. Bierman would buy 12½ per cent? A. That's right.

(900) Q. And 62½ per cent— A. And Kevelson would buy the 50 per cent, so in other words we would sell 62½ per cent of the stock. Or I would sell 62½ per cent of the stock. And that subject matter was discussed.

Q. What was to become of the remainder of the stock? There would be Miller's stock—when I say Miller's stock I mean the stock ear-marked for Miller if and when he paid his note. A. Well, frankly, Mr. Schwartz owned 125 shares of stock that day and there was no particular mention made as to whether Schwartz' stock was going to be sold or part of the Miller stock I was holding was going to be sold. There was just conversation about having controlling interest, Kevelson and whoever else, Bierman or Miller, to own 62½ per cent of the stock, and then the deal was finished.

Q. Was any other plan suggested that day?

The Court: What about the remainder of the stock?

The Witness: I held the remainder.

The Court: You would hold it?

The Witness: Between me and Schwartz, we would have the remaining of the stock.

The Court: You would have the remainder?

The Witness: That is correct.

A. (Continuing) That didn't please Mr. Miller because he still wanted to make a deal for all. And we kept on shouting (901) and yelling and hollering. And there may have

been one or two other suggestions, I can't remember right now, but all I do remember now is Miller running out, "Well, you are a damn fool, Marcus, this whole damn building is going to come down on us, you will lose every nickel you got. I am through with the whole thing, you save yourself." And he walked out the door.

Q. Why did he do that, if you know? A. I haven't the slightest idea.

Q. Well, was there something you said or refused to do, or what? A. I told him he could not have his stock without paying me cash.

Q. Is that what he got angry about? A. That is what he got angry about.

Q. Was anything else discussed at that first meeting?

The Court: He doesn't seem to remember any other plans.

Do you?

The Witness: Frankly, we were there for about an hour and there may have been something else said and done, but those two or three plans stand out in my mind: first Kevelson was going to buy it for $125,000; then Miller suggested Bierman wanted 12½ per cent more so they could have controlling interest, and then he wanted to buy it all—he wanted some (902) arrangement where he could buy it all. Those are the three particular things that stand in my mind.

Q. All right. Did you say your lawyers were present? A. Mr. Schwartz was present and Judge Lieberman was present.

Q. Now, were the lawyers instructed to prepare papers? A. They were not.

Q. Was there an arrangement made for another meeting? A. Nothing definite at all transpired from that meeting.

Q. Well, when was the next meeting? A. There was no next meeting.

Q. Well, now, are you talking about the first meeting in your office? A. I am talking about the first meeting in my office.

The Court: He only had one meeting in his office—

The Witness: That's right.

The Court: —which apparently ended up with Bill Miller going out in a hustle. Is that right?

The Witness: Yes, sir.

The Court: As I understand it, on that day in your office nothing was agreed upon?

The Witness: Yes, your Honor.

The Court: The next time you got together is when you got together at—

The Witness: Mr. Schwartz' office on September 14th.

The Court: Now I suppose that Judge Grosman wants (903) to know is what happened between the time of the meeting in your office and the time you had the meeting in Schwartz' office when the papers were ready?

The Witness: On a day or two after this meeting in my office, when I was at the Riviera, Mr. Bierman came over to me and sat down and we conversed on some general topics, and he said to me, "Sam, you are an awful damn fool—"

The Court: Well, let's not go through that again. That ended up where you got the two $5,000 checks.

The Witness: That's right, yes.

The Court: That was the next discussion?

The Witness: Yes.

The Court: After that, was there anything between that meeting with Bierman, by chance, that you recited, and then the meeting in your lawyer's office?

The Witness: There was no other meeting in between those two.

The Court: And no conferences?

The Witness: No conferences, no sir.

The Court: No communication of any kind?

The Witness: I don't recall any communication of whatever kind at all.

The Court: Do you know whether your lawyer communicated with Lieberman?

The Witness: Oh, yes.

(904) Mr. Grosman: Wait a minute, wait a minute.

The Court: Let's try to nail this down. Do you know whether there were any talks between your lawyer, Mr. Schwartz, and Bill Miller's lawyer, Judge Lieberman?

The Witness: I know of my own knowledge of no meeting. I know of my own knowledge none whatsoever.

The Court: All right. Now, did your lawyer, Schwartz, inform you that he was still negotiating?

The Witness: Mr. Schwartz called me—I am not definite whether I called Mr. Schwartz or Mr. Schwartz called me the day after this receipt—I think Mr. Schwartz called me and he said, "Judge Lieberman," or Miller, "told me you are prepared to go through with the deal for the sale of your stock. Is that correct?"

I said, "Yes, arrange for a conference."

The Court: Did Mr. Schwartz indicate that he knew that you had received two $5,000 checks?

The Witness: He did not, sir.

The Court: He did not indicate that?

The Witness: No, sir, he did not indicate it. I didn't say anything of it at all. I said, "Yes, I was out—" Oh, I did say I received a deposit.

The Court: You told him that-

The Witness: I told Mr. Schwartz, "I took a deposit from Mr. Bierman last night and arrange for a conference to (905) get together.

The Court: All right. Now, as the result of that conversation is that how you got together on September 14th?

The Witness: Yes, your Honor.

The Court: All right. Now we got him up to September 14th.

By Mr. Grosman:

Q. Now, who first asked you to come to Schwartz' office on September 14, 1948? A. Mr. Schwartz called me in my store.

Q. Now, when you went up to that office, what hour did you go there? A. As I recall now, it was around the shift of my lunch hour, in other words somewhere between 1 and 2 o'clock.

Q. And you were there how long? A. I would say I left there about 3 o'clock.

Q. Now, when you arrived there had papers been drawn? A. They were.

Q. Can you tell us now what papers were ready when you arrived at Schwartz' office on September 14th? A. I wouldn't know. I saw a big pile of papers on the desk there and I wouldn't know what papers were prepared.

Q. Well, you know some were drawn because you signed them. A. There was a whole stock of papers on the desk.

(906) Q. What happened when you arrived? When you entered Schwartz' office? Who did you find there? A. When I entered Schwartz' officer there was Mr. Lieberman, Mr. Miller and Mr. Schwartz.

Q. And you proceeded to negotiate? A. Yes, sir. I sat at a table with them.

Q. Well, now--

The Court: Judge Grosman asked you if you negotiated some more.

The Witness: No. The first thing Mr. Schwartz said to me was, "Sam, I understand from Miller and Lieberman that you are going through with the deal to sell all the stock; is that so?" And I turned to Miller and I said, "Is that so?" Miller nodded his head. I said, "It is okay with me."

Q. What happened after that? A. The next thing that I can remember right now was something was said about the stock book being in a terrible mess.

Q. Let me ask you this: you say that you were told that Miller was going to buy all this stock. Was a price fixed? A. Nothing was said there because we had practically set the price at our first meeting, if he was going to buy all the stock it was merely to pay me the $50,000 note and interest. So there was no other question about it.

Q. Who was paying you that? (907) A. Miller was supposed to pay me the $50,000 with interest.

Q. And you were to get what else for the remaining stock for your stock? A. $125,000 from Mr. Kevelson.

Q. That is what you understood you were to get? A. That's right.

Q. For all of the stock except Bierman's? A. No, not all of it. I didn't owe all the stock. I only owned—

The Court: He meant all that you owned.

The Witness: Oh, all that I owned, yes, sir.

Q. So that that would include your 625 shares, right? A. That's right.

Q. Plus the 500 shares ear-marked for Miller for which he hadn't paid and which you were holding? A. That's correct.

Q. Did that deal go through? A. It did not.

Q. Were you shown any contracts that had been prepared? A. Well, the contracts had all been prepared and all the papers prepared on the desk.

Q. Now I show you this contract marked DM-22. Do you recall seeing that contract on that day? A. Yes, I do.

Q. What condition was this contract in when you arrived (908) at Schwartz' office? A. What condition was it in?

Q. Yes. Were all the spaces filled in, or what? A. Frankly, I don't recall too much, but I know—

Q. Well, look at the contract and see if it doesn't refresh your mind. A. Well, frankly, it doesn't because I didn't pay too much attention to the condition of the contract.

Q. All right. Did you read the contract? A. I did not.

Q. Why not? A. I had a lawyer there representing me, I didn't think I had to.

Q. What happened thereafter? A. There was some remark made by one or both of the lawyers that the stock book was in a terrible mess, and that they were going to straighten out the stock book mess. And I was asked to sign a few stock certificates.

Q. Did you sign them? A. I did.

Q. Do you recall what else you signed on that day? A. Oh, I signed a raft of papers; I can't remember what I signed. There were numerous papers that I was signing and signing.

Q. Now, who did you understand was selling to whom, and (909) what, that day? A. I understood I was selling my stock and the stock I had ear-marked to Miller was supposed to be the deal. Miller was to pay me for his stock the $50,000 note, and Kevelson was to pay me the $125,000 for my stock.

Q. Now, on that note, you mean preceded it? A. No. We started to sign papers and then Mr. Schwartz said to me, "Sam, I have been told by Lieberman and Miller that this paragraph 3 in this contract was to be deleted, and I deleted it."

Q. What is paragraph 3 of the contract? Will you read it please, if you can? A. "The seller is authorized to pay all of its outstanding obligations of whatsoever kind and description that may be contained upon the corporate books, and to pay over at the closing the surplus remaining, if any."

Q. That was stricken out? A. That was stricken out.

Q. Does it appear stricken out on the contract? A. Yes, it is.

Q. Marked what? A. Marked DAB-22, is that it?

Q. Now, what did you—

Mr. Brigadier: That is wrong, that is DM-22.

Q. DM, is that it, DM-22? (910) A. Yes.

Q. All right. What did you say when you were told that that paragraph 3 had been stricken out? A. I said to Mr. Schwartz—

Q. Pardon me. I assume this was all in the presence of Judge Lieberman and Mr. Miller? A. Yes, sir, it was.

Q. Within their hearing? A. Within their hearing.

Q. All right, go ahead. A. I said to Mr. Schwartz, "what does that mean, Bob? Does that mean that I am not going to be paid the moneys I loaned the Riviera and Milmar?" He says, "That's what they say."

Well, I hit the ceiling. I says, "Bob, never in any negotiations, in any remarks, in any meetings did I ever offer to waive any moneys that Milmar or Riviera owes me for loans I have advanced them."

Q. Can you tell me what was said by Miller or by Lieberman? A. Well, they all jumped up and a lot of name

calling started going back and forth, yelling, shouting and hollering, and confusion, and this lasted for 10 or 15 minutes.

Q. Then what happened? A. Then finally they reinstated—they reinstated that clause in a letter form, that I was to receive any loans made (911) by me, any loans that I had given to the Riviera and Milmar.

Q. I show you a letter dated September 14, 1948, addressed to Mr. Al Bierman, c/o of Bill Miller's Riviera, signed "Milmar Estates, by Sam Marcus, President, Attest, Robert J. Schwartz, Secretary." What that the letter you say you received in substitution of paragraph 3 of the agreement, DM-22? A. Yes, yes, Mr. Schwartz says this letter would take care of the moneys due me.

Q. Was this letter drawn, executed, in the presence of Miller and Lieberman? A. It was.

Q. With their consent? A. Yes, sir.

Mr. Brigadier: The original one that is in the escrow file went in evidence, itself. It is DM-9. It seems to me if the document is the same as the one in evidence it only clutters up the record.

Mr. Grosman: Check it, maybe it is different.

Mr. Brigadier: I have no objection to it going in evidence.

The Court: Don't clutter up the record. If it is already in why put it in twice?

Mr. Grosman: It is in as DME-9, your Honor.

Mr. Brigadier: This one has a seal on it.

(912) Mr. Grosman: Yes.

Mr. Brigadier: Then they are the same.

Mr. Grosman: You have one without a seal?

Mr. Brigadier: The photostats don't turn up the seals.

Mr. Grosman: All right, it is in evidence.

Colloquy

Now may I read this into the record, your Honor?

The Court: Yes.

Mr. Brigadier: Judge, may I also suggest that you identify it for the record by the number that is in the record?

Mr. Grosman: Well, DME-9.

Mr. Brigadier: Yes.

Mr. Grosman: "September 14, 1948, Mr. Al Bierman, c/o Bill Miller's Riviera, Inc., Fort Lee, New Jersey.

"Dear Mr. Bierman: This is to confirm our understanding that the undersigned corporation represents that it will pay all of the presently outstanding obligations of the corporation, consisting of the corporation's obligations for legal fees or other—"

Mr. Brigadier: Obligations.

Mr. Grosman: "—obligations to Samuel Marcus, personally—

Mr. Brigadier: "* * * and loans," you read that wrong.

Mr. Grosman: "—and loans and obligations to (913) Samuel Marcus personally."

There is some writing in there, your Honor, that is very fine.

Mr. Brigadier: May I suggest a correction, Judge?

Mr. Grosman: Yes.

Mr. Brigadier: It should read, "legal fees or other obligations and loans * * *."

Mr. Grosman: "* * * to Samuel Marcus personally."

Mr. Brigadier: That's right.

Mr. Grosman: Now, the paragraph is initialed "RJS" and I believe "AL." Is that correct, Mr. Brigadier?

Mr. Brigadier: Yes, alongside of the insertion, the handwritten insertion.

Mr. Grosman: Yes; all right.

"The corporation also states that it will defend any litigation, pay any judgments which may be obtained against said corporation in connection with any obligations due as of this date or prior thereto. Very truly yours, Milmar Estates, By Samuel Marcus, President." The seal of the corporation is affixed on the right. On the left, written in ink are the words "Attest: Robert J. Schwartz, Secretary."

Q. Now, did that take care of paragraph 3? A. Yes, it did.

Q. What obligations did the corporation owe you on that date, September 14, 1948? (914) A. I believe there was a balance due me of approximately $46,000.

Q. What was that for? A. Loans advanced.

Q. To? A. To Milmar Estates.

Q. Now, have you the checks or notes, or whatever else? A. I believe you have them.

Q. (continuing) —you may have upon which you base your claim against Milmar Estates for loans? A. Yes, sir, I do.

Q. Now, by the 5th count of your cross-counterclaim you are suing your co-defendant Milmar for $46,801.23. A. That's right.

Q. That is what you claim is coming to you from Milmar? A. That's correct.

Q. For loans? A. Yes, sir.

Q. Will you look at these documents and tell me what they represent? A. These are all—

Q. Will you briefly run them over and tell us? A. There is a check here for $5,100 to Milmar Estates, Inc.

Q. Dated? A. Dated December 27, 1946. And there is a check here, December 3, 1946, Milmar Estates, $2,000.

There is a check here (915) October 30, 1946, to Milmar Estates, $3,500. There is a check here to Milmar Estates, November 3, 1947, $5,500. There is a check to Michaels Realty Corporation, $808.33. There is a paid note to the Michael Realty Company of $2,500. There is a paid note to the Michael Realty Company of $2,500, second one.

There is a check of September 30, 1947, of $1,000. There is a check of January 2, 1947, $3,500. There is a check to Milmar Estates on February 24, 1947, of $1,500. There is a check of February 27 to Milmar Estates for $3,000.

I have here a deposit slip of $1,100 in cash which I had to put into the bank to meet a certain payment.

Q. To whose account? A. To the Milmar account.

Q. All right. Go ahead. A. I have a check here, the Modern Industrial Bank for $1,000. This was for a liquor loan which Milmar Estates had made for the benefit of the Riviera. The Riviera was supposed to pay this item and they didn't pay it and Milmar had to pay it. I have another check here, the Modern Industrial Bank, for $3,000; which is also part of the liquor loan that Riviera was supposed to pay.

Q. What is the date of it? The date of it? A. September 5, 1947. This Sam Marcus, personally, and Milmar had endorsed that note, we borrowed the money from the (916) bank for the benefit of Miller.

Q. Was it paid by you? A. Paid by me personally, yes.

Q. All right. A. I have a check to Milmar Estates dated December 16, 1947, $1,000. I have a check of December 2, 1947, $2,500. I have a check, December 2, made payable to Sam Marcus—Sam Marcus endorses it to Milmar Estates for $3,500. That's about all.

I have a note here, I have an on demand note signed by Sam Marcus and Hoffman, as comptroller, payable on demand, dated October 29, 1946, for $3,500.

The Court: Was that made to you?

The Witness: Made to me, made payable to Sam Marcus. I am not certain, your Honor, whether these checks contain a complete—there may be one or two that I don't have available here.

Q. Now, how much do you say was due to you on notes, checks, from Milmar Estates on September 14, 1948? A. The balance, after we deducted the payments, was approximately 46 thousand some odd dollars, as you have in your complaint.

Mr. Grosman: I would like to offer these in evidence, your Honor.

Mr. Brigadier: Judge, did you furnish us with photostats of these?

(917) Mr. Grosman: Of these checks?

Mr. Brigadier: Yes.

Mr. Grosman: I don't think so. But there is a schedule annexed to the answer and counterclaim setting forth the checks, that is the amounts due, and the credits.

Mr. Brigadier: I know. I wanted to know whether I had in my file photostats or whether I had to order them; that is what I want to know for. May I see them, Judge, before you put them in evidence?

(The documents were handed Mr. Brigadier.)

Mr. Brigadier: We will do this later, with the Court's permission, subject to our being able to check them against the items that appear in the counterclaim that he filed, so that we don't delay this examination.

Mr. Grosman: You may have them at any time you like. As you observe, there seems to be exhibit marks on here; I think, if not all of them, some of them were produced at the deposition hearings.

Mr. Brigadier: You want to put them in evidence?

Mr. Grosman: Yes, as one exhibit.

Mr. Brigadier: Yes.

Mr. Grosman (addressing Clerk): You better separate the checks and notes and the deposit slips.

The Clerk: DM-24 in evidence, 14 checks and 3 notes—

(918) Mr. Grosman: 14 checks—

The Clerk: —3 notes.

Mr. Grosman: And deposit slips?

The Clerk: 11 Deposit slips.

(Received and marked Exhibit DM-24.)

The Court: Did you have those checks and notes and certificates of deposit with you on September 14th, at the closing?

The Witness: No, I did not.

The Court: You say the purpose of this DME-9 was to take care of your loans, advances—loans and advances to Milmar, is that right?

The Witness: Yes, your Honor.

The Court: That was to be paid in addition to anything else that was to be paid?

The Witness: Yes, your Honor.

The Court: I take it you have not been paid, have you?

The Witness: No, I have not.

Mr. Grosman: And they are the subject of count 5 of the counterclaim.

The Court: Yes. With all the pleadings I had the pleadings analyzed. There are so many I had to have them analyzed.

You claim $46,801.23 for loans and advances?

(919) The Witness: That's correct, sir.

Samuel Marcus—Defendant—Recalled—Direct

By Mr. Grosman:

Q. Now, Mr. Marcus, I show you some more documents that were signed on, suppose to have been signed on September 14th, and ask you to look at them and tell me whether they were in fact signed on September 14th, and how they happen to be signed on that day.

Mr. Grosman: I want to get all these together so we don't have to founder around after them, your Honor.

The Court: That is a very good suggestion.

Mr. Grosman: We may have a little confusion, your Honor because some of these exhibits came out of the escrow file and all I have is photostats.

Mr. Brigadier: Why not use the exhibit that is in evidence already?

Mr. Grosman: If it is in evidence I am not going to ask that another one be marked.

Q. I show you a note written on yellow paper, dated September 14, 1948, signed by, I believe, Al Lieberman, marked Exhibit P-45 for identification, as of December 26, '51. Do you remember that being signed on that day? A. Yes, yes, I recall this, yes.

Q. All right. Now, in what connection was this exhibit signed? Well, let me ask you first, was it given to you? A. No, it wasn't given to me.

Q. Who was it given to? (920) A. I didn't see it delivered at all.

Q. All right.

Mr. Brigadier: How did he get it?

Mr. Grosman: That is what I am trying to find out.

Q. Where did you get this exhibit? A. I believe you found it in Mr. Schwartz' file.

Q. In your lawyer's file that you turned over to me? A. That is correct.

Q. Right.

Mr. Grosman: Does that answer your question, Mr. Brigadier?

Mr. Brigadier: I think it answers yours and mine, both.

Mr. Grosman: All right, we are both satisfied.

I offer this in evidence, and may I ask that it be marked.

The Clerk: DM-25, writing dated September 14, 1948.

(Received and marked Exhibit DM-25.)

Q. Mr. Marcus, how did that note come into being, and what was the purpose of it, if you know? A. Yes, I have a recollection of this now; when I was looking at it. At the very final of the session, when everything was completed and I was ready to go home, I said something to my lawyer, I said, "Bob, let me understand clearly now, in case anything happens here and I am not paid, everything I am leaving here we get all back?"

(921) He said, "Oh, there is no question about that, everything is taken care of first-rate." And Judge Lieberman joined in and said, "By all means, Marcus, if anything is wrong here you put it back in status quo. As a matter of fact, just to make you feel better I will give you an escrow receipt for the note that you gave Bill." And he sat down and wrote this piece of paper. I didn't see it delivered. As a matter of fact I was just going out the door and I saw him sitting down writing it and I think this is evidently what he wrote.

Q. Now, did you leave Miller's note in escrow? A. I gave the note to Mr. Miller.

Q. In escrow? A. I don't know just what it was. There was a conversation between me and Miller at the time and whether it was supposed to be in escrow or not in escrow, I am not certain right now. Miller passed the remark, "Well, you have got the stock, what do you need my note for?" And first I hesitated, and Miller's persuasion was correct, if you are owing the stock you don't need the stock and a note, and I said, "You are right, Miller, here is your note."

The Court: In other words the fact that you were holding his stock—

The Witness: The fact I was holding his stock, and the fact that I didn't need his stock and a note, so I said "All right, Bill, you are right, here is your note."

(922) Q. You know you handed the note to him or to his lawyer? A. I handed the note to him.

Q. And his lawyer wrote out that escrow receipt for the note? A. I saw Mr.—

Q. Wait a minute. A. I saw—

Q. Wait a minute. (Continuing) DM-25? A. I saw Mr. Lieberman— Mr. Lieberman passed the remark to me, "If it will make you feel any happier I will even give you an escrow receipt for your note."

Q. Which he did? A. Which evidently he did. That looks like his handwriting.

The Court: Let me see it; I have seen Judge Lieberman's handwriting.

"September 14, 1948. Received from Sam Marcus a note dated June 1, 1947, for $50,000, payable to Sam Marcus and made by William Miller and payable by Bill Miller's Riviera, Hudson Terrace, Fort Lee,

N. J., which note I am to hold in escrow as per agreement made September 14, 1948."

You did give it to him in escrow, then.

Mr. Grosman: Yes.

Q. Now I show you a document dated September 14, 1948, addressed to Milmar Estates, Inc., c/o Samuel Marcus, 18 East 42nd Street, New York City, signed Bill Miller's Riviera, (923) Inc., by William Miller, President, which I will describe in a little more detail later on. Can you tell us whether that document was executed and delivered to you on September 14th, '48? A. Yes, Yes, I remember this.

Q. In what connection? A. This was delivered in connection that I owned at that time 51 per cent of the stock of the Riviera. I also had in my possession the resignations of officers and directors of Bill Miller's Riviera. One of the bases of the agreement was that I would surrender, that I would give back to him that Riviera stock. So that—

Q. In what event? A. If the deal went through and Kevelson bought his stock, and Miller paid for his stock, or whichever way, he would receive back the 51 per cent of the Riviera, as well as get back his resignations and everything else.

Q. Well, now on September 14, 1948, who held the 51 per cent stock of the Riviera? A. I don't recall whether I had it in my possession or whether Schwartz had it in his possession. I may have had it, I may not, I don't quite recall.

Q. Had it been turned over to you previously? A. I have a slight recollection that I did ask Mr. Schwartz for it, but I cannot be definite in my assertion.

(924) Q. Schwartz was your attorney? A. Schwartz was my attorney.

Samuel Marcus—Defendant—Recalled—Direct

Q. Now, had it been turned over by Miller or someone on behalf of the Riviera, the corporation— A. Oh, yes, surely.

Q. —to you or to Miller, previously? A. Turned over to Schwartz?

Q. Yes. A. Yes, it was.

Q. Who turned it over? A. Miller turned it over.

Q. In what connection? A. In connection with our agreements and lease that we entered into on July 23, 1947.

Q. I show you Exhibit DME-28, is the lease you referred to in connection with which the 51 per cent stock of Miller's Riviera was turned over to Mr. Schwartz? A. That is correct.

Q. Now, will you describe briefly for us—don't make it too long— what the circumstances were under which this 51 per cent under this lease—the lease was executed and 51 per cent of the stock turned over to Schwartz in escrow?

Mr. Brigadier: If your Honor please, we had it all day yesterday; he was examined at substantial length about it.

The Court: Yes.

(925) Mr. Brigadier: I don't care if you want to take the time.

The Court: You don't have to go over it again, I have DME-2, which is the agreement which was drawn on July 23, 1947, that explains all this.

Mr. Grosman: All right.

Q. So on September 14th you say that the 51 per cent stock of the Riviera was produced by your attorney, Mr. Schwartz? A. Either by myself or by my attorney.

Q. And turned over to Judge Lieberman? A. That is correct.

Q. The last you know of it, that 51 per cent stock of Bill Miller's Riviera, Inc., was in possession of Judge Lieberman? A. That is correct.

Q. You received a receipt for it, did you? A. I didn't; I don't know what Mr. Schwartz received.

The Court: He is referring to the escrow receipt dated September 14th, signed by Abraham Lieberman.

Mr. Grosman: Isn't it in evidence?

The Clerk: You didn't do anything with it.

The Court: DME-7.

Mr. Brigadier: Are you referring to the paper that he has been using?

(926) The Clerk: Yes.

Mr. Brigadier: There again I would like to suggest to you, Judge, it is already in evidence; why don't you refer to the exhibit record in evidence? It is DME-14.

Will you check it, please, just to make sure what I said is sure.

DME-14, look at that and check it with the one you have. We have enough exhibits as it is.

Mr. Grosman. I certainly don't want to clutter the record. That is correct.

Q. Now, Mr. Marcus, will you look at the receipt, DME-14, and tell me whether that receipt was executed on September 14th covering the 51 per cent stock?

(Witness address counsel.)

Q. Talk out loud so he can hear you. Look at it.

The Court: Read them when he hands them to you.

Q. I have enough trouble with this thing without your throwing me off the track. A. I don't know if this is a receipt, frankly speaking.

Q. All right, read it, Mr. Marcus. A. Read it?

Q. Yes. A. Out loud?

Q. No, to yourself. Satisfy yourself whether or not that was given to you on September 14th. (927) A. Oh, yes, yes, this was given to me on September 14th; that is, it was given to my attorney, it wasn't given to me. I saw it.

Q. All right.

The Court: Was that for the Riviera stock, that receipt?

Mr. Grosman: Yes, your Honor. It reads as follows— I will read the first paragraph of it:

"This will confirm our understanding that all of the letters, papers, documents, stocks and other securities which are held in escrow in connection with certain agreements executed in connection with the lease of Bill Miller's Riviera, dated various dates, on or about July 23, 1947, shall all remain in escrow", then the words as they presently are, are stricken out and in ink is inserted, "with Abraham Lieberman, Esq.," initialed "R.J.S." and "A.L." So apparently that is what it covers.

Mr. Brigadier: Judge, have you got both of those initials on there, because mine doesn't have "R.J.S." and "A.L."

The Clerk: There is no "R.J.S." on this one.

Mr. Brigadier: That is all right. I have a photostat of the other one, but it doesn't make any difference.

Q. Now, what else was done on September 14th?

Mr. Grosman: With your Honor's permission—

(928) The Court: Have you shown him the documents?

Mr. Grosman: No. With your Honor's permission I would like to call his attention to some specific documents.

The Court: Yes.

Q. I show you a letter dated September 14th, marked Exhibit PL for identification, December '26, '51, and ask you whether that document was given to you on September 14th, or the original if it? A. Yes, it was.

Mr. Brigadier: Pardon me, Judge. I think you must have made a mistake. What is the number? It doesn't make sense to us, there is no PL.

Mr. Grosman: I have Exhibit P-11, and in the corner I have 2/20.

Mr. Brigadier: You said PL, and we knew there couldn't be a PL.

The Clerk: DME-22.

Mr. Grosman: May I have that, please?

Q. DME-22, can you explain how this document came into being, and the purpose of it? A. Oh, there was some discussion with reference to tabs that Bill Miller had, and Bill Miller said, "That's all all right, we will forget about the tabs." I don't know who brought it up, but he said, "We will forget about any money that you owe."

(929) Q. You, personally? A. Probably about a 100, 150 dollars or so in tabs that I had charged.

Q. When you say "tabs" you mean what? A. Charges.

Q. You mean food and drinks? A. Food and drink checks, right.

Q. So this letter was executed to show that all was forgiven? A. That he would cancel those tabs.

(930) Q. All right. Was there some talk about what rent would be charged to Bill Miller's Riviera in the event there was a default in the contract—

Mr. Brigadier: May I ask the stenographer to repeat that. I'm sorry, I did not hear the question.

Mr. Grosman: I didn't finish it. Will you read what I said, please?

(Question read.)

Q. —September 14, 1948, between Milmar Estates and Al Bierman? A. There was some conversation of the fact that in the event things went—

Q. Wait a minute. I just asked you whether there was or not. A. Yes, there was.

Q. Now, was that understanding—whatever it was—reduced to writing? A. I believe it was.

Q. Now, I show you a photostatic copy of a letter—

Mr. Brigadier: Judge, would you use DME-26, please, then we won't have to do this again.

Q. —photostatic copy of a letter dated September 14, 1948, marked DME-26, addressed to Bill Miller's Riviera, signed Milmar Estates by Samuel Marcus, President, Attest: Robert J. Schwartz, Secretary. It concerns (931) the rent to be charged to Bill Miller's Riviera in the event of a default on the contract of September 14, 1948. A. I remember a conversation pertaining to this.

Q. Was that agreed on, as shown in that writing? A. Well, I didn't read this. I signed it. But it evidently was.

Q. You didn't read it? A. I didn't read it, no.

Q. Did you sign it on September 14, among the other documents that were signed? A. That was signed. That's one of the papers Mr. Schwartz gave me to sign.

Q. And you signed it? A. I signed it.

Colloquy

Mr. Brigadier: The only correction I would like to make, Judge, is that you said this thing says that in the event of a default on the contract of September 14th. It doesn't say that. You know that yourself, don't you, sir?

Mr. Grosman: Well, now, I will read the exact wording then there won't be any question about it.

Mr. Brigadier: The last paragraph.

Mr. Grosman: I thought I was giving you the substance of this because it is in evidence.

(932) Mr. Brigadier: I don't want to make an issue of it, but the fact is that there is a mistake in the paper, and I thought the Judge ought to know it isn't as simple as that. At the top it is referred to as September 14, but in the last paragraph it is referred to as the contract of purchase dated September 3rd. And if your Honor will look at the exhibits you will see it was originally typed September 3rd. The "3" is crossed out and the "14th" is put on top.

I didn't want to be bound by your statement as to what was in this exhibit, because it wasn't just what you said it was.

Mr. Grosman: All right, I am sorry.

Mr. Brigadier: Beyond that, I have no objection.

Mr. Grosman: The first paragraph refers to the agreement, September 14, '48. I admit that the last paragraph refers to a contract of purchase dated September 3, 1948. Correct?

Mr. Brigadier: That's it.

Mr. Grosman: Now, will you also stipulate that there is no such thing as a contract of purchase dated September 3, 1948.

Mr. Brigadier: I won't stipulate anything of the sort, because the testimony of Judge Lieberman is (933) that they met on the third and agreed on the

third—or, rather, on the 2nd—that, therefore, they received their instructions to draw these documents, that they were then drawn the following day, on the third, which is altogether different, of course, from the testimony this witness has given.

Mr. Grosman: What I mean is that there is no document that may be termed a contract of purchase bearing the date September 3, 1948.

Mr. Brigadier: I won't stipulate, because the documents will speak for themselves as to what happened on September 3rd.

Mr. Grosman: All right. The man says he won't stipulate. I can't make him.

Q. Now, was there a lease dated September 14, 1948, executed and placed in escrow with Judge Lieberman? A. I believe there was.

Mr. Grosman: Have you the lease?

(Document handed to counsel by the Clerk.)

Q. I show you a lease dated September 14, 1948, between Milmar Estates, a New Jersey corporation, and Bill Miller's Riviera, Inc., a New Jersey corporation, marked Exhibit DME-30, and ask you whether that was executed on September 14, 1948, among the other documents? (934) A. Yes, it was.

Q. And this lease, was that agreed upon that day, and the terms discussed, and all that business? A. Yes, it was.

Q. When was it prepared? A. I don't know when it was prepared.

Q. Was it ready when you got there on September 14th? A. It was.

Q. Did you read it over? A. I did not.

Q. Why not? A. I relied upon my attorney to carry—
Q. Did you sign it? A. I believe I signed it.
Q. At whose request? A. At Mr. Schwartz's request.

The Court: Are you sure you signed it?
The Witness: I see my signature on there.

Q. When I say "you"—in what capacity did you sign? A. Let me see the signature on there.

The Court: I see Milmar Estates, Inc., William Miller, President, and Bill Miller's Riviera, (935) Inc., William Miller, President, and R. J. Schwartz, Secretary.
The Witness: I signed it here as Sam Marcus, President of Milmar Estates, Incorporated.

Q. Is that 'Sam Marcus' there? A. That's right.

The Court: Anything wrong with your eyes?

Q. Is that your signature? A. That's my signature, yes.
Q. All right. It looks like 'William Miller'.

The Court: It certainly does to me.
Mr. Grosman: But if you look at the two signatures, one under the other,—
The Court: Well, you know better than we do. Is that your signature?
The Witness: Yes, it's my signature.
The Court: Milmar Estates, Inc.
The Witness: Sam Marcus, Milmar Estates, Inc.
The Court: It certainly looks like William Miller.
Mr. Grosman: Well, they spent so much time together the signatures begin to look alike.
The Court: Too bad they don't think alike. Suppose we take a five minute recess, gentlemen.

(Short recess.)

Samuel Marcus—Defendant—Recalled—Direct

(936) AFTER RECESS

By Mr. Grosman:

Q. Now, Mr. Marcus, I show you a document which I think is in evidence.

Mr. Brigadier: What marking do you have on it?
Mr. Grosman: P-21 I have on here.
Mr. Brigadier: DM-E-15.

Q. DM-E-15, dated September 14th, addressed to William Miller's Riviera Inc., signed Milmar Estates Inc., Samuel Marcus, president. Was that executed—the original of that executed on September the 14th, 1948, if you know? A. I am not definite about this.

Q. It is dated September 14th, 1948? A. It is dated September 14th, yes.

Q. Will you read the contents to yourself and tell me whether that represents one of the agreements made on that date. A. If I recall correctly this is something we spoke about during our conversations before we entered into this agreement. Should I tell the conversation?

Q. Yes, go ahead.

Mr. Brigadier: Will you fix the time please.

Q. With whom please? A. Mr. Miller.

Q. And the date approximately. A. I would say sometime prior to August 27.

The Court: If you will note, the first sentence (937) in this document says, "This will confirm the understanding arrived at September 2, 1948."

The Witness: Well, I didn't have any conference—well, it could be possible—I didn't have any conference with anybody as I recall but it is possible that date may be right. It might be earlier, I don't know.

At the time the discussion was strictly that Mr. Kevelson was going to buy 625 shares of stock, and Mr. Miller said to me, "Well, Sam, now, supposing this guy puts up this $30,000 and walks out on the proposition. Don't you think I am entitled to a cut there?"

I said, "I think you have got something, Bill. I will give you your percentage share of what you would get as if you owned your stock. You have an option on 37 and one half percent of your stock, and you will get 37 and one half percent credit against your note, and then he said, "Of course, that will also include the return of my note in case I want you to keep the stock."

I said, "Definitely you can have your note if you don't want your stock. I will keep the stock and give you back your note." That was the basis of our understanding, then when the deal was pending just Mr. Kevelson buying 625 shares of stock from me.

Q. Now, this writing as far as you know was signed on that day? A. It is my signature and whether I signed it that day. I (938) can't say with definiteness.

Q. Let me ask you, Mr. Marcus, when you left that conference room in Mr. Schwartz's office on September 14, 1948, did you take away any documents with you or did you leave them with Mr. Schwartz? A. Everything was left with Schwartz except all Mr. Schwartz gave me was an escrow receipt to take with me.

The Court: Is that the only escrow receipt?

The Witness: Which one is that? That is itemized—supposed to be—one of those things.

The Court: I guess that is Judge Lieberman's.

Q. I show you an escrow receipt dated September 14, 1948, marked DME-7, and ask you if that is the receipt

you refer to or a copy? A. Yes. This is the paper Mr. Schwartz gave to me.

Q. That is all you took with you out of the conference room? A. No, I also took with me a black box, a corporation type of box that is generally where you generally have stock books and minute books in the box, and this box was laying there and I put that under my arm because I always held possession of that and I took that back with me.

The Court: You mean a corporation outfit?
The Witness: A corporation outfit.
The Court: Of Milmar?
The Witness: That is right, yes.

(939) Q. Now, did you take the books of account of Milmar Estates, Inc., with you? A. I never had the books of account of Milmar Estates.

Q. Did you? Then, of course, you didn't take them with you? A. That is right. I mean I never had the books of Milmar Estates.

Q. All right. Now, do you know how the figure 625 shares of Milmar Estates, Inc., came to be inserted? A. Yes.

Q. In paragraph two of this receipt, DME-7? A. Yes.

Q. How? A. When all the papers were signed and Miller was—I don't know whether I asked him or Mr. Schwartz asked him to produce his money. He took an envelope out of his pocket and there was a check for $10,000 and $10,000 in cash, and I first objected to cash entering in this transaction, but then when I was assured that it was perfectly o.k., I could deposit it in the bank and the source would be satisfactory, and Mr. Schwartz said, "You got to take cash because it is legal tender," and then I said to Mr. Miller— There is something missing here. He said, "Sam, will you step outside with me a minute?" I went

outside and went into another room. He said, "Sam, Mr. Lieberman—Mr. Bierman promised to send me up a certified check for your $50,000 note and your interest. (940) Mr. Bierman took sick and he has promised me it will be up here in a couple of days. Now, I got this Mr. Kevelson waiting. Don't hold up the deal for a mere trifle. This means a lot to me. I got a good deal worked out—"

The Court: With Kevelson?

The Witness: With Kevelson. "Kevelson is a very wealthy man. He likes the Riviera. He is going to put a lot of money into the Riviera. He has offered me $500 a week salary," and we kept on, and I said to Mr. Miller, "Listen Bill, I have had your promises and balogna so many years—I have loaned you every dollar I have saved in the last 30 years." I said, "I want nothing to be done with this stock here unless I get cash on the line."

He tried to plead with me that it would disrupt the deal and I still wouldn't budge. After about fifteen or twenty minutes of conversation we walked back into the room and we told the lawyers, "The deal is for 625 shares."

Q. That is how the numeral 625 came to be inserted? A. I presume so.

Q. In paragraph two of this receipt? A. I presume so.

Q. How about the stock of Bill Miller's Riviera, Inc., can you tell me how the numeral 50 came to be inserted? In paragraph 7? A. Well, if I am not mistaken there was a conversation that took place where Bill Miller to help convince me or something (941) or other offered to put up the balance of his Riviera stock in escrow so that in the event of a default or something I could have all the Riviera stock. There was some conversation as to that and frankly

just what was done I don't know. I know there was a conversation pertaining to his willingness to—

Q. There were some certificates of Bill Miller's Riviera, Inc., up in escrow with Schwartz? A. 51%.

Q. These 50 were they to be part of that escrow stock or in addition to it? A. Frankly, I don't know what the attorneys did in these things. All I do know is that there was conversation that Miller would put up the balance of his Riviera stock so as to secure me so that he knows in case of default everything would be coming back to me.

Q. Now, let me get this straight, Mr. Marcus, what was the final deal between you and whoever you dealt with that day with respect to the sale of your stock? A. The final definite deal was that I was selling 625 shares to a Mr. Kevelson and Miller was representing Mr. Kevelson at that time.

Q. How much were you to get for 625 shares? A. It was a total agreed price of $140,000.

Q. How was that made up? A. It was made up by the contract price, I think, of $125,000 and I believe another $15,000 note which Mr. Miller gave me (942) after he spoke to Mr. Kevelson over the telephone.

Q. $140,000, that was the price for 625 shares? A. Yes, sir.

Q. How about the $50,000 due to you on your note from Miller? A. Well, Miller at that time told me, he told me that Kevelson doesn't want anybody as partner who might be owing any big money like that, and Miller definitely told me he must have the return of the note and that was the conversation. He said, "Marcus, you have got the stock. Give me the note and we are all quits."

Q. Did you retain the stock, the 500 shares of stock that had been ear-marked for William Miller? A. I did.

Q. You surrendered the note? A. I surrendered the note.

Samuel Marcus—Defendant—Recalled—Direct

Q. That is covered by that escrow receipt you identified here this morning? A. That is correct.

Q. Did you have the stock, the 500 shares of stock with you? A. I did.

Q. Have you this stock with you now? A. I do.

Q. Produce it (witness does so).

Mr. Grosman: Stock certificate number one, William (943) Miller—that is Milmar Estates, Inc.—nine shares of stock to William Miller. Certificate Number 10, 116 shares Milmar Estates to William Miller. 125 shares Milmar Estates, Inc., in name of William Miller—

Mr. Brigadier: Will you give the certificate number?

Mr. Grosman: 11. Number 12, 125 shares of Milmar Estates stock to—in the name of William Miller. Number 13, 125 shares of Milmar Estates stock in the name of William Miller. All of these certificates are endorsed in blank by William Miller, and they total 500 shares of stock. I ask that they be marked in evidence.

Mr. Brigadier: No objection.

The Court: You had those with you at the closing?

The Witness: Yes, your Honor.

The Clerk: DM-26, five stock certificates of Milmar Estates, Inc.

(Marked DM-26.)

Q. Did you exhibit these certificates to anyone on the day of the closing, September 14, 1948? A. What I did—

Q. Did you? A. Well, I did not particularly exhibit those to anycne.

Q. All right. Go ahead tell me in your own way. A. What I did, when they called for my stock certificates I had them all together in an envelope, mine and Miller's.

I (944) took out all the certificates and I separated mine from Miller's, and I had five or six of them. They were all done in the presence of everybody there. I picked out my certificates, endorsed them in blank on the back, turned them over to Judge Lieberman, took the other certificates, put them back in the envelope and put them back in my pocket.

Q. Where was this done? A. Right on the desk where Mr. Miller, Judge Lieberman and Mr. Schwartz were present.

Q. Will you tell us for the benefit of the Court where all these papers were signed? Was it a desk, a table or what? A. I believe it was a table, something similar to that table right down there, like that (pointing).

Q. Indicating the court room table, this flat table? A. Something smaller than that.

The Court: You call those library tables.

The Witness: A library table, yes.

Q. What sort of room was this table in? A. A regular office.

Q. What was it a conference room, library or what? If you remember? A. Frankly, I don't remember.

Q. Now, in addition to the stock ear-marked for Marcus—

Mr. Brigadier: Ear-marked for whom?

Q. For Miller— A. I had my own stock.

(945) Q. Consisting of how many shares? A. 625 shares.

Q. Did you produce those? A. I did.

Q. And what did you do with them? A. I turned them over to Judge Lieberman.

Q. In the presence of whom? A. In the presence of all— Mr. Miller, Mr. Schwartz.

The Court: You heard him say what he did. He took them all out of an envelope and separated them.

Samuel Marcus—Defendant—Recalled—Direct

Mr. Grosman: I want to know who he handed them to.

The Court: He said Judge Lieberman.

Where is Schwartz's stock by the way?

The Witness: I didn't have Schwartz's stock.

Q. Had you purchased or acquired Schwartz's stock at that time? A. I had not.

Q. Now, you told us something about a set of stock certificates that were signed on September 14, 1948. A. Yes, sir.

Q. What happened to those certificates? A. Frankly I have not the slightest knowledge of them. I had lost complete—after all the commotion, fighting and yelling and hollering—I am a nervous person and neurotic and I was pretty well overwrought. I just wanted to get out of there and I—we all completely forgot about them. I (946) don't know what happened to them.

Q. You say that those stock certificates were prepared when you first went into the place. A. I don't remember when they were prepared. All I know is I was told when I first came in that they were straightening out the stock book list and would I sign a few certificates.

Q. And you signed? A. And I signed.

Q. Do you remember being asked about that same subject on your deposition examination? A. I do.

Q. Do you recall what answer you gave? A. I told them I did not recollect signing any certificates that day.

Q. Now, when did you call to mind this fact that you did sign? A. Only when they were produced to me, when they were produced to me at my deposition. It simply stunned me momentarily. I realized I had signed them. I knew they were my signatures.

Q. Now, was there any understanding that in the event of a default or—I withdraw that—Was there any understanding between you and Miller and your representatives

that any part of the new stock certificates signed on September 14, 1948, was to be turned over to Miller? A. Absolutely not.

Q. Did Miller pay anything for any stock certificates on (947) that day? A. He did not.

Q. Or at any other time? A. That is it?

Q. Your answer is what? A. I mean he did not at any other time.

Q. Was it explained to you by anyone that in the event of a default 625 shares of new stock issued and signed by you on September 14, 1948, was to be returned to you while 50% of that stock issued on September 14, 1948, was to be given to Miller? A. No one said a word about that.

Q. Did you ever agree to any such thing? A. I did not.

Q. Will you produce the stock certificates please that were signed on September 14, 1948.

Mr. Brigadier: They are all in evidence, Mr. Grossman.

Q. I show you stock certificates to order of Samuel Marcus BME-19A for 500 shares of Milmar stock. It bears number 17. Do you remember signing that? A. I do not—I do now.

Q. On September 14th? A. I do.

Q. I show you additional certificates all of them made out to Samuel Marcus on that date. They bear numbers 18, 19 and 20 and they are marked Exhibit 19B, 20A and 20B and ask you whether you signed the certificates on September 14, 1948? (948) A. I believe I did.

Q. To your knowledge were they ever delivered— A. They were— –

Q. Wait a minute—to William Miller? A. They were not.

Q. How do these certificates happen to be in circulation, if you know? A. I do not know.

Samuel Marcus—Defendant—Recalled—Direct

The Court: Let me see those.

Q. Was Al Bierman present at a meeting of September 14, 1948?

The Court: No, he wasn't. Is that right?

The Witness: He was not.

Q. Was his absence explained by anyone? A. In my conversation with Miller, Miller had told me Al Bierman was sick.

The Court: He said Bierman was ill?

The Witness: During our conversation he told me that Al Bierman was ill and that was why—

Q. Now, were resignations of the officers of Bill Miller's Riviera deposited with Mr. Lieberman or Judge Lieberman that day? A. I believe they were.

Mr. Grosman: May I call the Court's attention to the exhibit, receipt ME-7, escrow receipt issued by Judge Lieberman?

(949) The Court: Yes, I have a photostat of that.

Q. Yes. Referring to the top "Re Bill Miller's Riviera, Inc.," and paragraph one refers to the resignation of officers and directors of Bill Miller's Riviera, Inc., was there some talk about whether or not the stock deposit, the stock of Milmar deposited with Judge Lieberman was to be voted? A. There was some talk about that and I—

Q. What was agreed? A. I believe it was agreed that the stock would not be voted.

The Court: Is that written anywhere in these documents?

Mr. Grosman: Yes, your Honor, it is in one of these documents which I will find in a moment.

Q. Was there a document given to you wherein that statement was contained that the stock was not to be voted? A. I don't recall. I know that there was conversation about it. I don't recall whether any such thing was reduced to writing.

The Court: I think I recall that Judge Lieberman in his testimony admitted that there was such a writing, but they voted anyway in order to continue the corporation activities.

Mr. Brigadier: It is in evidence. All you have to do is locate it.

The Court: It is ME-6, I think, what you are looking for. (Paper handed to Mr. Grosman.)

The Court: Yes, it is. I have a photostat of it.

Q. I show you a letter marked DME-6, dated September 14, (950) 1948, signed William Miller, addressed to Milmar Estates, Inc. I direct your attention to the second paragraph which reads as follows: "I further agree that until a certain contract of purchased dated September 14, 1948, shall have been paid in full that I will not vote said stock without the written consent of Samuel Marcus."

The first paragraph, which is short, reads as follows:— "This is to confirm our understanding that I will deposit with Abraham Lieberman, Esquire, at least 50% of all of the stock of Milmar Estates, Inc.," and then there is added in the margin in ink "and 50% of Bill Miller's Riviera, Inc., which shall consist of my own and Al Bierman's," initialed Robert J. Schwartz, R. J. S. Is it R. J. S.? A. I think so.

Q. And A. L. A. Yes.

Q. Now, do you know whether the stock deposited with Judge Lieberman was voted? A. I believe it was.

Q. How long after? A. I don't have any—

Q. After September 14, 1948? A. I wouldn't know of my own knowledge.

Samuel Marcus—Defendant—Recalled—Direct

The Court: I think the crucial question is, did you ever consent in writing to them—to Miller voting your stock?

The Witness: I did [illegible] our Honor.

Q. Or anybody else voting your stock? (951) A. I did not.

Q. You say, I believe, it was voted? A. Yes.

Q. Now, you heard the testimony of Mr. Kevelson and Mr. Miller given in this court room with respect to that subject? A. I recall it.

Mr. Brigadier: Is he to be asked to act as judge to decide what the testimony means. The testimony has been heard by your Honor.

The Court: He admitted that it was voted. Judge Lieberman was frank enough to admit that it was voted.

Mr. Grosman: I merely asked the question—

Q. Did anyone ask your permission to vote that stock? A. They did not.

Q. You never gave it? A. That is right.

Q. Now, I show you a writing on the stationery of the Hotel Charlotte, Charlotte, North Carolina, dated 9-12-48, signed by Al Bierman, addressed to "Dear Bill." Did you ever see this document before? A. Yes.

Q. Where did you see it? A. I think Mr. Miller gave this to me at one time, telling me that this authorized him to appear for Mr. Bierman.

Q. September 12, 1948? A. That is correct.

Q. Now, you recall a telegram being produced at the (952) September 14, 1948, meeting? A. I believe someone produced a telegram, yes.

Q. Do you know why the telegram was produced in view of the writing? A. I really don't know.

Samuel Marcus—Defendant—Recalled—Direct

The Court: Is that in evidence?

Mr. Brigadier: It is in the depositions, but it is not in evidence.

Mr. Grosman: I offer this in evidence.

The Clerk: DM-27, writing dated 9-12-48.

(Marked DM-27.)

Q. Now, were there some mortgages discussed on September 14, 1948? A. There were some discussion about mortgages. I really don't know what was done about them.

Q. I show you Exhibit DME-13, which is a chattel mortgage given by Al Bierman and William Miller to Milmar Estates, Inc., on the chattels of Bill Miller's Riviera, Hudson Terrace, Fort Lee, New Jersey, dated the 14th of September, 1948, signed Al Bierman, William Miller, and ask you whether you remember this exhibit being executed and delivered on that day? A. I have no knowledge of this exhibit at all.

Q. Do you remember whether or not the matter of giving a chattel mortgage on the assets of the Riviera were discussed that day? A. There was some discussion about mortgages, but what was (953) done I don't know.

Q. You were there? A. I had a lawyer there handling it and I don't know.

Q. You relied on your lawyer? A. I relied on my lawyer, what he was doing.

Q. I show you Exhibit DME-12, which is a statutory mortgage on real estate dated September 14, 1948, given by Al Bierman and William Miller to Milmar Estates on property at Fort Lee, Bergen County, New Jersey, signed, Al Bierman, William Miller, executed and acknowledged and taken by Abraham Lieberman, a master in Chancery of New Jersey, that is the acknowledgment of William Miller. The acknowledgment of Al Bierman was taken by a notary public of Virginia.

Samuel Marcus—Defendant—Recalled—Direct

Do you remember this mortgage being discussed? A. There was discussion.

Q. And executed? A. There was discussion of mortgages to be given to me for my security, and that is all I remember. I don't know what was finally done.

Q. Were these mortgages— A. I don't know anything about these mortgages. I don't know what was finally reduced to writing. All I know is there was discussion that I was to receive some kind of security for the stock I was selling to Kevelson.

The Court: Wait a minute. Weren't you paid for that stock you sold to Kevelson?

(954) Mr. Grosman: Not on the 14th.

The Witness: No, sir. I only received $30,000.

The Court: The balance.

The Witness: There was some talk. I don't know what was finally done.

Mr. Grosman: Did you have a question, Mr. Brigadier?

Mr. Brigadier: The judge got the answer to my question. I didn't know what he was saying either.

Q. You say there was some talk about giving you mortgages? A. That is right.

Q. You are not familiar with these two mortgages, one a chattel mortgage DME-13, and the other a mortgage on realty, DME-12. Now, I ask you to look at the real estate mortgage, DME-12, given by Bierman and Miller to Milmar and ask you on what property this mortgage was given? A. This appears to be the property owned by Milmar Estates.

Q. And occupied by Bill Miller's Riviera? A. Occupied by Bill Miller's Riviera.

Q. Do you know how it came about that this mortgage was given by Bierman and Miller to Milmar on property

owned by Milmar? A. I have not the slightest idea of the legal—No, sir, I do not.

Q. I thought maybe you knew. A. I don't know.

Q. Nobody else seems to know. I thought maybe you knew. (955) A. I don't know.

Q. Now, what security were you to have for the sale of your stock? A. From what I understood from conversations I was supposed to have a mortgage, that Mr. Kevelson was to execute a mortgage in my favor, just what the mechanics was to be I don't know, but I was to get sufficient security for the sale of my stock to him. Just what was finally accomplished I don't know.

> The Court: Did you understand that Mr. Kevelson would give you a mortgage?
>
> The Witness: Mr. Kevelson was the buyer, and I definitely didn't trust Mr. Miller's signature on any papers so my instructions were to my attorney that I would like to get some substantial person, and I felt that Mr. Schwartz was taking care of it properly for me, that I was properly secured.

Q. Kevelson was not present at this meeting? A. He was not.

Q. And you had never met him up to that point? A. I had never met him but I did draw a report on him.

Q. I didn't ask you that. A. Oh, I am sorry.

Q. At the meeting of September 14, 1948, you received how much on account of your stock? A. On the 14th I received $20,000.

Q. And you have received ten before that, making thirty in all? (956) A. And I received ten before that, that is true.

Q. Was any part of the money paid to you on September 14, 1948, deposited to the account of Milmar Estates, Inc.? A. Yes, sir, it was.

Q. How much? A. $10,000.

Q. And what happened to that money? A. I later withdrew that money.

Q. About how much later? A. About four or five days later, six days I think, on the 20th.

Q. You withdrew— A. I withdrew $10,000 from Milmar Estates.

Q. And appropriated that money to yourself? A. I did.

Q. Why was that done? A. Well, if I am not mistaken, they gave me a check made payable to Milmar Estates so I had to deposit the check to the Milmar account.

Q. Did Miller and Bierman know about this deposit that you have now spoken of? A. I believe they must have known about it.

Q. Who handed you the check for $20,000? A. There was no check for $20,000.

Q. Well, for $10,000? A. $10,000, Mr. Miller did.

Q. That check was made out how? (957) A. Payable to Milmar Estates.

Q. You deposited that to Milmar Estates. A. I did.

Q. On the 14th? A. No, I deposited it on the 17th.

Q. And you withdrew it again? A. And I withdrew it on the 20th.

Q. Over your signature? A. Yes, sir.

Q. As what, president? A. As president of Milmar.

Q. So that you did act as president of Milmar Estates after September 14, 1948? A. I did.

Q. Have you the deposit slip showing the deposit of that money to the account of Milmar Estates, Inc. A. I do.

Q. Have you got it or did you give it to me (looking)? A. I believe you should have it among your papers.

Q. All right. I will find it.

Mr. Brigadier: That I can't help you with, judge.

Mr. Grosman: I know.

Samuel Marcus—Defendant—Recalled—Direct

The Court: Did you notice on the closing date that the check of $10,000 instead of being made to you was being made to Milmar Estates?

The Witness: I didn't notice it when I received it.

(958) The Court: You didn't?

The Witness: Frankly, I don't recall right now whether I paid any attention to it or not. All I know is that when I got back to the office I saw the check was payable to Milmar and I deposited it to Milmar, and when I left that meeting I always felt I was still president of Milmar; I didn't question it when I got it.

The Court: Was it Mr. Kevelson's check?

The Witness: I don't recall whose check it was, your Honor.

Q. I show you deposit slip to the account of Milmar Estates, Inc., in the Public National Bank and Trust Company in New York, dated September 17, 1948, for $10,000, with a notation on it, "B. M. Riviera, payment on account of contract September 14, 1948," and ask you what that represents? A. That represents a $10,000 deposit. I think that "B. M. Riviera" might mean that the check came from Bill Miller's Riviera, because my secretary as a rule, when she deposits checks for me generally marks alongside a duplicate copy so I am not definite, your Honor, but it is possible.

The Court: It appears so.

The Witness: It appears so, yes.

Q. In whose handwriting is that slip made out? A. That is my secretary.

Q. Are these the $10,000 that you referred to as having been given to you on September 14th, 1948? A. That is correct.

(959) Q. Which you deposited to the account of Milmar Estates, Inc., and then subsequently withdrew. A. I do.

Samuel Marcus—Defendant—Recalled—Direct

The Court: What was the date deposited?
Mr. Grosman: September 17, 1948.

Q. Who was your secretary who made these notations? A. Miss Paternitte. Her name now is Mrs. Maginn, I believe.

The Court: Shall we adjourn for lunch. It is a quarter of. Two o'clock.

(Recess.)

AFTERNOON SESSION

(960) SAMUEL MARCUS, resumed the stand.

Direct examination by Mr. Grosman (continued):

Q. Mr. Marcus, I direct your attention to the agreement of September 14, 1948, marked DM-22, and ask you whether you authorized the making of any—or let me ask you this. Can you tell us whether this agreement, Exhibit DM-22, was in this condition on September 14, 1948, when it was given to you? A. Yes, sir; it was.

Q. Did you receive this agreement or was it given to your counsel? A. It was given to my attorney.

Q. Mr. Schwartz? A. Mr. Schwartz.

Q. Now, thereafter did you authorize any changes in this agreement, particularly paragraphs five and ten? I show you DM-5, in evidence, direct your attention to the insertion in ink, paragraph five "up to fifty percent." Did you authorize anyone to insert those words "up to fifty percent" in paragraph five? A. I did not.

Q. Or in paragraph ten, the words "at least fifty percent" did you authorize anyone to insert those in the agreement? (961) A. I did not.

Q. Did anyone ask you for permission to insert them in the agreement? A. They did not.

Q. On September 14, 1948, or subsequent? A. They did not.

Q. Did Mr. Robert Schwartz, your attorney, call you up a week or ten days after September 14, 1948, and speak to you concerning the insertion of these words in the agreement, DM-22? A. He did not.

Q. And you say you didn't authorize it? A. I say it.

Q. When did you first learn that these words had been inserted in the paragraphs named in this agreement? A. When I visited your office one time, Judge Grosman, and you showed me some papers, some type of affidavit, and you asked me to read it over, and I spent time with you reading it, and I suddenly read the photostatic copy of the contract attached, and I reached that paragraph there, and I suddenly said to you, "Judge Grosman, there is something wrong here. Although—I am definite that this is not part of our contract."

(962) Mr. Brigadier: Will you fix the date of this. I don't object to the hearsay part, but I'd like a date.

Q. Can you tell me approximately when that was, if you know? A. Well, it's very difficult. No, I don't. It was during a visit to your office when you showed me some type of papers.

Q. Well, now, did you make more than one visit to my office? A. Yes, sir; I did.

Mr. Brigadier: I am willing to take your statement as to the date.

Mr. Grosman: I don't know the date. If I knew it I would be glad to give it to you.

My recollection is—I won't swear to it—that it was some time after you filed an affidavit in which there was a copy of this agreement annexed.

Mr. Brigadier: You mean the receivership?

Mr. Grosman: I think in connection with that receivership. That is my best recollection.

The Court: What about the other interlineations that are in that agreement, Mr. Marcus? There are other interlineations. Did you notice those?

The Witness: Well, I believe all of those were already done when I arrived there, because I (963) don't recall any corrections being made on the contract at my visit there.

Q. Take a look at this contract. You see the insertion "twelve hundred and fifty" in the first 'whereas' paragraph. Was that put in before execution? A. I don't recall.

Q. The initials "A. L." and "R. J. S." A. I don't recall whether they were put in before or after.

Q. Now, the bottom of paragraph 2, on page 2, you have a statement to this effect, "Time is the essence of this contract. The chattel mortgage shall contain a clause providing for a fifty percent release after every $25,000 shall have been paid." What does that refer to? A. Frankly, I can't remember just what the conversation was with reference to that.

Q. When you obtained your file from Mr. Robert Schwartz, your then attorney, who did you take it to? A. I took it direct to Mr. Roth.

Q. And from there? A. From there Mr. Roth and I went out together to your office.

Q. And you delivered the file to me? A. Mr. Roth delivered the file to you.

(964) Q. Now, did you at any time see in that file any more copies of this contract, DM-22, than the one which you gave to me? A. I never examined the file. I delivered the file completely intact to Mr. Roth.

Mr. Grosman: May I have the other contract?

(Document handed to Counsel.)

Q. Which contract do you say is the one that was finally executed on September 14, 1948; was it DM-22—

Mr. Brigadier: Judge, there isn't any dispute between us that the one executed on September 14th did not have these insertions in it. Our own testimony is that they were done afterwards. The only issue is whether or not they were done with his authorization. He testified it wasn't, Lieberman testifies it was. That's the issue.

Mr. Grosman: All right. That being so, I won't ask him anything further about these.

Mr. Brigadier: I was going to ask you, are you going to question him about these remaining interlineations?

Mr. Grosman: He says he doesn't know too much about them, that he relied upon his attorney.

Q. Now, have you given us all of the checks or notes received by you for the payment of money to (965) Milmar or to the Riviera? A. I believe I have.

Q. What is this? A. This is a note for $5,000 that a friend of mine, Murray Sass, had given them a check for it, and received this note, which was never paid, and which subsequently I made good to Mr. Sass. And he returned this note to me. I have the note.

The Court: Who is the maker of that note?

Mr. Grosman: The maker is Bill Miller's Riviera, Inc., J. R. Hoffman, Comptroller, New York, July 31, 1946, $5,000, six months after date, to Murray Sass.

While I have this marked will you look at these checks, please?

Samuel Marcus—Defendant—Recalled—Direct

(Documents handed to the witness.)

Mr. Grosman: Do you want to see this?

Mr. Brigadier: The only question I raise, Judge, is this included in your counterclaim?

The Court: No.

Mr. Brigadier: If it is not, I don't see its relevancy. I object.

Mr. Grosman: Except this, your Honor—

The Court: Why do you want it?

Mr. Grosman: It shows how much money this (966) man contributed to these enterprises before he became obnoxious.

The Court: Well, that's a Riviera obligation, isn't it?

Mr. Grosman: Yes. They are interchangeable. We have a suit against the Riviera. But his dealings, both with the Riviera and Milmar, were through Miller.

Mr. Brigadier: If it is offered simply to show that, and it is not offered as the basis of any claim, I have no objection.

Mr. Grosman: I am not offering it as the basis of a claim at this time.

The Court: All right.

Mr. Grosman: I may ask at a later date for leave to amend a suit against the Riviera to include it, but I am not doing it at this time.

The Clerk: DM-29, note for $5,000 dated July 31, 1946.

(Received and marked Exhibit DM-29.)

Q. Now, have you examined these checks? A. I have.

Q. What do they represent? A. They represent loans that have been unpaid by the Riviera, made by me.

Q. To the Riviera? (967) A. To the Riviera.

Q. At whose request? A. At Mr. Miller's request.

Q. And are these the notes upon which you are suing the Riviera now? A. That's the checks upon which we are suing the Riviera; yes, sir.

Mr. Brigadier: Are these the ones that are set up in your schedule?

Mr. Grosman: That's what he says.

Mr. Brigadier: No objection.

The Clerk: DM-30, six checks and one note.

(Received and marked Exhibit DM-30.)

Q. I show you a number of checks and receipts of the Imperial Sign Corporation, the checks made to that concern, and ask you what these checks represent? A. These checks represent a guarantee I had made to the Imperial Sign Company when the sign, Bill Miller's Riviera, was placed up on there, and it ran about $4,500, and I guaranteed this account, and when the Riviera didn't pay it, why, I paid the man.

Q. And are these made the subject of your suit against the Riviera? A. I think they are.

Q. Is that one of the items? (968) A. I think we have included that, yes.

Mr. Grosman: Do you want to see these?

Mr. Brigadier: I have no objection to them going in.

The Court: Did you ever make a demand on Mr. Miller and the Riviera for the repayment of—

The Witness: Well, I

The Court: Don't interrupt me.

The Witness: I'm sorry, sir.

The Court: You do the same thing to your own lawyer. Did you ever make a deman on Miller or the Riviera for the repayment of all these moneys which you claim you paid for it?

The Witness: I made constant demands and occasionally I got some repayment made. Mr. Hoffman would come over every once in a while and bring me a check—something—payment on account, and kept always promising me and I'd go out—promising more. I'd go out to the Riviera, and plead with Mr. Miller to give me some money. Some time he'd give me a thousand dollar check, and always complaining he's got creditors, and problems, and I can wait for my money. After all, I had to see the Riviera going along—

The Court: Don't tell me that again. I have heard that many times already.

(969) Did you ever keep your own books on your relationship with Miller or the Riviera, your own books?

The Witness: No, sir; I didn't.

The Court: You mean you relied on checks and notes exclusively?

The Witness: I relied on my checks as receipts and I relied on Mr. Hoffman. That year Mr. Hoffman was my accountant.

The Court: Yes, you told me that about fifty times.

The Witness: And Mr. Hoffman told me that the books of the Riviera reflected all my loans and I had nothing to worry about. He was taking care of it.

The Court: And you believed him.

The Witness: And I believed him; yes, sir.

The Court: All right. That's enough.

(Documents handed to Counsel.)

Mr. Brigadier: I don't want to total the checks. I am assuming it is the same amount. I have no objection.

Mr. Grosman: All right.

The Clerk: DM-31, checks given to and receipts given by Imperial Sign Company, in evidence.

Samuel Marcus—Defendant—Recalled—Direct

(Received and marked Exhibit DM-31.)

(970) Q. Now, Mr. Marcus, my attention has been called by Mr. Brigadier to the fact that in addition to the documents which you have identified as having been signed on September 14, 1948, there are some more signed on that day signed either by you or Miller. I show you Exhibit DME-11. Read it, please, and tell me whether you have any distinct recollection of having signed that on that day. A. Frankly, it is my signature, but I don't have any particular recollection of the contents.

Q. I show you DME-17, signed by William Miller. Do you have any distinct recollection of that paper being discussed or signed on September 14, '48? A. Yes, I recall a conversation pertaining to this.

Q. Now, what was the conversation pertaining to that exhibit? A. At the time Miller told me that he was going to remain and get a salary of five hundred dollars a week. I felt that I should be entitled to a little profit on my shares of stock which I was selling. I told Miller I had invested a great deal of money with him over there, never got any interest payments on any of my loans, loans not being repaid, and I thought if he was going to be so well fixed with a five hundred dollar a week job, why, I should be entitled to a little bit more on my (971) stock. And that is the time he called up Mr. Kevelson. And what their conversation was, I don't know, but Mr. Miller came back and said, "All right, I will sweeten the deal with $15,000."

Q. Did you ask him for $15,000 additional? A. I don't recall whether I asked for that amount, or whether he offered that amount. But I know it was acceptable to me at the time.

Q. I show you Exhibit DME-27, and ask you whether you have a distinct recollection of having signed that document? A. I have no recollection in particular of this document at all.

Samuel Marcus—Defendant—Recalled—Direct

Q. Now, this document provides that in the event of default—I better read the whole thing. "September 14, '48. Mr. William Miller, Fort Lee, New Jersey. Dear Sir: This is to confirm our understanding regarding a certain note which you have executed on September 14, '48, in my favor. In the event that the contract dated September 14, 1948, for the sale of Bill Miller's Riviera, Fort Lee, New Jersey, is not fulfilled, then and in that event the undersigned agrees to release you from the terms of said note." A. Yes, I recollect that now. I recollect that, yes.

Q. Did you agree to release him from the note? (972) A. That's right. Mr. Miller said that—

The Court: Is that the $15,000 note?

The Witness: The $15,000 note, yes.

The Court: You could have mentioned the $15,000 note right in the memorandum.

The Witness: Yes. That's right. I recall that now. I had agreed—

Q. All right. Now, you refer now to the $15,000 note? A. To the $15,000 note; yes, sir.

Q. Not to the $50,000 note? A. Not to the fifty, no.

Q. I show you Exhibit DME-10, dated September 14, '48, signed by William Miller, and ask you whether you have a distinct recollection of Mr. Miller having signed that document, on that day? A. I don't particularly have any recollection of this document.

The Court: Well, you did say, though, that you had seen a written authorization before and you were wondering why he sent them a telegram, too.

Mr. Grosman: That was something else.

The Witness: That was my written authorization that I had.

Mr. Grosman: There was a handwritten note.

(973) The Court: Oh, yes. I saw that one, too.

Mr. Grosman: On stationery of the Southern Hotel.

Q. Now, I show you DME-23, which purports to be your resignation as an officer and director of the corporation effective immediately. Do you recall having signed that? A. It's my signature, but I don't recall signing it.

Q. I show you DME-24, which purports to be a resignation of Robert J. Schwartz. Do you recall that being signed by Robert Schwartz on that day? A. I do not.

Mr. Grosman: Now, does that cover all the exhibits?

Mr. Brigadier: I think it does, Judge. I think it covers them all.

Q. I show you a photostat of an exhibit marked DM-228, May 11, 1954, initialed "EPL", letter from you to Robert Schwartz, October 1, '48— A. I didn't write that letter. It's my signature, but I didn't write the letter.

Q. Well, how did your signature get on this letter? A. Mr. Schwartz wrote that and had me sign it.

Q. Oh, I see. I see what you mean. You mean (974) the handwritten part of the letter, the body of the letter, is not in your handwriting. A. That's correct.

Q. But the signature is. A. That's correct.

Q. You affixed your signature? A. That's right.

Q. It refers to a mortgage on the Riviera, Fort Lee, New Jersey, which is in your name. Was there such a mortgage? A. I don't believe so.

Q. Well, there was a chattel mortgage that you identified this morning. A. I thought there was something in my name, but we haven't found anything in the file.

The Court: He said he understood the mortgages were to be in his name, but they turned out to be in Milmar's name. Is that right?

The Witness: That's correct. Yes, sir.

Mr. Grosman: All right. I'll ask that this be marked.

Samuel Marcus—Defendant—Recalled—Direct

The Clerk: DM-32, photostat of a letter dated October 1, 1948.

(Received and marked Exhibit No. DM-32.)

Q. Now, Mr. Marcus, was there a time when you (975) made up your mind to rescind this whole transaction? A. Yes, sir; there was.

Q. And did you authorize me to ascertain for you where you might make a tender of the moneys that you had been paid on account? A. Yes, sir.

Q. What do those moneys amount to that you have actually received? A. I believe I have received the total of approximately ninety thousand dollars, but whether or not they were all payments on the contract, I am not certain.

Q. Now, is that all the moneys that you received from anyone in connection with the transaction of September 14, 1948? A. No, I believe—

Q. And the loans that you claim to be due you? A. No, I believe we received an additional amount of money, a payment made on that note of Bill Miller's. I believe we received part payment on that.

Q. You say the note of Bill Miller. There are two notes, aren't there? A. The $15,000 note that was made out on September 14th.

Q. How much did you receive on account of that? A. I don't have my accurate figures available right now. Possibly seven or eight thousand dollars.

(976) Q. Now, did you know where you might find Miller, Bierman, for the purpose of making this tender? A. I did not.

Q. Did you try to find out their whereabouts? A. We did.

Mr. Grosman: Will Counsel—

Mr. Brigadier: Oh, we'll stipulate, Judge Grosman, that we received from you—

Mr. Grosman: A notice?

Mr. Brigadier: Yes. I want the date, however, of that—that is most important—and the contents of it. Do you have a copy?

Mr. Grosman: I have one here, yes, somewhere. If you have it, you might produce it. The original, of course, is on file.

The Court: Yes, I saw it in the pleadings.

Mr. Brigadier: Then that would show the date of the service on us. That date is very important.

October 22, '54 is when we were served with this paper. You say it is on file?

Mr. Grosman: I think it is on file, Mr. Brigadier.

Q. Do you now tender yourself willing to return this money that you mentioned? A. I do.

(977)-Q. Did you ever receive word as to where you might go for the purpose of making this tender to Miller and Bierman, or whoever else had paid it to you? A. I did not.

Mr. Grosman: Now, Mr. Brigadier, may I ask you whether or not your clients are prepared to accept the return of this money at this time?

Mr. Brigadier: I don't know that I have to respond to it. But if I do, the answer is no.

Nor do we concede that this constitutes a valid, legal tender.

Q. Do you know whether at the time you sought to ascertain the whereabouts of Miller and Bierman for the purpose of making the tender which you refer to, whether either of these men were in New Jersey? A. I do not believe they were.

Q. Do you know where Miller was? A. To the best of my knowledge, by hearsay—

Mr. Brigadier: Let the record show that they were in Las Vegas.

Samuel Marcus—Defendant—Recalled—Direct

Mr. Grosman: Wait a minute. Did you get Mr. Brigadier's statement?

Mr. Brigadier: Is this what you are referring to, this date?

(978) Mr. Grosman: Yes, approximately that time.

Mr. Brigadier: It was served on me October 22, 1954. Just hold it a minute. Maybe I can get a stipulation.

(Discussion off the record.)

Mr. Brigadier: All right. It is stipulated that they were not in New Jersey on October 22, 1954.

Mr. Grosman: All right.

Q. Did Milmar Estates, Inc., a New Jersey corporation, ever make any demands or claims upon you subsequent to September 14, '48? A. They did not.

Q. Now, did you ever have any conversation with Miller regarding the amortization payments on the Marden mortgage? A. Yes, I believe we had conversation on that.

Q. It had been originally five thousand dollars a month? A. That's correct.

Q. And reduced to two thousand? A. No, I think we had it reduced to three thousand dollars.

Q. Now, after it had been reduced was there any conversation between you and Miller respecting the increase of those payments? (979) A. Yes, there was.

Q. What did Miller tell you? A. Miller told me that Mr. Marden had been in the night before—

Mr. Brigadier: Could you fix the time on this? This is also very important.

Q. Approximately what time was this? A. This would be either late—

Q. Was it before September 14, 1948? A. Yes, before September 14th.

Q. How long before? A. It would either be late August or early September, within that period.

Q. Now, what did he tell you? A. Miller told me that Mr. Marden had been in the night before, a little bit drunk. He said, "You know how people talk, Sam, when they're drunk. Marden told me not to expect any further reductions of the mortgage payments."

Q. Meaning what? A. Meaning that after the first of the year, why, the mortgage payments would be back to five thousand dollars per month.

Q. Now, did Miller tell you whether or not Bill Miller's Riviera, Inc., would be able to meet those (980) payments? A. Mr. Miller said to me, "Sam, you know how things are. You can't expect any more rent from me for the rest of this year."

Q. And did you rely on that statement? A. I did.

Q. Now, what else did he tell you, if anything, respecting what would happen if Marden demanded the restoration of the payments to five thousand dollars a month? A. He said, "You very well know, Sam, this business can never pay that type of an amortization. And you haven't got any more money to put into it. You had better take what you can, because, believe me, I am your friend. You have got a big investment here and I feel sorry for you. I am a man that can take care of himself. I'm an actor's agent. I've got a number of acts which I make a good commission on."

The Court: I think you told us all that.

Q. Did he say what would happen? A. Yes, he did.

Q. To the property? A. Yes, sir; he did.

Q. Tell us about that. A. He said, "You know very well we won't be able—" (981) or "—you won't be able to meet the mortgage payments and Marden will foreclose on the mortgage. Frankly, that's what I think he's after."

Q. And did you rely on that statement? A. I did.

Q. Was it true that you could not meet the increased amortization payments out of your own pocket, if they were increased to the original amount? A. That's true.

Q. Were you influenced by that statement in agreeing to sell your holdings in Milmar? A. I was.

Q. Now, do you know whether those statements were true that were made to you by Miller? A. They were not true.

Q. How do you know that? A. I spoke to Mr. Marden.

Mr. Brigadier: I object, if your Honor please, to what Mr. Marden may have said. The documents will show that what this man is testifying to is not true, the documents signed by Mr. Marden.

Mr. Grosman: Now, if your Honor please, I object to that statement.

Mr. Brigadier: Well, you must have copies of them, Judge.

(982) Mr. Grosman: Please. When you get around to showing by documents that Mr. Marcus is not telling the truth, you may do so.

Mr. Brigadier: I promise you I will, Judge.

Mr. Grosman: But to blurt out in open court here, from your counsel table, that he is not telling the truth is—

Mr. Brigadier: I objected to what he said Marden said to him. That's hearsay. I said let the documents speak for themselves or bring Marden in.

Mr. Grosman: All right. Maybe we will do that.

Mr. Brigadier: I have him under subpoena. He will be here.

Mr. Grosman: All right. Fine.

Mr. Brigadier: Mr. Schimmell, I mean.

Q. Now, after September 14, 1948, when you signed this contract that has been referred to as, I think DME-5 and

DME-22, do you know whether Miller, Bierman and Mr. Kevelson took over the affairs of the Milmar Estates?

The Court: He answered that. Don't answer it again.

Q. Now, Mr. Marcus, you told us that you elected to rescind the contract of September 14, '48, to whatever (983) extent you are able to do so. Now, in the alternative, if the Court should find that you are not entitled to rescission, do you demand the payment of $35,000 deposited in the registry of this court on account of the sale of your stock? A. I do.

Q. Plus the balance due on the $15,000 note from Miller? A. I do.

Q. Plus the money due for the loans to Milmar? A. I do.

Q. On which you are suing. Now, you claim that in addition to the 625 shares of Milmar Estates, Inc. which you deposited with Judge Lieberman, you are entitled to all the remaining stock of Milmar Estates, Inc., with the exception of—what is it?—twenty shares belonging to Bierman? A. That's correct.

Q. And you ask for a judgment declaring that you are the unconditional owner thereof, do you? A. I do.

Mr. Brigadier: Do I understand correctly, Judge, you mean this is apart from any rescission, is that right?

Mr. Grosman: This is in the alternative.

(984) Mr. Brigadier: No. Wait a minute. Apart from whether he is entitled to rescission, you say that he seeks the ownership of these shares?

Mr. Grosman: That's right, a declaratory judgment that he is the owner of all the remaining shares except those owned by Bierman.

Q. Now, if the Court should find that you are bound by the contract of September 14, '48, DME-22, even though

you are not named as a party to the contract, have you elected to declare a default because of the fact that the payments stipulated in that instrument were not made to you in accordance with the terms? A. I do.

Q. Of that contract? A. I do.

Q. And I think you told us that you are claiming from Milmar Estates, Inc., $46,801.23 under the fifth count of your complaint for money loaned or moneys paid on account and for the benefit of the corporation, is that correct? A. That's correct.

Q. Now, with respect to the stock of the Riviera, Bill Miller's Riviera, Inc., a New Jersey corporation, which you say was deposited with Judge Lieberman on September 14, '48, to guarantee against default payments, (985) you claim that you are entitled to that stock? A. I do.

Q. By reason of the default? A. That's right.

Mr. Grosman: Your Honor, may we have a few minutes' recess so that I can check these pleadings to see if I have covered everything?

The Court: Yes, sir. We will take a five-minute recess.

(Short recess.)

(986) Mr. Grosman: I want to ask Mr. Marcus one question.

By Mr. Grosman:

Q. Mr. Marcus, it has been testified here that on September 14, 1948, it was you who suggested that the old stock of Milmar, Inc., be discarded, or disregarded, and that new stock, a completely new issue of stock be made.

The Court: He denied that already, Judge.

Mr. Grosman: I just want to make sure.

The Court: Didn't you already tell us that is not so?

The Witness: That is not so, yes, sir.

The Court: I think in connection with that, that somebody suggested that because he didn't have the stock with him that he suggested, "Well, let's get new stock out and don't worry about it."

Mr. Grosman: Yes.

Q. Now, did anything like that ever happen? A. No, sir, it did not.

Q. Did Mr. Schwartz and Judge Lieberman tell you that such an arrangement was not the proper way to handle the transaction, and did you nevertheless insist that it had to be done that way? A. I did not.

Q. Now, did you subsequently buy some stock in Milmar Estates from Robert J. Schwartz, your attorney? (987) A. I did.

Q. How much stock did you buy? A. 125 shares.

Q. And did you agree to pay him a definite price? A. I did.

Q. How much? A. I think the total amount was $7,875.

Q. Do you recall when that was? A. I believe the actual time when we agreed on a purchase was somewheres around November of 1948.

Q. Are you certain that it was after September 14th, '48? A. Oh, definitely.

The Court: Now, have you tied up all the loose ends, Judge?

Mr. Grosman: There is one more thing I want to ask him.

Q. Can you tell us, please, how the figure of $7,875 was arrived at for the purchase of Schwartz' stock? A. Yes, sir.

Q. How? A. When Mr. Schwartz came to me and told me that he would like to sell his stock I said, "Bob, I am

presently getting about 70 per cent of my money I have paid for stock and advanced to Milmar and Riviera. There is a total there of (988) close to about $200,000. This $140,000 figure is about 70 per cent. Now, I don't have any hopes of getting any more money for possibly four or five years, because Milmar will have all they can do to pay its mortgage, and there will be no surplus from which to pay loans. So if you want to, and you are interested in selling this stock, I will make a deal with you, I can't pay you right now, but I will start paying you about the 1st of May of next year. And if and when more moneys are paid back to me I will make good to you the balance of your investment.

Q. That is how you arrived at that figure? A. That is correct.

Q. Now, is $7,875 seventy per cent, approximately seventy per cent of Schwartz' investment in Milmar? A. That's correct.

Mr. Brigadier: Judge, do you mind asking him if he has the checks for the payment?

Mr. Grosman: I will in just a moment.

The Court: I may be able to help you.

I notice that part of that $15,000 note that Miller gave you was assigned to Mr. Schwartz, wasn't it?

The Witness: Oh, no, no. I paid Mr. Schwartz complete with my own checks.

The Court: With your own money?

The Witness: All my own checks, yes.

(989) Mr. Brigadier: He produced them in the taking of the depositions, checks payable to Schwartz, checks totalling this amount; that is why I suggested to Judge Grosman that he put those in, because I would have to ask about them later, anyway, and I thought it would be better if they went in now.

We can let it go to Monday.

The Court: Yes, suppose Judge Grosman brings them in Monday morning. He has got them there.

Mr. Grosman: That is all I want to ask of this witness.

The Court: Then we will close for the day now?

Mr. Brigadier: That's right, sir.

The Court: You may step down, Mr. Marcus.

The Witness: Thank you.

The Court: We shall now adjourn, gentlemen, until Monday morning at 10:15 A. M.

(Adjourned to Monday, February 7, 1955, at 10:15 A. M.)

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(990) Newark, New Jersey, Monday, February 7, 1955.

(Hearing resumed pursuant to adjournment.)

(Appearances as previously noted.)

The Court: Are you ready, Mr. Brigadier?

Mr. Brigadier: Yes, I am ready for cross.

SAMUEL MARCUS, resumed the stand.

Mr. Grosman: There is one question I want to ask him.

Direct examination by Mr. Grosman (continued):

Q. Mr. Marcus, you testified that Milmar had advanced to the concessionaires of Bill Miller's Riviera some $19,000, the end of the first season, was it? A. That's correct.

Q. And I show you these notes; what do they represent?

(Documents handed to the witness.)

A. They represent the settlement that I made with the concessionaire. He sued Milmar and we gave him a series of notes and settled.

Q. Why did the concessionaire of Bill Miller's Riviera sue Milmar? A. Milmar had guaranteed the money that the concessionaire (991) had given to Mr. Miller, and the concessionaire, Mr. Markowitz, turned to us for payment, couldn't get it from Miller.

Q. How much had he given Miller? A. He gave Miller originally $50,000.

Q. And how much was due to him? A. There was nineteen thousand some odd dollars balance due him.

Q. You gave these notes—Milmar gave these notes? A. Milmar gave the notes.

Q. $19,000 worth of notes? A. That's correct.

Q. And were they paid? A. They were paid.

Q. They weren't paid by the notes? A. They were paid—Milmar paid the notes.

Mr. Grosman: I want to offer these.

(Documents handed to counsel.)

Mr. Brigadier: No objection.

Q. What do these three papers represent, Mr. Marcus? A. Oh, I think—this is one note that was—we didn't have enough money in Milmar, I think, and it sort of bounced back to us.

Q. What do you mean, "sort of," did it bounce back? A. Yes, I think I didn't have sufficient money in Milmar at that time and this is a protest note which we took care of (992) and paid.

Q. All right. A. And this is just the bank charge for the account, bank charge, and—I don't know what this is. This looks like some bad check, I guess, that was given to us that probably didn't pass through.

Q. Let me see it.

(Document handed to counsel.)

Mr. Grosman: Max F. Dalotsky.

Samuel Marcus—Defendant—Recalled—Cross

The Court: It looks like you deposited a check from him which bounced—

The Witness: Which bounced, yes.

The Court: —charged to your account.

Q. It has nothing to do with this? A. No, it has nothing to do. It may be a check Miller gave me in payment of one of these notes which bounced back.

Q. You are not sure? A. I am not sure what it is.

Mr. Grosman: All right, mark these two, please. This item of $2, bank charge, leave out.

The Court: That's a service charge, I guess.

The Clerk: DM-33, series of 42 documents.

(Received and marked Exhibit DM-33.)

Mr. Grosman: That is all.

Cross examination by Mr. Brigadier:

(993) Q. Mr. Marcus, have you ever employed any name other than Samuel Marcus? A. What do you mean by that, Mr. Brigadier?

Q. I think the question is very simple. A. Will you repeat that?

Q. Have you ever employed—

The Court: You don't have to repeat it. Let him repeat it.

(Question read.)

A. I did.

Q. And what name did you employ? A. The name of Harry Samuels.

Q. And in what connection did you use the name Harry Samuels? A. I used Harry Samuels as a signatory and I used the name as an officer of one of my corporations.

Samuel Marcus--Defendant—Recalled—Cross

Q. And what corporation was that, Mr. Marcus? A. I believe I used that in the Peace Light Corporation.

Q. You used it as the name of an officer? A. Used it as the name of an officer.

Q. Could you tell us why it was necessary for you to use a name other than your own as the name of an officer in the corporation? A. Yes, it was innocent enough. I just didn't want people—business people—to know that I was particularly connected (994) with this organization.

Q. And this organization that you speak of is what? A. Peace Light Company, Inc.

Q. That wasn't a company that operated a night club? A. No, it was not.

Q. It had nothing to do with night clubs? A. No.

Q. It was a business corporation, wasn't it? A. That's correct.

Q. It manufactured a product? A. We did.

Q. It manufactured a religious product, didn't it? A. We manufactured several different types of products.

Q. Among which was a religious object? A. That's correct.

Mr. Grosman: I object to this. It has no bearing on this whatsoever.

The Court: How is it material, Mr. Brigadier?

Mr. Brigadier: I think whether or not he used another name is extremely material, sir, in view of the fact that he has put into evidence two documents that he didn't call to our attention, documents signed by him, under the name of Harry Samuels, and which were put into evidence under the name of Sam Marcus. What I had in mind you will find in Exhibit DM-30.

(995) Mr. Grosman: I have no—

Mr. Brigadier: Let me finish.

Mr. Grosman: I am sorry.

Mr. Brigadier: You will find two checks which were put in evidence Friday as part of a batch showing moneys that were given by Samuel Marcus, you will recall, to Bill Miller's Riviera or to Milmar.

Now, you will find in this Exhibit a check on the account of Associated Photo Products drawn to the order of Sam Marcus, and then endorsed on the back, "Sam Marcus, pay to Bill Miller's Riviera, Sam Marcus." But there wasn't the slightest indication that the man that drew this check on the account of the Associated Photo Products is also Mr. Samuel Marcus —the Harry Samuels.

And there is another check—I guess you have them both in front of you.

So I certainly think, in view of the fact, one, that they have put these into evidence without an explanation, leading us to believe it might be someone else; and, two, that when a man employs an alias I think you have a right to look into this for the purpose of credibility. You do that in all actions, not only criminal, but civil as well.

The Court: I am sure Judge Grosman never noticed that they were signed by Harry Samuels.

Mr. Grosman: I didn't notice it and it doesn't (996) make a particle of difference. Now, whatever name this man may have used for his own purposes, because he may not have wanted competitors to know that he was associated with another enterprise, doesn't make a particle of difference. As your Honor knows, a man may use whatever name he wants—

The Court: As long as he doesn't intend to defraud.

Mr. Grosman: —as long as he doesn't use it for the purpose of defrauding. I don't mind his asking Mr. Marcus as much as he likes about the alises, I am sure Mr. Marcus can explain them, but when he starts go-

ing into what the company manufactures, whether they manufacture religious objects, and all that, I say we are going too far afield.

The Court: Yes, I don't think that concerns us, what he manufactures.

Mr. Brigadier: Only insofar as his prior answer was, sir, that he didn't want it to be known that he was associated with this company. And if this company manufactured, as he himself testified—incidentally, even on direct examination—a product that was of a religious nature—as I understand, it was a religious figure that was lit up—certainly we have a reason to find out what was there about this company that led to the employment of an alias.

But if your Honor feels that I should stop at this point, I am willing to stop.

(997) The Court: He said that the only reason he used it was that he didn't want competitors to know that he was in that company. Is that right?

The Witness: Yes, your Honor.

The Court: Did you have any other motive?

The Witness: No other motive whatsoever. I never drew—I never had a bank account under that name, never drew a penny salary under that name, never used it for any other purpose but just to—not to have my competitors know that I am particularly with that company.

The Court: Are you satisfied with that explanation?

Mr. Brigadier: Yes, for the time being.

The Court: All right.

Q. I then direct your attention to the two checks in Exhibit DM-30—

Mr. Brigadier: Will you please hand those up to the witness?

(Documents handed to the witness.)

Q. You will notice the signature "Harry Samuels, A.P.P." at the bottom of each of those checks? A. That's correct.

Q. And they are your signatures? A. They are.

Q. These are not Peace Light checks, are they? A. No, this is another company check where I used the same (998) name.

Q. I see. So it wasn't only in Peace Light that you were concealing from your competitors your connection with the company, is that right? A. That's correct.

Q. You were also concealing it in relation to Associated Photo Products? A. That's correct.

Q. And that was the reason why you employed the name Harry Samuels in connection with Associated Photo Products? A. I wasn't connected with Associated Photo Products at that time.

Q. Well, then how did you come to draw these checks? A. Mr. Anton, who was the owner of that company at that particular time, found it necessary to go on business trips, and he is a personal friend of mine, we were closely associated in business ventures, he asked me to act as his attorney and sign checks for him. There again, he was in the wholesale photographic business. I was in the retail photographic business. It wasn't feasible for the other retail people to know that I was associated with Mr. Anton and, therefore, I couldn't use my own name and divulge the fact that probably I was associated with Mr. Anton in the photographic business. And that is why I continued to use (999) the name of Mr. Samuels.

Q. I see. Now, this Mr. Anton that you speak of is the same Anton that appears on the books of the Riviera, is that right? A. Yes, that's the same person.

Q. The same Anton. The same friend that you spoke of, whom you had interested in going into the Riviera, is that right? A. He didn't go into the Riviera.

Samuel Marcus—Defendant—Recalled—Cross

Q. Wasn't he a stockholder of the Riviera at any time? A. I had stock issued to him as a bonus or premium, or whatever it is, for the money that he had loaned me, but he didn't go into the Riviera enterprise.

Q. The stock was not his? A. The stock was his.

Q. Well, then, he was a stockholder of the Riviera. A. He was a stockholder.

Q. That's what my question was. A. Okay, fine.

Q. He was a stockholder of the Riviera, right? A. That's correct.

Q. And is this the same Anton that was in Peace Light? A. Mr. Anton—I don't know whether he was in Peace Light. I believe when we were trying to wind up the affairs of Peace Light Mr. Anton appeared as an officer of the corporation, but (1000) he had no connections in there whatsoever. He owned no stock.

Q. Did not appear as a stockholder in Peace Light? A. No, he didn't, that's right.

Q. Now, you were asked, Mr. Marcus, at the outset of your testimony, on direct examination, to list the business enterprises that you were engaged in from January, 1946, down to the present time. Do you remember Judge Grosman asking you that question? A. Yes.

Mr. Grosman: What page are you reading from?

Mr. Brigadier: Page 2 of his direct.

A. Yes, I believe he did.

Q. Direct examination Do you recall this question, "And during that period were you in business from January, '46, down to the present time? Answer: Yes," right? A. That's correct.

Q. "Question: What business? Answer: Well, I had a retail photographic store"—and I wish you would please listen to this carefully—"at 18 East 42nd Street, employed about 50 people. I had a retail photographic store on 136

West 32nd Street, employed about 40 people. I owned and operated the Photo Finishing Laboratories, employed about 30 people. I had a half interest in a concern called the Peace Light Company where we manufactured novelties. And (1001) I had a third interest in a company called Duane Product where we manufactured electric irons, electric cameras and slide projectors."

Do you recall giving that answer? A. Yes, sir; I do.

Q. And then you proceeded thereafter to tell what happened to each of these enterprises, is that right? A. I believe so.

Q. Now, did you give us all the enterprises that you have been in since January, 1946? A. I don't know whether I did or not. I go into so many business deals that I probably—I may have omitted some—a few.

Q. Do you recall now any that you omitted? A. Yes, I had a real estate company called the Factory Surplus Merchandise, Inc.

Mr. Grosman: Factory what?

The Witness: Factory Surplus Merchandise, Inc.

Q. Where was that located? A. That was at 12 Duane Street.

Q. Who was associated with you in that one? A. Mr. Parris and myself, I believe.

Q. Was Mr. Anton in that one? A. Mr. Anton—again we had some difficulty with one of the tenants in there, we wanted to dispossess him, and I (1002) think I had Mr. Anton appear for me as an officer, or director, or something, I don't recall just what the situation was at the time.

Q. Now, any other enterprises that you were in in this interval? A. Oh, I was in another operation, the Photo Sound Studios, a motion picture studio.

Q. Yes. And who was associated with you in that enterprise? A. Mr. Anton and myself.

Samuel Marcus—Defendant—Recalled—Cross

Q. This was the corporation that was convicted, was it not, of manufacturing pornographic films? A. I beg your pardon. I don't think there was any conviction. I personally didn't have anything to do with the operation of the company. Mr. Anton operated the Photo Sound Studios, and he had made a film having some nude pictures in it. They were not pornographic. And the D.A.—at that time there was sort of a drive on there—and I don't know what the settlement of the unit was, because I was never mixed up in it, I had no part of the operations at all, and Anton merely—the Photo Sound Studios merely leased the floor from me, and they set up a studio, and I was a fifty per cent owner, but had nothing to do with the operations. And there was no conviction, as far as I know of. Of course, I really don't know what happened.

(1603) Mr. Anton made a picture, a motion picture, for a client, which was deemed sort of objectionable. It was by no means pornographic.

The Court: You had nothing to do with the criminal part of it?

The Witness: Nothing whatsoever. I had no connection with it whatsoever, strictly Mr. Anton.

Q. You knew that a Grand Jury indictment was returned against the corporation? A. I did not.

Q. You have never known it up to this moment? A. I have never known it up to this moment.

Q. You did not know that Anton and the corporation pleaded to this indictment? A. I did not know up to this moment, sir.

Q. You did not know that—who are Ray Lewis and Oscar Fagin? A. Ray Lewis was somebody employed by Mr. Anton.

Q. And you do not know that Ray Lewis and Oscar Fagin pleaded guilty to the indictment? A. I know nothing

whatsoever of what happened with that—with the operations, or the court actions, or anything at all. I never paid any attention to it.

Q. You were a fifty per cent owner of the corporation? A. Yes, I was.

(1004) Mr. Grosman: May I ask at this time—I didn't want to interrupt Mr. Brigadier—I assume that you have a record of the conviction somewhere of Photo Sound Studios?

Mr. Brigadier: What is the purpose of your inquiry, sir?

Mr. Grosman: Because you seem to make such a big fuss about the fact.

Mr. Brigadier: You can be sure, Judge Grosman, I owe enough respect to the Court not to ask a question unless I have a basis for it.

Mr. Grosman: All right.

Mr. Brigadier: I will not tell you what evidence I have at this moment.

Mr. Grosman: Because if you are going to prove it, I want to check that record, find out whether or not there was a conviction—not against a couple of employees of the corporation, but against a corporation whom you charge that Mr. Marcus had an interest in.

Mr. Brigadier: I didn't charge, he said he had an interest.

The Court: He admits that he had a fifty per cent interest.

Mr. Brigadier: I will put in my proof, Judge Grosman, and you put in yours.

Mr. Grosman: I know that, but when you ask a (1005) respectable man—when you infer that he has been convicted of having something to do with the production of pornographic literature, I think you owe him an explanation.

Mr. Brigadier: If your Honor please, did I say at any time that I asked him whether he had been convicted? I said the corporation, and I then proceeded to list the individuals, Ray Lewis and Oscar Fagin.

The Court: And Mr. Marcus says he knows nothing about that affair, the criminal prosecution.

Mr. Grosman: I want to know whether the corporation was convicted, not some employee. That's what I want to know.

Mr. Brigadier: The corporate defendant was fined $250 on January 15, 1947; and, in addition, another $250 on Count 12 for the production of an immoral show; Evan Anton, director; Ray Lewis, producing manager; Oscar Fagin, cameraman. The fine is marked "paid," according to their records.

The Court: You know nothing about that?

The Witness: I know nothing about it whatsoever. I did know, your Honor—Mr. Anton had told me he was down the D.A.'s office about some picture he made for someone, but he never told me anything at all of what happened, and I haven't the slightest idea—this is the first knowledge that I know there has been a conviction or anything at all.

Mr. Grosman: Now, may I ask where all this took (1096) place, what court?

Mr. Brigadier: When you get to your redirect examination, question him. I think I should be permitted to conduct my cross in my own way.

The Court: I am sure Mr. Marcus can't help you. He says he knows nothing about the outcome.

Q. Now, Mr. Marcus, you told us of the Masarel Realty and you told us about Photo Sound connections. Any other corporation during this period? A. Frankly, it's—

Q. Just a moment. A. I may have—

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IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12073

AL BIERMAN and WILLIAM MILLER,
Plaintiffs-Appellees,

vs.

SAMUEL MARCUS,
Defendant-Appellant and Cross Claimant-Appellant,

and

MILMAR ESTATE, INC., a corporation organized under the rules of the State of New Jersey,
Defendant-Appellee.

AL KEVELSON,
Defendant on Cross Claim-Appellee.

Civil Action (No. 1026-50)

On Appeal from Final Judgment of the United States District Court for the District of New Jersey

Sat Below: Modarelli, U.S.D.J.

APPENDIX TO APPELLANT'S BRIEF

[Volume III—Pages 801a to 1216a]

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Q. Will you hold it a moment? I am sorry. My question was based on a long premise. You mentioned Factory Surplus and Photo Sound. I suggested another name to you, Masarel. A. Yes, Masarel Realty. Masarel Realty Company owned the building where—

Mr. Grosman: No question has been asked of you.

The Court: Wait till he asks a question. How do you spell Masarel?

The Witness: M-a-s-a-r-e-l.

Q. And you were connected with that corporation? A. I am.

Q. Still connected with it? (1007) A. I am.

Q. And what does that corporation do? A. That corporation owns the building that my laboratory is at 424 East 89th Street.

Q. Is Anton or Parris connected with that corporation? A. They are not.

Q. Now, are there any other enterprises that you can think about that you haven't told us about, between 1946 and the present time, the period about which Judge Groman questioned you? A. Frankly, I can't think. I often go into business ventures with people, sometimes it lasts a month, sometimes—

The Court: Don't explain. You can't think of any others?

The Witness: I can't think of any other at this moment.

The Court: Maybe he will refresh your recollection.

Q. Does the name Weimet Film Company, Inc., mean anything to you, Mr. Marcus? A. Yes, sir; it does.

Q. What does it mean to you? A. It is an enterprise—it's an enterprise that I went in in 1945 as a partnership and then in 1947, I believe, we incorporated, and I sold out my interest in that company in 1950, I believe.

(1008) Q. Does the name Weimet Camera Corporation mean anything to you? A. That's the same outfit. They had two names. They operated two different sort of—one was cameras, one was film, or something of that nature.

Q. You didn't recall these names until I mentioned them to you? A. Frankly, I don't know why I didn't recall them, I should, because it is a very important—

The Court: The answer is no, you didn't.

The Witness: No, I didn't.

Q. Yet at this time you are maintaining at this very moment an action in the Supreme Court of the State of New York, you and the 42nd Street Photo Shop, Inc., as plaintiffs, as against Weimet and Company, Inc., Weimet Camera Corporation, and others, defendants, isn't that right? A. That's correct.

Q. An action which you have brought to rescind a transaction involving the sale of stock on the ground of fraud, is that right? A. That's correct.

Q. And also for loans appearing on the books of the company, is that right? A. That's correct.

Q. I show you what purports to be a photostatic copy (1009) of the original complaint, and the supplemental complaint, that you filed in that action, and ask you if that is it?

Mr. Grosman: I object to it as being wholly immaterial to this action. Now, if he wants to show that to attack his credibility, that is one thing, but we are not going to try half a dozen cases.

The Court: I don't know what your purpose is, unless you intend to prove a course of action by this man, that he has instituted many suits along the lines of this one.

Mr. Brigadier: That's right. Not only this one, I am going to show other suits, the same kind of suits,

not only the present one that is before you, and this one, but others that I have yet to bring out. And under the authority of Prof. Wigmore, it is perfectly—

The Court: I know all about Wigmore's rule.

Mr. Brigadier: —permissible for that purpose.

The Court: I have had that before here.

Mr. Grosman: Now, if your Honor please, are we going to go into the details?

The Court: No, only to show that he has brought the same kind of actions, with the same allegations, and Mr. Wigmore says that is admissible.

Mr. Grosman: He has admitted that. Now are we going to get the pleadings in that?

(1010) Mr. Brigadier: Just the complaint to show what the nature of the action is.

Mr. Grosman: He has admitted—

Mr. Brigadier: Just a moment. I want the Court to have the benefit of what he has said in the document as to the nature of the action, otherwise I would have to read the whole complaint to him and say to him, "Is this what you said in this action?" Instead I am offering the complaint itself as a statement of what he does, not only in this action, but in the others I have yet to reach.

Mr. Grosman: You know, he might have been trimmed by a man like Miller in a dozen actions.

Mr. Brigadier: The Court has a right to consider that, according to Mr. Wigmore.

Mr. Grosman: I don't know anything about Wigmore.

The Court: Well, I have had it before here, Judge Grosman. We looked it up at that time and we found it is admissible.

Mr. Grosman: He has admitted that, your Honor, that he brought a suit of that nature.

The Court: Let's not argue about it. You may mark the complaints, and the complaints only.

Mr. Brigadier: Thank you. This is the original complaint and the supplemental. I think we can mark them as one Exhibit.

(1011) Mr. Grosman: Will your Honor note my objection?

The Court: Yes, sir.

The Clerk: DME-46, photostat of complaint and supplemental complaint, Supreme Court of the State of New York.

(Received and marked Exhibit DME-46.)

Q. Mr. Marcus, were you ever connected with the Motion Picture Equipment Company, Inc.? A. Motion Picture Equipment Company, Inc., the name is not familiar to me.

Q. Did you ever bring an action in 1948 against the Motion Picture Equipment Company, Inc., for the equitable rescission of stock purchase agreement on the ground of fraud?

Mr. Grosman: I object to that as being wholly immaterial. He says Wigmore authorized—let him give us the citation.

Mr. Brigadier: The Court has ruled on it. I don't know that I have to give you the citation, but here it is. False claim of a cause of action—Section 340—especially where fraud is charged that you may show the course of conduct in other litigation of a similar nature.

The other is Section 377.

Mr. Grosman: What is the edition?

(1012) Mr. Brigadier: Third Edition.

The Court: There are two sections, aren't there?

Mr. Brigadier: Yes. I gave him both, sir, 340 and 377.

Q. Mr. Marcus, I show you what purports to be a certified copy—certified to by the Clerk of the Supreme Court of New York—of a complaint in an action entitled Manuel Hoffman, and others, including the name Sam Marcus, as plaintiffs, against Motion Picture Equipment Company, defendants, and ask you whether that refreshes your recollection? A. I had nothing to do with this action whatsoever.

Q. This action was brought—

Mr. Grosman: You answered now.

Q. This action was brought without your knowledge? A. This action—I was asked to join in this action.

Q. And did you? A. I put my name down, not knowing even what the action was about.

The Court: Well, that is a very dangerous thing to do, Mr. Marcus.

The Witness: Well—I'm sorry.

The Court: As your own lawyers will tell you, very dangerous.

Q. Do you know what disposition was made of that (1013) action? A. I do not.

Q. I call your attention to a certified copy of an order ordered in this cause, certified to by Mr. Archibald Watson, Clerk of the Supreme Court, and direct your attention to the paragraph on page 4, which reads, "Ordered, adjudged and decreed that the claim of the plaintiffs against the defendant for alleged fraud is withdrawn and the plaintiffs make no claim of fraud." Are you familiar with that? A. I was only a small stockholder in that—

The Court: He didn't ask you that. Are you familiar with that?

The Witness: No, I am not.

The Court: Why don't you answer it?

The Witness: I am not familiar with it.

Mr. Brigadier: I wish to offer this complaint in evidence. And I would like to offer the certified copy, certified to—

Mr. Grosman: Wait a minute before you mark it.

Mr. Brigadier: —certified to by the Clerk of the Supreme Court of New York County, setting forth this provision in this order that I have referred to.

Mr. Grosman: I object to that on the ground that Mr. Marcus said he had nothing whatever to do with these (1014) things.

Mr. Brigadier: Oh, no, he didn't. He said he put his name down.

Mr. Grosman: Put his name down to what?

Mr. Brigadier: To a party plaintiff in this action.

Mr. Grosman: Is he named as a party plaintiff?

Mr. Brigadier: Oh, yes.

The Court: He is. He was asked before it was brought to him.

Mr. Grosman: All right.

Q. You were asked on direct examination about a corporation, 42nd Street Photo Shop, Inc., do you recall that? A. I do.

Q. And that is one of your corporations? A. It is.

Q. And who is connected with you in that corporation? A. No one.

Q. Anton and Parris are not in that one? A. No one was in that corporation but myself.

Q. Now, do you recall an action brought by 42nd Street Photo Shop, Inc., against one Chappelle? A. Chappelle, yes, I do.

Q. C-h-a-p-p-e-l-l-e? (1015) A. That's correct.

Q. And that one you brought in 1952, didn't you? A. That's correct.

Q. And that is an action for the recovery of damages for fraud in inducing a contract for the sale of assets to you—or, rather, to the corporation, is that right? A. Frankly, I don't think that is—the complaint is the man stole $4,000 on me, I am trying to get it back off him.

Q. You didn't charge fraud in that case? A. I don't know what the charge is. My lawyer is handling the case.

Q. I show you a certified copy of the complaint in that action, certified to by the County Clerk of the Supreme Court of New York, and I direct your attention to the second page of that, which says, "Verified by Samuel Marcus, president of 42nd Street Photo, Inc., on the seventh day of November, 1951." Did you verify this complaint? A. I signed that paper on the advice of my attorney.

Q. Well, you know what the word "verified" means, don't you? A. I don't read a paper when the attorney gives it to me to sign it.

Q. You answer my question. Do you know what the word "verified" means? A. I do.

(1016) Q. Sworn to? A. That's correct.

Q. Did you swear to this complaint? A. I signed that wherever my attorney asked me to sign it.

Q. You answer my questions, Mr. Marcus. Did you or did you not swear to it? A. I signed it wherever I was asked to sign.

Mr. Brigadier: If your Honor please, I think I am entitled to a direction that the witness answer that question.

The Court: He doesn't have to answer. You know what the Cases hold. He signed the jurat on that. He is bound by it.

Mr. Brigadier: I offer this in evidence.

Mr. Grosman: May I see it, please?

(Document handed to counsel.)

The Clerk: DME-47, photostat of complaint, New York Supreme Court, marked in evidence.

DME-48, photostat of order dated February 20, 1950, marked in evidence.

(Received and marked Exhibits DME-47 and DME-48.)

The Clerk: DME-49, photostat of document bearing verification date November 7, 1951, marked in evidence.

(Received and marked Exhibit DME-49.)

Q. Mr. Marcus, you now know, do you not, that in addition (1917) to these companies that we have spoken of at this point that there are quite a few others that you haven't told us about? A. I don't know of any in particular. Can you refresh my memory?

Q. You mean you don't know the companies you have been connected with in 1946 other than what you have told us about? A. Mr. Brigadier—

The Court: If you don't, you say you don't.

A. I don't, no.

The Court: Do you keep a list of the companies you are interested in?

The Witness: Well, I guess—

The Court: Yes or no?

The Witness: No, I don't.

The Court: All right. That answers it.

Q. Does the name Safut Trading Company mean anything to you? A. Yes, it does.

Q. What does it mean to you? A. That's a company I have recently went into, within the past few months. It is a new company, recently organized, for the purpose of purchasing war surplus materials.

Q. As a matter of fact, you formed this in May, 1954, (1018) didn't you? A. Frankly, I don't recall exactly the date. We didn't do anything for a while. And we just recently become active and really doing some work in the company. But I am not active in the company at all. I am merely a third partner in the operation.

Q. You are president, aren't you? A. President? No, it is not a corporation.

Q. Aren't you president and treasurer—that isn't the report you gave to Dun & Bradstreet? A. I made no such report whatsoever to Dun & Bradstreet. I don't believe it's a corporation. I think it's a partnership.

Q. And you are a partner; who else is with you in that? A. There is Mr. Sam Futterman and Mr. Aberle.

Q. Now, does the name Tricol Products Company mean anything to you? A. Yes, it does.

Q. What does it mean to you? A. Oh, I think that is back in '42 or '43. We ran a little color company called Tricol.

Q. That's prior to '46? A. That's correct.

Q. All right. I am only going to take you from the period that you testified to, which is '46.

Now, what about Photo Shop, Inc.; is that one of your (1019) companies? A. It is.

Q. You had a number of companies with the word photo shop in it, didn't you? A. Two.

Q. Well, you had this one, Photo Shop, Inc., is that right? A. That's correct.

Q. And then you had Photo Shop 42nd Street, Inc., is that right? A. That's correct.

Q. Now, did you have another Photo Shop for the 44th Street store? A. 44th Street store?

Q. Or in the thirties? A. I didn't have no 34th Street store.

Q. Well, you had a store on 42nd Street, right? A. Right.

Samuel Marcus—Defendant—Recalled—Cross

Q. And that one was operated by Photo Shop 42nd Street, Inc.? A. That's right.

Q. Now, did you have a store on some other street besides 42nd? A. I did.

Q. In the thirties, I think you testified to, didn't (1020) you? A. 32nd Street.

Q. That's right. Now, under what name was that one operated? A. Photo Shop, Inc.

Q. That's the one that I mentioned to you today, right, Photo Shop? A. You mentioned both of them to me today.

Q. But Photo Shop, Inc., is one that you did not mention in the list that you gave to Judge Grosman, is that right? A. He didn't ask me to give him all my ventures. He just asked me what business was I in and I mentioned some of the major businesses I was in.

Q. I see. Now, was Anton or Parris in Photo Shop, Inc., the 32nd Street one? A. They were not.

Q. Were they in the 42nd Street one, Photo Shop 42nd Street, Inc.? A. To the best of my recollections, they were not.

Q. I see. Now, what is Coastal Marine? A. That was another company I was interested in in '43, '44 and '45, which dissolved.

Q. It has been dissolved since? A. That's right.

(1021) Mr. Grosman: May I interject at this point that he did refer to 42nd Street and 32nd Street stores.

Mr. Brigadier: He did. I told you he did, but he didn't refer to the corporation. That's what I am trying to tell you. And the impression is that they were both under the Photo Shop, whereas there are two distinct corporations.

Q. Does the name Pictomart mean anything to you? A. Yes, it does.

Q. Was that one of your corporations? A. Yes, that was another company where we organized for manufacturing of a little novelty toy.

Q. And Parris was connected with you in that one? A. Parris was connected with me in that, that's correct.

Q. What was he, a partner? A. I forget now whether he was a third interest or a half interest. I forget just what our arrangements were there.

Q. Now, does the name Associated Photo Products, Inc., mean anything to you? A. Yes, it does.

Q. Is that another one of your companies? A. Associated Photo Products—will you mention that name again, please?

Q. Associated Photo Products, Inc. A. Incorporated, yes. I was associated in the corporation.

(1022) Q. And that is the one where Anton was in it? A. Anton was associated with me in that operation, yes.

Q. Now, is that in any way connected with Associated Photo Products? A. The corporation took the private ownership over. Mr. Anton was first in business as an individual and then, when he was expanding and things were going good, and he needed more space, he asked me would I be interested in joining with him in a venture.

Mr. Grosman: Will you answer the question?

A. And the corporation took over the private ownership.

The Court: That is all you had to say.

Q. The two checks that you put in evidence, among others, about which you were questioned today, from DM-30, were checks of Associated Photo Products, right? A. That's correct.

Q. Now, at that time, as I understand your testimony, that business—you had no interest in that business, is that right?

Mr. Grosman: He didn't say that.

Mr. Brigadier: Oh, yes. When he was asked why he signed that check he said he did it as an accommodation to Mr. Anton who had to go away.

Q. Isn't that right, sir? A. That's correct.

(1023) Mr. Brigadier: Well, you and your lawyer ought to get together on this.

A. I'm sorry.

Q. You had no interest in that, you were merely accommodating him at the time, was your testimony, right? A. I had the interest of a personal friend, close associate.

Q. You know what I mean, business interest, Mr. Marcus. That's all we are talking about. A. As far as business interest, had no share of his business, if that's what you mean.

Q. No business interest in that Associated Photo Products? A. Other than probably as a creditor.

Q. Let's nail it down to the dates of those checks. In June, 1946, and in July, 1946, the date of those two checks in front of you, did you have any financial interest in Associated Photo Products? A. I am not certain whether or not the corporation was formed, and those checks may be checks, old checks. If before the corporation, I did not have any financial interest, other than as a creditor.

Q. Mr. Marcus, didn't you testify this morning that when you signed these checks you did so purely as an accommodation for Mr. Anton, who was going off on a trip; do (1024) you want to change your testimony now? A. No. I see the check here, without the "Incorporation." Now, if those checks are before the incorporation, then I did not have any interest. If these checks are corporation checks, then I would have had an interest.

Q. But, Mr. Marcus, you are testifying—and you testified this morning—that you signed those checks as an ac-

commodation for Mr. Anton, that's why the power of attorney was given to you, as I understand you, for this bank account, is that right? Isn't that what you testified to? Just answer my question. A. I did. But I saw "Associated Photo Products" here without "Incorporation" after it, and I am taking it for granted that these checks are checks prior to the corporation.

Q. Yes, but, Mr. Marcus, you gave us an explanation, under oath—just listen to me, please—of what you had done and why you had done it. Now, are you saying that what you are giving us was not your knowledge, under oath, but your guess, under oath, as to what you had done? A. Mr. Brigadier, I would like to straighten you out, and straighten out myself. I still tell you, prior to the corporation, Mr. Anton gave me a power of attorney to sign checks for him. If these dates are prior to the incorporation—

The Court: To the date of the incorporation. Now, have you got his explanation?

(1025) Mr. Brigadier: Okay.

The Court: Do you have the date of the incorporation?

Mr. Grosman: May I also point out, they are signed as attorney.

The Court: Yes, I know.

Mr. Grosman: The two checks that I think he is referring to.

Mr. Brigadier: Will your Honor give me a moment to confer with Mr. Kesselhaut? We have assigned each of us certain parts of the case for preparation.

The Court: Yes, they are both signed "Harry Samuels, Attorney," as the maker.

Q. Mr. Marcus, does the name Republic Cab Company mean anything to you, Republic Cab Company? A. Yes, it does.

Samuel Marcus—Defendant—Recalled—Cross

Q. What does it mean to you? A. That's a company where Mr. Hoffman swindled me out of $24,000.

Q. And you were in this company? A. Mr. Hoffman—

Q. Just answer my question. A. —dragged me into the company.

Q. And you were in the corporation, right? A. Yes, sir; I was.

(1026) Q. Were you a stockholder? A. Yes, I was.

Q. Were you an officer? A. I don't remember whether I was an officer. I took no active participation in the company.

Q. And you were swindled out of— A. $24,000.

Q. —by Mr. Hoffman? A. By Mr. Hoffman.

The Court: Mr. Jacob Hoffman?
The Witness: Mr. Jacob Hoffman.
The Court: Your accountant?
The Witness: Yes, sir.

Q. Now, was Mr. Parris in that company? A. He was.

Q. And did he operate the company? A. Mr. Parris went in with Mr. Hoffman and they—Mr. Parris was working there, together with Mr. Hoffman. Then Mr. Hoffman decided he wanted to buy out Parris. And he bought out Parris. He said he couldn't get along with Parris, and he bought Parris out. And after he bought Parris out, he managed to milk the company and do me out of $24,000, my entire investment.

Q. I see. Now—we will come back to Mr. Hoffman in a few moments—does the name Marcus Photo Laboratories mean (1027) anything to you? A. Yes, sir; it does.

Q. What does that mean to you? A. That's a photo finishing laboratory—

Q. I'm sorry. A. —that I had for 35 years.

Q. I don't want to mislead the Court or you. That's a name you did disclose? A. That's right. That's a photo

finishing laboratory. I have been in that business since I left the Army in 1917.

Q. I just wanted to be sure I hadn't misled you. You did disclose that name. I tell you that.

Now, does the name Home Service Sales Company mean anything to you? A. I know the name, but it means nothing to me.

Q. You weren't connected with it? A. No, sir; I was not.

Q. Do you know whether Anton or Parris were connected with it? A. They were not.

Mr. Grosman: I object to that as being immaterial.

Q. Wasn't Home Service Sales Company a subsidiary of Peace Light Company? A. No, that was another company where I got swindled out of by Mr. Goodman, a friend of Mr. Hoffman's.

(1028) Q. Which is the other company, I didn't— A. The Home Service Company.

Q. Then it does mean something to you? A. I had no part of that company.

Q. No, but you said it meant nothing to you. A. I told you I know the name, but it meant nothing to me.

Q. But you were swindled out of money by the company? A. By Mr. Goodman, who was my associate in the Peace Light Company. He organized this company as a side line, on his own, his own trademark, and he took merchandise from the Peace Light Company to his own effect, $10,000 worth.

The Court: Were you swindled out of ten in that one?

The Witness: That's right.

The Court: Home Service Company?

The Witness: This Mr. Goodman, who was my associate in Peace Light and who was introduced to me by

Hoffman, went ahead and started this new company as a side line—

The Court: I heard what you said. Don't repeat.

Q. What about the name Wood Modes, what does that mean to you? A. That's a little machine shop, a wgood-working machine shop that I bought in 1945, 1945 or '46. I bought that company in conjunction with the Peace Light Company to manufacture little wooden racks, library racks, toys and things of that (1029) nature.

Q. That then was really a subsidiary of Peace Light? A. That was a subsidiary of Peace Light, that's correct.

Q. You weren't cheated out of any money on that one? A. No—thank goodness—that's one operation I wasn't cheated. I got the machinery.

Q. Just one question about Mr. Hoffman. He not only was your accountant in Milmar, he was your accountant in every one of these ventures that I have mentioned today, wasn't he? A. All of those ventures originated in '45 and '46, when, to my sorrow, I met Mr. Hoffman.

The Court: Is the answer yes, that he was your accountant?

The Witness: Yes, in '45—in '46 he was my accountant. He wasn't my accountant in '45. Mr. Goodman, my associate in Peace Light, brought in Mr. Hoffman in '45—'43, I think we started the Peace Light Company, in '43 or '44. Mr. Goodman brought in Mr. Hoffman as his accountant in '44, and he continued handling the Peace Light account. And then when my accountant took severely ill and dropped out of practice in 1946, Mr. Hoffman, handling the Peace Light, I asked him to step in and handle my books for me during '46

Q. Isn't it a fact that Mr. Hoffman used to bill you (1030) directly for the services that he rendered as an

accountant in every one of these enterprises that I mentioned today? A. No, it is not a fact.

Q. That you did not receive such bills? A. No, it is not a fact. I sometimes—

The Court: Don't repeat it. You said it is not a fact. That answers it. In other words, that is not true?

The Witness: That is not true.

Q. We will come back to that when Mr. Hoffman shows up with the documents.

Mr. Brigadier: I am saying that because I don't want your Honor to think that I am going to drop this. I have to come back to this, but I need the documents that are in his possession.

Q. Now, Mr. Marcus, I want to direct your attention now to the month of July, 1948, and in particular to the time of your meeting with Mr. Loew. Had you inserted an advertisement for the sale of the Riviera property? A. I did not.

Q. Did you insert any subsequent to the time that you met with Mr. Loew? A. I did not.

Q. You at no time have inserted any advertisement— A. At no time.

Q. —seeking a purchaser for Riviera? (1031) A. At no time for the Riviera.

Q. Now, under what circumstances did you come to meet with Mr. Loew? A. I spoke—there was a very dear friend of mine, Mr. Ike Marks, president of the Keystone Manufacturing Company in Boston. I told—I asked Mr. Marks, one time on his visit with me in New York, whether or not he might be interested—I brought him over to the Riviera as a social evening and I asked him would he be interested in joining me with the venture, that I needed some person with a little more capital, we got a wonderful proposition

here. And he said, "Well, Sam, this is too far away from my businesses, but I do have a good friend of mine who, I think, would be interested." And he told me about Mr. Loew, that he had all kinds of theaters, night clubs, drive-in theaters, and that he is a man who goes in for that type of proposition. I had never met Mr. Loew before and never even knew of him.

One evening about 12 o'clock, when I was home, Mr. Marks called me from Boston, told me that Mr. Loew was going to be in the Latin Quarter that night, and I was to go down and see him, that he had arranged an appointment with Mr. Loew.

I went to the Latin Quarter that night. I met Mr. Loew and Mr. Lou Walters.

The Court: Is that the first time you ever met (1032) Mr. Loew?

The Witness: That's the first time I ever met Mr. Loew.

A. (Continuing) And we sat down and we discussed about the problem. I told him what the exact situation was. I told him—

Q. What did you tell him? A. I told Mr. Loew—

Q. That's what I am asking you about, not all these preliminary things. What did you tell him? A. I told Mr. Loew that I had 625 shares of the property which was mine, that I had 500 additional shares of Milmar property, which was mine, also—Miller was going to buy it, but he didn't buy it, and that I am in a position to sell him 90 per cent of the stock of the Milmar Estates and he asked me what price. I said $250,000.

He says, "What is the mortgage on it?" I said, "To the best of my recollections now, the mortgage is down to roughly about two hundred and twenty-five or two hundred and thirty-five thousand." He jotted those figures down on a pad.

He says, "What about the other 10 per cent of the stock? He says, "I generally like to buy all. I don't want partners in my deals." I says, "The other 10 per cent is owned by an associate of mine, Mr. Schwartz, and I feel certain he will be happy to sell on the same basis."

(1033) Mr. Loew asked Mr. Walters, "What do you think of the deal?" Mr. Walters said, "It sounds all right, if it's so. Why don't you go out and then take a look at the property?"

Mr. Loew said, "Marcus, if what you say is so, we got a deal." We shook hands. "I am going over, look the place over. We will get together in a couple of days."

Q. All right. Now, there is one thing that I am not clear about. What did you say to Mr. Loew, if you said anything, as to why you wanted to sell? A. I was just—I didn't say anything why. I was anxious to get out of the property and get away from my headaches of chasing Bill Miller all around the room for my rent money. I had all I wanted of it. I didn't want to go chasing everybody for nickels and dimes.

Q. Was that your only reason? A. And that was my purpose in wanting to sell.

Q. Was that your only reason? A. My only reason for wanting to sell was because I wasn't getting my rent money promptly from Mr. Miller, and that it was too much of a pressure for me to keep advancing money to the Milmar Company for the amortization of a mortgage, interest and taxes.

Q. Now, you told Mr. Loew that you had 90 per cent of the stock available, is that right? (1034) A. I told Mr. Loew that I had six hundred and—

Q. Just answer my question. A. That's correct.

Q. I don't want a whole speech each time. A. That's right.

Q. Didn't you tell him that you have 90 per cent available for sale? A. I said I could produce 90 per cent of the stock.

Q. All right. And that could be made available for your sale, right? A. That's correct.

Q. Of that 90 per cent you knew that you had 625 in your own name, right? A. That's correct.

Q. There were 500, you said, in the name of William Miller, but which were not owned by William Miller, is that right? A. That's right.

Q. I understand your testimony that at no time was the stock, certificates totaling 500 shares standing in the name of William Miller, ever owned by William Miller, is that right? A. That's correct.

Q. It is your contention, and your testimony, that as to those 500 shares that the reason they were issued in (1035) William Miller's name is because you had given William Miller an option to purchase them, right? A. I hadn't given him any written option.

Q. Well, you gave him an oral option? A. I gave him an oral option that whenever he felt that he would like—like he wanted to buy those things, why, and they were still available, he could buy them.

Q. Then your answer to my question was yes, wasn't it? A. That's correct.

Q. Well, try to answer them yes or no when you can, Mr. Marcus. A. Thank you. I will do that.

Q. So that the 500 shares, I will repeat again, were regarded by you as owned by you, not by William Miller, isn't that right? A. That's correct.

Q. And even though they were issued in William Miller's name, you testified, I think on a number of occasions, that that was done solely because of this option that had been given to William Miller, isn't that right? A. That's correct.

Mr. Grosman: He never said that.

The Witness: I'm sorry.

The Court: I don't recall that he ever used the (1036) word "option."

Mr. Brigadier: Oh, yes. During the recess I will give you the book and page number where he kept using the term—option, option, option. Not once, I will point it out on a number of occasions.

He just testified that he did. But I will show it in the record, in the direct, where he said it.

Mr. Grosman: Now, I don't want Mr. Marcus to be misled. Originally there was no talk of an option.

Mr. Brigadier: I don't want Judge Grosman to testify.

The Court: I will tell you what we will do now. We will take a five minute recess and you find in the direct where he used "option." I have no recollection of it.

(Short recess.)

Q. I direct your attention, Mr. Marcus, to Paragraph 7 of an affidavit made by you on December 21, 1953. That is your signature, isn't it? A. Yes, sir; it is.

Mr. Grosman: Just a moment, please. What affidavit is that?

Mr. Brigadier: Would you tell that to Mr. Grosman?

(Record read.)

Mr. Grosman: Is that annexed to a Pleading somewhere?

Mr. Brigadier: An affidavit you filed.

(1037) Mr. Grosman: I know. We filed a number of affidavits. Is it annexed to a Pleading?

The Clerk: It is in the Pleading file, Judge.

Mr. Brigadier: It is the reply affidavit that Mr. Marcus made in the application for the receivership.

The Court: Filed when?

Mr. Brigadier: December 28, 1953.

Samuel Marcus—Defendant—Recalled—Cross

Q. I direct your attention to Paragraph 7—

Mr. Grosman: May I find it, please, so I can follow you?

Mr. Brigadier: Surely, Judge.

(Discussion off the record.)

Mr. Grosman: Go ahead, Mr. Brigadier.

Q. Have you read Paragraph 7 of the affidavit? A. Yes, sir; I have.

Q. And is it true, as you stated therein, with respect to the allegation in Paragraph 4, "I deny that in September, 1948, William Miller was the owner of any stock of Milmar Estate, Inc. As heretofore stated he was privileged to purchase 500 shares of Milmar Estate, Inc., for $50,000, which privilege he never exercised." Is that right? A. That's the language of Mr. Grosman. I signed that paper.

The Court: Wait a minute. Do you repudiate that, too?

The Witness: No, sir; I don't repudiate it. I (1038) signed the paper.

The Court: He should have paid the $50,000 note, then he would have owned the 500 shares.

The Witness: That's correct, your Honor.

Mr. Brigadier: And you had given him a privilege to purchase it.

The Court: All right. It's my fault. I didn't understand it that way.

Mr. Brigadier: It is also in the deposition. I don't think I should go through it, should I? He used the word "option."

The Court: No.

Mr. Brigadier: We will wander off and we will spend days just taking these collaterals.

Samuel Marcus—Defendant—Recalled—Cross

Q. Now, I want to come back to this conversation with Mr. Loew. You said at that time—just let me review this very briefly, because we got off on this collateral of the word "option"—that you had 625 shares in your name, right? A. That's correct.

Q. And then the 500, which was the privilege—or earmarked or optioned for Miller, right? A. That's correct.

Q. But which you owned, right? A. That's right.

Q. That made a total of 1,125, right? (1039) A. That's correct.

Q. Then there were the 125 that Bierman—that Schwartz owned, is that right? A. That's correct.

Q. And that's the 10 per cent you speak of, right? A. That's correct.

Q. That you did not have? A. That's right.

Q. But which you thought you would be able to get, is that it? A. That's correct.

Q. So that you contemplated a deal in which you will give him the full 100 per cent? A. No, sir; I told him that if he insisted upon the 100 per cent I thought—I thought—that Mr. Schwartz might join in the sale with me.

Q. Then that would change the price, would it not; it would increase the price? A. I told him that I thought Mr. Schwartz might be glad to take the same proportionate share for his stock and it is my belief that I could obtain 100 per cent for him.

Q. I am not clear about this, Mr Marcus. The figure of two hundred and fifty thousand was to cover only the 90 per cent? A. Approximately 90 per cent of the stock, that's correct.

(1040) Q. So that if Schwartz' stock was added later there would have to be an additional price paid on that, isn't that right? A. I had nothing to do with Schwartz' stock. I told him—

The Court: That's not the question at all. You un-

derstand the question. A. Yes, there would be an additional amount paid for Schwartz' stock, surely.

Q. And as I just understood you a moment ago, I think you said apportioned on the same basis, meaning in relation to the figure of two hundred and fifty thousand for 90 per cent, that you would estimate the same value for the 10 per cent, is that right? A. We didn't make any deal. I wasn't bargaining for Schwartz' stock.

Q. Nothing was said about the other 10 per cent. You are the one testifying, Mr. Marcus, not I. I want to know what happened. A. All I said was that an associate of mine owns the other 10 per cent and I believe he might be willing to sell on the same basis.

Q. Yes. Now, that 10 per cent, which was 125 shares, right, Mr. Marcus? A. That's correct.

Q. —that represented the investment that Schwartz had (1041) made of how much money? A. Eleven thousand some odd dollars. I don't recollect what it was.

Q. Bierman had invested $20,000 in this corporation, hadn't he? A. Bierman invested nothing with me and in the corporation.

Q. Didn't you issue stock to Bierman? A. No stock—I gave Mr. Bierman 20 shares of stock from the 500 shares of stock I was holding for Bill Miller.

Q. You gave him—

The Court: Wait a minute. Let's stop right there, please. You gave Bierman 20 shares for his $20,000—

The Witness: No, your Honor.

The Court: —out of Miller's stock?

The Witness: Miller said to me one day—

The Court: No, wait. Let's not start quibbling again. Read back his answer, please.

(Record read as follows: "No stock—I gave Mr. Bierman 20 shares of stock from the 500 shares of stock I was holding for Bill Miller.")

The Court: That's right. So then you only could have sold 480 shares of Miller's stock, is that right? What were you going to do with Bierman's 20. I want to know.

The Witness: Nothing. We didn't—

The Court: Nothing. All right. That's all I want (1042) to know.

The Witness: It wasn't mentioned at all.

The Court: Nothing.

Q. Mr. Marcus, in the answer and counterclaim that you filed in this action don't you concede that Mr. Bierman owns 20 shares of stock? A. Yes, sir; I do.

Q. You do, don't you? A. I do.

Q. So there is no dispute about that, is there? A. No. dispute.

Q. So you couldn't have been selling that 20, right? A. That's right, I wasn't selling that 20 shares.

Q. I direct your attention to page 73 of the deposition, of December 19, 1951, and I ask you whether you didn't testify as follows: "I think Mr. Miller gave me a check for Mr. Bierman for the purchase of 10 per cent interest in the Milmar Estates—"

Mr. Tepper: What page are you reading from?

Mr. Brigadier: Seventy-three.

Mr. Grosman: I have it here. I don't find it. What line?

Mr. Brigadier: Fifteen.

Mr. Grosman: Oh, you are reading the middle of the paragraph. All right, go ahead.

(1043) Q. "I think Mr. Miller gave me a check for Mr. Bierman for the purchase of 10 per cent interest in the Milmar Estates. Question: What was the amount of the check? Answer: I believe it is $20,000."

And then the further question at the bottom was: "Was Bierman paying 10 per cent cash for his 10 per cent interest? Answer: I fr[illegible] don't recall just what was put in. I don't recall what [illegible] actual total was that was put in. Question: But you do know that he put in the twenty thousand, right?"

Mr. Grosman: Now, if your Honor please, there is no dispute about that.

Mr. Brigadier: Just a moment.

Q. I call your attention to this answer on page 74: "All I do know is that Mr. Miller told me that he had promised Mr. Bierman 10 per cent of the stock for $20,000."

Do you recall testifying to that? A. I believe I said that. I also corrected myself.

Q. I direct your attention to page 169 of the deposition—

The Court: Don't go so fast. They have to find it.

Mr. Brigadier: Let me give them a date. December 26.

Mr. Grosman: We have the page.

Q. "Question: Mr. Marcus, I would like to clear up (1044) your conception of the ownership of stock in Milmar Estate, Inc.

"Now, will you tell us who from the beginning were the owners, or who from the beginning up to this time was the owner of the stock of Milmar Estate, Inc.?

"Answer: I was the owner of 1,125 shares and Bob Schwartz was the owner of 125 shares at the inception. At a later date, upon Miller's request to me, and as a favor to Miller, he asked me would I release 20 shares of stock from the 500 shares which he was to purchase from me so that he could give it to Al Bierman who had loaned him $20,000 for this venture."

Did you so testify? A. I think I did.

Q. Well, you don't doubt that this is a correct transcript of what you said? A. I just said I think I did.

Q. I see. Now, therefore, of the 500 that were privileged, or earmarked, or optioned, there was only 480 actually that you could give to Mr. Loew, is that right? A. That's correct.

Q. Now, I want to ask you this. If Mr. Schwartz received for his eleven thousand odd dollars 125 shares, or 10 per cent interest, and you state here of Bierman having a 10 per cent interest, why is it that you only gave Bierman (1045) 20 shares instead of 125?

The Court: I knew that was coming.

A. I believe I corrected my testimony later on and told you that I didn't know what the arrangements Mr. Bierman had with Mr. Miller. I was just thinking I remembered something was mentioned to that effect. Mr. Miller testified that he promised Bierman 10 per cent of his shares of stock. So that neither one—I don't recall—and I straightened out my testimony and said that I don't know what arrangement Mr. Bierman had with Mr. Miller.

Mr. Grosman: Now, your Honor, may I point out that Mr. Brigadier only read a portion of the man's answer. If you will read the bottom line on page 169 and the top of 170, which is the balance of his answer, I think you will find an explanation for what he is trying to—

Mr. Brigadier: I think when it comes to redirect, Judge Grosman can point to anything that will substantiate his contention.

The Court: Do you want it done formally that way?

Mr. Brigadier: No, for this reason: There are literally dozens and dozens of places in the depositions which are in contradiction of testimony he has given.

If I have to stand here in front of you and read from the deposition, I could spend three days just reading from the deposition.

(1046) My thought in the matter, frankly, was this, that when I got through, I would make a formal offer of the various portions of the deposition. Frankly, I don't even think you have to stay in the courtroom, because I can read them to the stenographer, and you can read them and study them at your leisure. It is going to take, frankly, I have estimated easily a matter of several hours to read into the record statements made in the deposition that run contrary to statements that were testified in direct examination. And I thought my suggestion would be a good one.

The Court: Let's do it the most expeditious way.

Mr. Grosman: Now, that's all right, Judge. Of course, I don't agree with Mr. Brigadier about this contradiction business. But if he is going to take a statement out of context, we want to know it.

Now, if you will look at the bottom of page 169 and the top of page 170, the balance of his answer, you will find that his first statement is explained by the latter statement.

The Court: What date was that taken?

Mr. Grosman: One hundred and sixty-nine, your Honor, the last line.

The Court: One hundred and sixty-nine?

Mr. Grosman: Yes. "Upon his asking for this favor (1047) I granted it to him, and let him have 20 shares of stock from the 500 shares of stock which I owned and was holding for him, subject to his paying me $50,000 for it. Thus the balance of the stock that I have right now is 480 shares of stock, which I will turn over to Miller any time he wants to pay me $50,000, plus the interest he owes me."

Mr. Brigadier: Which is just what I said was the testimony in the deposition, but was not the testimony on direct, as to the conversation with Loew. I don't say this contradicts it, it supports it.

Mr. Grosman: I don't agree.

Mr. Brigadier: My immediate question was for him to explain, if he could, why only 20 shares were issued for the $20,000 that Bierman put in. Let me follow that up with this question.

Q. Mr. Marcus, the stock of Milmar was par value stock, was it not; it was stock that had a par value, isn't that right? A. I believe it's so.

The Court: What do you mean, you believe, you don't know?

The Witness: Well, frankly, I am not too acquainted with the corporation. I believe they had stock in those things.

Mr. Brigadier: Let me have the original he put (1048) in evidence, the stock that he said he gave Lieberman.

The Court: Let's not waste time. I have got a photostat here. It is printed so large a blind man can see it.

The Witness: Yes, par value $100, that's correct.

The Court: Now, do you, if it's so?

The Witness: Yes, sir.

The Court: Very good.

Q. Now, in computing the number of shares that you gave to Mr. Schwartz, the 125 shares, wasn't it on the basis of $100 per share? A. It was not.

Q. On what basis was it? A. I don't know what the basis was. We figured out—

The Court: You better say who "we" are.

A. That was the time when Mr. Schwartz—at the organization, when the corporation was formed.

The Court: Who was there?

The Witness: Mr. Schwartz was there, Mr. Hoffman was there, Mr. Miller was there, and I was there.

The Court: So there were four there. Now, you figured out what?

The Witness: And I don't recall just what the subdivision was. It was agreed that Mr. Schwartz would have 125 shares for the money he was putting in. At that (1049) time it was a case of people having money was entitled to more for their money than people who didn't have money. And we worked out a basis of that kind, who was entitled to what. And because of the fact that Miller didn't have any money at that time, Mr. Miller agreed on that particular basis that Schwartz would have 125, that I would have 625, and that he would have the privilege, or option, whatever you want to call it—giving me $50,000 to buy this stock. I don't know how it was worked out at that time.

The Court: You mean mathematically?

The Witness: Mathematically, yes, your Honor.

Q. But you do know that it ended up with Bierman getting only 20 shares for $20,000? A. It ended up with Bierman getting no shares at that time.

Q. Well, eventually—you admit to the fact that Bierman got 20 shares.

The Court: He means at the organization meeting.

The Witness: Several years later, I believe.

The Court: Subsequent.

The Witness: Yes, that's right.

Q. And that is the way it ended up, with Bierman 20 shares for the twenty thousand, right? A. Bierman didn't give me $20,000.

Q. Bierman's twenty thousand went into the purchase of the property, did it not? (1050) A. Miller gave me $20,000 that went in towards the purchase of the property.

Q. And you saw it was a check of Bierman's, right? A. I saw it was a check of Bierman's, yes.

Q. And you know that Bierman eventually got stock, right? A. And I know that Bierman got stock.

Q. And eventually got only 20 shares for the twenty thousand? A. That's correct.

Q. Now, coming back to this conference with Loew, was there any conversation about Bill Miller's Riviera at the time that you made this proposal to Loew to sell him approximately 90 per cent of the stock of Milmar? A. Yes, there was.

Q. And what was said about that? A. I told him that I had 51 per cent controlling interest of the Riviera, that I could deliver to him immediately upon purchase.

Q. That you owned 51 per cent? A. That I owned 51 per cent, in lieu of default.

Q. Did Mr. Loew say anything about the other 49? A. Frankly, I don't recall what conversation was had with reference to the other 49.

Q. Well, do you know whether Mr. Loew said he would (1051) be interested in going in this venture even though he would not own all the stock of the Riviera, Bill Miller's Riviera? A. Oh, I believe he was satisfied in having a controlling interest of the Riviera. He could do what he wanted to do.

Q. I see. Now, will you begin— A. We also had the resignations of officers and directors that went along with those 51 per cent.

Q. Of Bill Miller's Riviera? A. That's correct.

Q. Now, after this meeting with Lou Walters and Mr. Loew, did Mr. Loew say he was going to get in touch with you, or with Miller, or with both? A. Mr. Loew said, "I am going down and look at the property. You will hear from me in a couple of days."

Q. And did you hear from him? A. I did not.

Q. I see. This you place as taking place some time in July of 1948, right? A. I believe that's correct.

Q. I see. As a matter of fact, didn't you testify that it took place prior to the sending to Mr. Miller of what you called an option, isn't that right? A. To the best of my recollections, I believe that is so.

Q. You don't have any notes in front of you that you (1052) refer to, do you, during the taking of this testimony? A. No, sir; I don't.

Q. I show you Exhibit DM-18, and you will note the date of that is what? A. July 27, 1948.

Q. And this transaction with Loew, as I recall your direct testimony, took place prior? A. To the best of my recollections, it took place prior.

Q. Can you fix approximately how long prior, was it a week, or two— A. I am sorry. I cannot fix any particular date. It may have been a day before, it may have been a week before, it could have been two weeks before.

Q. Will you look at this Exhibit? Just look at it carefully. I am going to ask you some questions about it.

(Document handed to witness.)

Q. You have read it? A. Yes, I have.

Q. Does that serve to refresh your recollection as to whether the Loew transaction was regarded by you as at an end by July 27, 1948? A. No, I didn't regard it as an end.

Q. Had you heard anything from Loew up to that time?

The Court: He said no, he never heard from Loew, after he gave him—

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(1053) Mr. Brigadier: I am trying to place the period of time, sir.

Q. Now, I direct your attention to this Exhibit, DM-18, which you have just read, and call to your attention the first paragraph—well, let me read even the introduction of it, "Mr. Bill Miller, care of Bill Miller's Riviera, Fort Lee, New Jersey.

"Dear Bill: This is to substantiate our verbal understanding that you are hereby given a 10-day option in which to purchase my holdings of the Milmar Estates, Inc., owners of the Riviera property for the sum of $125,000, payable thirty thousand cash and the balance at $4,000 per month."

Now, do I understand, Mr. Marcus, that you mailed this option to Mr. Miller? A. My secretary mailed that letter to Mr. Miller.

Q. Under your direction? A. Under my directions.

Q. Did you dictate this letter to your secretary? A. I believe I did.

Q. Who was present when you dictated it besides you and your secretary? A. I don't believe, to my best of recollections—to the best of my recollections, there was no one else present.

Q. Nobody else? (1054) A. That's right.

Q. So that the drafting of this letter was entirely your own action, right? A. I believe it was.

Q. You weren't being advised at that moment by Robert Schwartz as to what to put in that letter? A. I don't think so.

Q. Judge Lieberman wasn't standing alongside of you and telling you what to put in that letter? A. No, he wasn't.

Q. Nor was Bill Miller telling you? A. That's right.

Q. You dictated this? A. That's correct.

Q. All on your own? A. That's right.

Q. Now, I direct your attention to the fact that in this you inserted "to purchase my holdings of Milmar Estates, Inc.," is that right? A. That's right.

Q. And your holdings at that time were 90 per cent of the stock? A. It was always understood—and, Mr. Brigadier, I would like to go on record now so that we won't misunderstand each other again, I have made that statement 15 different (1055) times—I have often spoke of Miller's stock. My contention at any time with our speaking was, when I mentioned Miller's stock, it was not Miller's stock, it was stock I held with a string attached to it, that when I mentioned selling my holdings, or selling my stock, I meant the 625 shares of stock, which was mine without strings. I think I have made myself perfectly clear, my depositions, what my meanings were, that when I say I am selling my stock, it meant my 625 shares, because I regarded it as a gentleman's agreement with Mr. Miller that he could buy his shares of stock. And I hold a gentleman's agreement, when I make it.

Q. Didn't you also testify in your depositions that you regarded all the stock as yours, except Robert Schwartz'? A. I said, and I say the same thing again, I regarded all the stock as mine, but I regarded a gentleman's agreement I had with Mr. Miller that he could buy his stock.

Q. But you do note that in this Exhibit, DM-18, you merely speak of "my holdings of Milmar Estates, Inc." A. It is merely a term. It is merely a term I have used with Miller right along, in all our conversations, that my holdings were the 625 shares of stock.

Q. Mr. Marcus, all I am asking you—you can answer it very simply—is whether you now know that in DM-18 the expression you used was "my holdings"? (1056) A. It is written on the letter and I must have used that expression. I have always used that expression.

Q. There isn't any doubt in your mind that you were the one who dictated that? A. I am certain I dictated it.

The Court: Don't keep repeating that over and over and over.

Q. Coming to the second paragraph of this letter, I direct your attention to this, "Inasmuch as I am dickering with other interested parties, I cannot make any more than a 10-day option at this price, and this option expires midnight the sixth day of August, 1948."

You dictated that, didn't you? A. I believe I did.

Q. And were you dickering with other interested parties on the date of this letter? A. I was still hoping to hear from Mr. Loew at the time of this letter.

Q. I see. Didn't you testify on direct examination that the pressure for you to sell your stock came from Miller, Bierman, that they were the ones that were pressuring you? A. At $250,000 I was happy to sell and get out.

Q. Just answer— A. At that price I was happy.

(1057) Q. Just answer my question. Didn't you testify on direct examination that you were being pressured by Miller and Bierman to sell? A. Later on I was.

Q. This is after this— A. This is after this happened.

Q. But by this date there was no pressure coming from them? A. No pressure coming on this date.

Q. That is all I wanted to know.

Going back to your conversation with Loew, the deal with Loew didn't involve your still being able to collect your loans from Milmar, did it? A. We never discussed that problem.

Q. Well, you were selling Riviera to Loew for $250,000, subject to the mortgage, right? A. That's right.

Q. And what you were selling was 90 per cent of the stock, is that right? A. Approximately 90 per cent of the stock.

Samuel Marcus—Defendant—Recalled—Cross

Q. And the controlling interest in the Riviera, right? A. That's right.

Q. Now, you knew at that time that you had vast sums of money coming to you, as you have testified, for loans that you had made to Milmar, isn't that right? (1058) A. That's right.

Q. According to your testimony by that time you had loaned Milmar over $40,000, is that right? A. That's correct.

Q. And by that time you had loaned Bill Miller's Riviera $15,000, right? A. That's right.

Q. Now, was it your intention to sell Mr. Loew 90 per cent of the stock of a corporation, which corporation owed you $46,000? A. Frankly, that conversation never came up.

The Court: *Between you and Loew?*

The Witness: Between me and Loew.

The Court: There is no reason for it to come up that I can see. What would Loew care about that?

Mr. Brigadier: Well, if Loew was buying the stock of the corporation, which corporation was obligated to pay you $46,000 for loans, wasn't there anything said about what was to happen to those loans?

A. That conversation never came up during the conversation that I had with Loew.

Q. Did you have any intention to wipe out those loans?

Mr. Grosman: I object to that.

Mr. Brigadier: I think this is very material, if your Honor please, in this transaction.

(1059) Mr. Grosman: There was nothing said about it.

The Court: Why would he talk to Mr. Loew about moneys due him from the corporation? What interest would Mr. Loew have in that?

Mr. Brigadier: For the same reason that we would have that interest. If we were buying stock in a corporation, wouldn't we want to know what the obligations of that corporation were, to determine whether or not that stock was worth $250,000?

The Court: Why would Mr. Loew discuss that with him, and why would he discuss it? Would he say to Mr. Loew, "Now, listen, Mr. Loew, you know, this corporation owes me $46,000"? So Loew would say, "What do I care? That's for you to get."

Mr. Brigadier: Yes, but if Mr. Loew was going to purchase 90 per cent of the stock of this corporation, sir, wouldn't he be interested in what the liabilities were?

The Court: I think when and if a deal had been consummated that Mr. Loew then would be interested in everything.

Mr. Brigadier: Let me remind you of what the testimony of Mr. Loew was.

The Court: Do you call this a firm deal that he is talking about between him and Loew? Would you call that a firm deal?

(1060) Mr. Brigadier: No, I wouldn't, but—

The Court: Particularly since Mr. Loew didn't know yet whether the mortgage balance was two hundred and twenty-five thousand or two hundred and thirty thousand. Do you think men like Loew throw $10,000 away because they like Mr. Marcus or like Mr. Miller?

Mr. Brigadier: Let me get right down to what it is.

The Court: All right, sir, get down to it.

Q. Did you hear Mr. Loew testify that your proposal to him was "lock, stock and barrel"? A. He said that he wanted "lock, stock and barrel." And I told him that I believe I could obtain for him my associate's stock.

The Court: That's right.

Q. The option of DM-18 expired by its own terms on August 6, 1948, did it not? A. That's correct.

Q. What was the next thing that happened in relation to the Riviera between you and Miller and Bierman? A. The next thing, as I recollect, Mr. Miller, on one of my visits—one of my visits at the Riviera, Mr. Miller approached me, and jocularly told me about killing the Loew deal. And he says to me, "If you are really serious about wanting to sell your stock, Sam, I've got a fellow here I (1061) think I can interest in your proposition. I got a guy here I think wants to buy 50 per cent. And then Bierman and I, maybe we will get our money together and buy the other 50. If you want to get out completely, I think I can arrange it for you."

Q. I show you Exhibit DME-3, Mr. Marcus, dated August 18, 1948. Will you look at that carefully?

(Witness looks at document.)

Q. Have you looked at it? A. I have.

Q. Did you ever see that document before? A. I did not.

Q. You did not dictate it? A. I did not.

Q. And you did not dictate it to your secretary? A. I did not.

Q. You never were present while this was drawn? A. I was not.

Q. I direct your attention particularly to the first paragraph of this Exhibit. Will you read it with me and see if it doesn't refresh your recollection. "Agreement made this date between William (Bill) Miller, hereinafter called party of the first part, also known as the buyer, and Sam Marcus, hereinafter called party of the second part, also known as the seller. The party of the first part agrees

(1062) to purchase all rights, title and interest, including all outstanding stock, notes, IOU's, options, agreements, and any other tranactions that the party of the second part has participated in with the party of the first part, including the agreements in the following companies and corporations: One, William (Bill) Miller; two, Milmar Realty Corporation; three, Bill Miller's Riviera, Inc." and I ask you whether that doesn't refresh your recollection as to this paper? A. Never saw that paper before in my life.

Q. And, therefore, you could not have delivered it to William Miller, is that right? A. That is correct.

Q. You heard William Miller's testimony that you did? A. I heard Mr. Miller's testimony and he is completely erroneous.

Q. And you have never seen this paper before the time it was produced at the trial of this case? A. Never have seen this paper before.

Mr. Grosman: If your Honor please, he has said that three times.

The Court: Yes.

Mr. Brigadier: Well, I think it is very important to get this nailed down.

The Court: Yes, this is important.

(1063) Mr. Grosman: Everything is important.

Q. Now, I show you an Exhibit that you produced and offered in evidence, DM-19, dated August 26, 1948, addressed to Bill Miller. That was sent by you to Bill Miller? A. Yes, sir; it was.

Q. Was that the one delivered by hand? A. No, I sent it registered mail.

Q. That was sent by registered mail? A. That's right.

Q. And can you state the circumstances under which you sent that? A. Yes, I believe I can recollect it. I was out to Bill Miller around that particular time—if I am not mis-

taken, this letter here was sent on the same day after Bill Miller ran out of my office and said, "The hell with you. You will lose the whole damn proposition." I think after he left I dictated this letter to my secretary so's I could declare a—and wanted to declare a default and take over possession of the Riviera. And that was one of the reasons of sending that letter.

Q. And you now say that you recall that this was the time when you said the meeting took place at which Miller ran out, is that right? A. To the best of my recollections, I believe that letter (1064) was sent pursuant to that meeting and Miller running out of the room and telling me, "The hell with it. The joint is going to drop and you will lose everything."

Q. And this was the meeting that took place in your office in New York? A. I seem to refresh my memory that letter there was part of that particular meeting, after he had left and told me how the building was going to go, we are going to leave everything in the place.

The Court: Does the first sentence of that letter refresh your recollection, where you say, "Dear Bill: As per your request for a statement of the amounts of money that you are in default I am hereby listing the same." "As per your request."

Now, when did he make that request?

The Witness: At that meeting. At that meeting I recall there was a request made for—"What do I owe you? How much do I owe you?" When we were hollering about the money that was due us that day.

Q. And as of that date, your letter of August 26 shows that there was how much rental in arrears? A. There are $6,000 rental in arrears.

Q. And that $6,000, including—just answer my questions, Mr. Marcus. You understand me.

And that $6,000 also included the two weeks' rental (1065) in advance, isn't that right? A. Frankly, I don't know whether that included—

Q. This is your letter. A. I say—but it doesn't say the six thousand includes those two weeks' rental. I am not certain whether that six thousand includes those two weeks or not. I am telling you I am not certain about it.

Q. Well, let's look at your letter. You say three rental payments of $2,000 each, six thousand, right? A. That's right.

Q. The lease calls for two weeks' rental in advance, and the rental to be paid each week. Under this arrangement, as of August 24, 19 payments were to be made, of which we have received only 16.

That includes the two rent—just figure it out. A. I don't know. It may or may not. I would have to take time and check up the rent roll and see what I did mean. Sometimes my phraseology is poor in my letters.

The Court: So you can't tell what it means now, but you expected Mr. Miller to know what you meant when you don't know what it means.

The Witness: I mean, I could tell by the books exactly what that—whether the six thousand included the two weeks' rental.

The Court: You were supposed to be telling him (1066) how much he was in default. He made the request, you said. Now you have got to look at the books to see what it is. You are the greatest double talker I have ever heard.

Here is a man who makes a simple request, he says, "Mr. Marcus, how much am I in default, what do I owe?" You send him a letter, give him an answer, he is supposed to gather from that what he owes you. Now you can't tell us what that means.

Samuel Marcus—Defendant—Recalled—Cross

The Witness: Your Honor, at the time I wrote the letter I probably knew. This is five, six years later.

The Court: But, my dear Mr. Marcus, this is your language. You should know what you mean.

The Witness: When I wrote it I knew what I meant.

The Court: And now you don't.

The Witness: At this time I would like to refresh my memory, your Honor, before I make a definite statement.

Q. Let's see if we can help. I show you DME-2, dated August 26, 1948, and you will note, Mr. Marcus, it is the same date that the prior Exhibit bears, right? A. That's correct.

Q. Have you ever seen this Exhibit prior to the taking of the deposition of Robert Schwartz? A. I never saw this prior to the taking of the deposition.

Q. You were present when Mr. Schwartz testified at the deposition, were you not? (1067) A. I was.

Q. And you heard him testify that this had been handed by you to him? A. No, he didn't testify such.

Q. He didn't? A. He did not.

Q. What did you understand him to say? A. He testified he thinks someone from my office delivered it to him.

Q. I see. But you, yourself, never delivered this to him, is that right? A. I did not deliver it to him.

Q. And prior to the taking of Mr. Schwartz' deposition in 1954 you had never seen Exhibit DME-2, is that right? A. That's correct.

Q. And you hadn't been told by anyone—by any person in your employ of such an Exhibit? A. Up to what time was that?

Q. Up to the time that Mr. Schwartz testified at the deposition. A. Up to the time that Mr. Schwartz testified at the deposition I was not told.

Samuel Marcus—Defendant—Recalled—Cross

Mr. Brigadier: I am going to lay the foundation, sir, for the typewriting expert.

Q. I show you a letter dated June 30, 1947, on the (1068) stationery of Photo Shop, Inc., and ask you if that is signed by you? A. It is.

Q. And do you know that this letter was typed at the Photo Shop? A. Yes, it was.

Q. At a typewriter in the Photo Shop? A. Yes, sir; it was.

Mr. Brigadier: I ask that that be marked for identification.

The Clerk: DME-50 for identification, letter dated June 30, 1947.

(Marked Exhibit DME-50 for identification.)

Q. I show you a letter dated March 26, 1948, on what purports to be Milmar Estates, Inc., stationery, 152 West 42nd Street. Is that letter signed by you, Mr. Marcus? A. Yes, sir; it is.

Q. Was that typed at the Milmar Estates office in New York? A. It was typed in my office.

Q. Where is your office? A. 18 East 42nd Street.

Q. Is that the same place as the Photo Shop? A. The Photo Shop, that's correct.

Q. The same typewriter typed those two? (1069) A. The same typewriter. I believe the same typewriter typed those two.

Q. I now show you Exhibit DME-2 and ask you whether you ever saw this document typed in your office, on your typewriter? A. I did not see it typed. But maybe I can save you some—

Mr. Grosman: No, please.

Mr. Brigadier: No. We will get to that. This one I want marked for identification.

Samuel Marcus—Defendant—Recalled—Cross

The Clerk: DME-51 for identification, letter dated March 26, 1948.

(Marked Exhibit DME-51 for idenitfication.)

Q. Mr. Marcus, will you tell us where this typewriter is located in connection with your premises, the typewriter on which letters, DME-50 and 51 for identification, were typed? A. That's my secretary's—that's my secretary, private secretary. It would be her typewriter.

Q. What was her name? A. Miss Adelaide Paternitti—Mrs. Maginn. Excuse me. Her present name is Mrs Maginn.

Q. Is she available as a witness? A. Yes, sir; she is.

Q. Do you have her address? A. I will have here as a witness.

(1070) Mr. Grosman: Nobody asked you that.

The Court: It's no use, Judge, no matter how much you caution him.

You won't take my advice, you won't take your lawyer's advice.

The Witness: I am sorry, sir.

The Court: You volunteer a lot of things that sometimes you shouldn't, I will tell you that.

Q. Now, I direct your attention, Mr. Marcus—

The Court: Did you get an answer to your question in which he gave an unresponsive answer?

Mr. Brigadier: He has given me a satisfactory answer.

The Court: All right.

Mr. Brigadier: If he is going to call his secretary, nothing would please me better.

The Court: All right.

Samuel Marcus—Defendant—Recalled—Cross

Q. Mr. Marcus, I take you now to this date of August 26 again, 1948. In your direct examination you testified, did you not, that between the date of the receipt, date of August 27, DME-1 in evidence, and the date of September 14, between those two dates, that you did not have any meeting with Miller, Lieberman and Schwartz? A. That's correct.

Q. And that the only meeting that you can recall is (1071) the meeting which occurred prior to August 27, right? A. That's correct.

Q. And on direct examination your answer, as I recall, was, "It happened two or three days prior." A. I thought it was two or three days prior. It was prior to the 27th.

Q. I just want to make sure it is the same meeting we are talking about. A. That's right.

Q. You now fix it as the day before, isn't that right?

Mr. Grosman: He didn't say that.

Mr. Brigadier: I understood—

Mr. Grosman: Give him a chance to answer.

Mr. Brigadier: I understood the witness testified that he now recollects from that letter that the meeting took place on the 26th—

The Witness: I said—

Mr. Brigadier: —and that it was after that meeting that this letter was sent. So I don't know why Judge Grosman says—

Mr. Grosman: Because you are talking so fast I can't—between the two of you I can't follow what is being said.

The Court: They do go at a rapid rate, both of them. They both cut each other off at a rapid rate, too.

(1072) If you would wait till the question is fully put and then answer, and if Mr. Brigadier would wait till your answer is fully made and then ask another

one, it would be much better for all concerned, particularly for me, who has to decide this case.

Mr. Grosman: I understood him to say that several days prior to this—

The Court: When he referred to that letter here, Judge Grosman, of December 26, then he said he thinks that it was the day before, that he wrote the letter the next day. Is that what you said?

The Witness: That's right.

The Court: That's what he did say. I will say he said two or three days on another occasion.

But now you are quite certain it was the day before you wrote this letter?

The Witness: It was— I believe—my best recollections right now is either a day before or on the same day. I am not definitely certain about that. I believe possibly my secretary could help me set the date correctly.

Q. But you do know that it was either that period—

The Court: Now you want to start another controversy.

Mr. Brigadier: That's right.

Q. What I am mostly concerned with is what happened (1073) at that meeting, how did the meeting come about, who suggested it, how was it arranged? A. We had had numerous discussions, Miller and myself. Every time I dropped into the Riviera, which was two or three nights a week, Miller would buttonhole me and start propositioning me, all through the month of August. Miller's first offers were that—"I got this guy who wants to buy 50 per cent."

The Court: Wait a minute. Just hold it a minute. Hasn't he told you that already?

Mr. Brigadier: No, I haven't questioned him about this.

The Court: All right.

Mr. Brigadier: That's the difficulty. I have yet to examine him on each of these.

The Court: I see.

A. (continuing) Miller told me on several occasions, through the month of August, that he has this guy who wants to buy 50 per cent.

Q. Mr. Marcus, let's get down to this meeting which you say now you think took place on August 26. Just answer my question.

The Court: How did that come about?

Q. Who called the meeting? A. Miller did. Miller said, "I have got to get this thing (1074) to a head, Marcus. This guy ain't going to wait around here all the time. I don't want to lose him. Let's arrange for a meeting and get this thing down to a head."

Q. So you agreed to meet at your office? A. So we agreed to meet at my office.

Q. You and Miller? A. Miller, and I, and Judge Lieberman and Bob Schwartz.

Q. That's what I wanted to find out. How did Judge Lieberman and Bob Schwartz get into this? A. Well, I told Bob Schwartz there was going to be a meeting in my office. And I don't know how Lieberman got onto it. I didn't invite him.

Q. Just make it as short as you can.

Lieberman showed up with Miller? A. With Mr. Miller.

Q. Now, what happened at this meeting? A. Miller came to this meeting prepared—he wants to buy all the stock, like the deal I offered to Loew. But necessarily he didn't have to pay that kind of money because he has

got a right to buy his stock of fifty thousand, plus his note. And we tried to negotiate an arrangement of how Miller could buy all the stock.

Q. Let's get first what Miller's proposal was, concretely, so we know it. A. Miller's proposal was, "Here, I have got this Mr. (1075) Kevelson. I have got this guy here with his dough all ready to give you. Now, what can we work out so I can get hold of my stock?"

Q. He didn't make a proposal, he asked you for a proposal? A. That's right.

Q. All right. Now, let's hear your proposal. A. And I said, "There is nothing you can do, Bill, to get your stock but put cash on the line."

Q. Did you tell him how much? A. $50,000 and interest.

Q. In other words, if he would pay that $50,000 note, he could have the 500 shares, which had become by that time 480, right? A. That's correct.

Q. And then what was he to pay for the remaining stock?

The Court: The note plus interest, he said.

Mr. Brigadier: Yes.

The Court: You left the interest out.

Mr. Brigadier: Fifty thousand plus interest.

A. (continuing) He was talking about buying his stock and buying—and this guy buying my stock. I told him he couldn't buy that stock without cold cash. He offered a counterproposition that Bierman would buy 12½—"How (1076) about Bierman buying 12½ per cent, so this guy would know we got controlling interest, so we would have 62½ per cent of the stock here?"

And we sort of discussed our problem, and we agreed upon the basis of him buying 62½ per cent of the stock. Then that wasn't satisfactory to him, and he went back again, demanding—he has got to have his stock, he has

got to have his stock, and he yelled, and we hollered, and we fought around there for three quarters of an hour or an hour. And the meeting ended up in complete discord. Miller jumped up off the seat and he says, "Well, Marcus, you are going to be sorry. You are going to lose the whole damn building. You know you can't get any rent." And off he stormed and went out of the room.

Q. Mr. Marcus, I have heard this before, but I still have to hear yet any one concrete proposal that you made or that he made in terms of dollars. That is what I am trying to find out. Was there any? A. What my concrete proposal was—a $50,000 note for his stock.

Mr. Grosman: Mr. Marcus, would you wait until counsel finishes his question.

Q. My question is: Was there any concrete proposal, either by Miller to you, in dollars and cents, or from you to him, in dollars and cents? (1077) A. Miller had that continuous proposal, since the option, that he could buy my stock; that Kevelson or his man—

Q. Mr. Marcus— A. —could buy my stock.

The Court: Are you both going to keep talking?

Mr. Brigadier: I want to stop him, sir, so we can get back to this meeting. I don't want the continuous proposal. I am trying to find out, on August 26, in dollars and cents, what each said to the other.

The Court: All right. Let's see if we can nail it down.

What definite proposal did Mr. Miller make, if he made a definite proposal?

The Witness: Mr. Miller's proposal, which was acceptable to me, was: Kevelson—or this guy—would buy my 50 per cent of the stock for $125,000, and he and Bierman would pick up their option. That was satisfactory.

Then he started telling me how he would pick up their option, with pink notes, green notes, yellow notes and brown notes.

The Court: And you wanted cash?

The Witness: And I wanted cash. And we had some fighting and yelling there, and he has got to do this and maybe Bierman—then he come back with a suggestion.

(1078) That didn't work. So he came back. "Well, this man wants us to have controlling interest here. Will you sell—"

The Court: Now, wait. Who is this man who wants him to have controlling interest?

The Witness: Kevelson; he didn't mention the name, your Honor.

The Court: You didn't know at that time.

The Witness: I didn't know the man's name. He said, "This man is going to put a lot of money into this business and he wants to have controlling interest of the real estate. Now, how about selling us another 12½ per cent of the stock so we can own 62½ per cent?"

The Court: All right. Now, by "we," who did he mean, Miller and Bierman?

The Witness: Miller and his associate—Miller and *this new* man coming in. Miller and Kevelson.

The Court: All right.

The Witness: So I said, "That's perfectly all right. I don't mind remaining a minority stockholder here. I will sell you as many shares of this stock that you want to buy. If you want to buy 12½ per cent more, I will sell you 12½ per cent more."

Q. At what figure? That's what I am still trying to find out, figures. (1079) A. There again, Bierman—he came

along with a suggestion that Bierman wanted to buy 12½ per cent—oh, I forget just what it was—at a valuation of the property, and—I can't remember every detail that happened there.

The Court: I know, but this is a big detail, how much he was to pay for it.

A. (continuing) I told Miller that if Bierman had that kind of money, to pay me 12½ per cent, at a figure—I don't know—the figure was $60,000, according to the way it rated out there, some agreement they would buy 12½ per cent of the five hundred thousand valuation.

I said, "If Bierman has got that kind of money, why the devil don't you pick up your option on your stock? You can get it for $50,000."

Q. You have discovered that, too, haven't you, Mr. Marcus? A. What do you mean?

Q. You have discovered that 12½ per cent on a $500,000 valuation would have come to more than the amount of this note. A. I knew that at the very time the deal was made.

Q. And yet they refused to pick up the note for fifty thousand, by which they could have gotten the half of the stock, is that right? (1080) A. That's right.

Q. And instead took an agreement from you whereby they would pay more than that amount for 12½ per cent, is that right? A. I don't know what they did, counselor.

Q. Isn't that what you have just told us, that the 12½ per cent would have cost $60,000? A. There was—I am telling you—you asked me the conversation that carried on there.

The Court: He said this is the conversation going on. He is giving you what he thinks was said there.

Mr. Brigadier: But I just want to bring that out.

The Court: He also brought out that he said to Miller, "Why don't you pick up your own note and get your stock for fifty thousand plus interest?"

Samuel Marcus—Defendant—Recalled—Cross

——Isn't that what you said?

The Witness: Yes, your Honor.

The Court: He doesn't seem to understand why he didn't, either, according to what he says.

Q. You signed this agreement, did you not, DME-25? A. Yes, that's my signature.

Q. And that is the agreement under which they were to pick up the 12½ per cent in the event of a default, based on the five hundred thousand valuation? (1081) A. Frankly, I didn't draw the agreement. The agreement was given to me. I signed it. There was talk about it. There was a lot of talk. There was a lot of different deals. And they were written down on paper and I signed them.

Q. You don't know what this is, Exhibit DME— A. This was pertaining—

Mr. Grosman: He didn't say that.

Q. Do you know what it is? A. Yes, I believe this is pertaining to Bierman's offer to buy 12½ per cent on a valuation of $500,000.

Q. In the event of a default? A. I don't recall whether it was default, or whether the deal didn't come through, or just what the deal was. But Mr. Bierman—Mr. Miller did say that Bierman was willing to buy 12½ per cent of the stock. And I said, "At what valuation?"

He said, "Well, whatever you think the company is worth." And I said, "I think the company is worth $500,000."

Q. But at this August 26 meeting they had stated to you that Bierman was willing to buy 12½ per cent at $60,000, is that right? A. Frankly, I am not too sure where these conversations took place. This is all five, six years. I know there was numerous conversations. Where and when that one particular conversation took place, I can't tell you definitely on (1082) that.

All I know, there was a series of talks. I had a talk with Bierman, and I had a talk with Miller, and I had a second talk with Bierman, and a second talk with Miller. The exact conversations that took place, and where they took place, I cannot with honesty say exactly where they took place.

Q. But I want to direct your attention to this meeting at which Judge Lieberman and Robert Schwartz were present, this August 26 meeting.

You say it ended up by Miller walking out in great anger? A. That's correct.

Q. And no deal was made? A. No deal was made.

Q. No agreement, oral agreement was arrived at, right? A. That's correct.

Q. And certainly no written agreement was arrived at? A. That's correct.

Q. Who left the office and in what order? A. Mr. Miller left the office.

Q. Who left next? A. I went downstairs to take some people who were in my (1083) store—my office is directly above the store—some people waiting to see me in the store, and I ran down to the store. I left Judge Lieberman and Schwartz in the office with by secretary.

Q. I see. And when you returned did you find out how long they had remained after you left? A. When I returned, they had left.

Q. And did your secretary tell you that she had taken dictation from them? A. Yes, she did.

Q. And did you ask her what kind of dictation? A. Yes, I did.

Q. And what did she tell you? A. She said Mr. Schwartz or Mr. Lieberman asked her to type out a memorandum.

Q. Did she tell you what memorandum? A. She did not.

Q. Have you asked her since Mr. Schwartz testified at the depositions whether DME-2 is the memorandum she typed? A. What was your question?

(Question read.)

A. I asked her did she have a recollection of a certain paper, and I mentioned what the writing was on the paper.

The Court: And what was the answer?

A. (1084) (continuing) And she said she did have a recollection of taking that dictation from one of the lawyers, making two copies, giving one to each lawyer.

Q. Did you show her the photostat that I furnished your attorney with of this document? A. I did not.

Q. You haven't, from the date that it has been furnished to the present moment? A. I haven't a copy of that document.

Q. Now, when you got back and she told you the attorneys had dictated a memorandum, weren't you interested in finding out what was in that memorandum? A. No, sir; I was not.

The Court: Hold it there. We will adjourn for lunch. Come back at 2 o'clock.

(Noon recess.)

(1085) Afternoon Session

Samuel Marcus, resumed the stand.

Cross examination by Mr. Brigadier (continued):

Q. At the recess, Mr. Marcus, I handed you Exhibit DME-2. You have it in front of you now? A. I do.

Q. And, as I recall your testimony, you say that when you returned to your office on August 26, 1948, your secretary, Mrs. Maginn, told you that she had typed a memorandum? A. That's correct.

Q. And that had been dictated to her by whom? A. By either one of the two lawyers.

Q. By that you mean Judge Lieberman or Mr. Schwartz? A. That's correct.

Q. Did she produce a copy of the memorandum? A. She did not.

Q. Did you ask her what was in the memorandum? A. I did.

Q. Did you ask her if she had a copy of it? A. I didn't.

Q. You didn't ask her whether she had a copy; is that what I understand? A. She told me that she had made two copies, one for each lawyer.

(1086) Q. So that she was not in possession of a copy, is that right? A. That's correct.

Q. And then you asked her what was in it? A. I asked her the substance.

Q. Now, I show you the Exhibit, which is in front of you, Mr. Marcus, and perhaps you can save us some expense.

Are you willing to concede now that this is the memorandum which was typed by your secretary? A. This appears to be the same typewriter as my typewriter. I couldn't concede. I would have to have my secretary concede as to what she typed.

The Court: Stop at this point. You know there is a rule in the Federal Rules of Civil Procedure that if you unnecessarily put your adversary to some expense, which is not necessary, which you could concede, I can add that to the costs against you. So I suggest that you look at it very carefully and, if need be, get the secretary to look at it.

The Witness: Well, your Honor, if I could get a copy of this—if I could get a photostatic copy—

Mr. Brigadier: I have furnished you with—

The Witness: —I'd be prepared to concede on it tomorrow.

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The Court: That's a good idea. You may save (1087) yourself some unnecessary expense. I think Judge Grosman has a photostat.

Mr. Grosman: We have. We would be glad to let him have it.

The Witness: So if you would hold that question until tomorrow I will be prepared to tell you whether I concede or not.

Q. I just want to ask you one other question, though. This photostat was delivered to your attorney several months ago; did you know that? A. I didn't, no.

The Court: That is, you didn't know it until you heard the statement here by Mr. Brigadier that it was?

The Witness: That's right.

Mr. Brigadier: I am sure Judge Grosman will concede that I did.

The Court: Oh, yes.

Mr. Brigadier: There is no question about it.

Q. Mr. Marcus, you were present at the time that Mr. Schwartz testified at the taking of the deposition? A. Yes, I think I was present.

Q. And you were present when I exhibited this document, DME-2, to Mr. Schwartz? A. Yes, I was.

Q. And, as a matter of fact, your lawyers passed it (1088) to you, didn't they, for examination? A. Yes, I glanced at it.

Q. In the presence of all of us. And at that point you said to your lawyer, "I never saw that in my life," isn't that right? A. That's correct.

Q. Now, didn't you, from that time down to the present moment, speak to Mrs. Maginn about this document? A. I was out for the first time since this case started—I was out to see Mrs. Maginn about two weeks ago, two to three weeks ago.

Q. Why didn't you go to see her, Mr. Marcus, right after this testimony was given by Mr. Schwartz, several months ago, in your presence? A. I called her several times for an appointment, when it might be convenient for me to see her, and the number—she had been moving from one place to another, and she just simply didn't have time to see me. And finally she did say she could see me—I think I went out there on a Sunday afternoon, about three or four weeks ago.

Q. Mr. Marcus, will you look at DME-2, the paragraph before the last, particularly the last sentence, "You are authorized to pay," do you see that sentence? A. Yes.

Q. Do you remember Judge Modarelli asking you the (1089) other day what Paragraph 3 of DME 5 meant?

Mr. Brigadier: Would you hand the witness DME-5?

(Document handed to the witness.)

Q. That's the paragraph that was stricken out, Mr. Marcus. A. Yes. What is the question, sir?

Q. Do you recall Judge Modarelli asking you whether you knew what Paragraph 3 meant? A. I believe your Honor did.

Q. Just answer my question. Do you recall the Judge asking you that? A. Yes, I do.

Q. Do you recall testifying that when you arrived on September 14 and found that this paragraph had been stricken out that you raised a fuss of some kind about it, is that right? A. That's right, I did.

Q. And then you insisted on another letter being drawn, right? A. Yes, that's right.

Q. Now, I direct your attention to the fact that Paragraph 3, the language in that paragraph, and the sentence which I directed your attention to in DME-2 are almost the same, are they not? A. I don't know whether it is or not. I am not prepared—

(1090) Q. Will you look at it, please, Mr. Marcus? Look at it now.

(Witness examines document.)

A. Well, I don't know whether it is the same. One says "you," the other says "the seller."

Q. Well, now, in DME-2 who purports to be the seller?

Mr. Grosman: If your Honor please, this instrument speaks for itself.

Mr. Brigadier: I think I have a right to examine him, sir, especially since the question was raised as to how this paragraph got in there and what it meant. And here it runs up for the first time in this memorandum the very language. And it now takes on some meaning, when read together with this, because it is very obvious that the original plan contemplated that Marcus' seller was going to get $125,000, from which he was first to pay out all outstanding loans, obligations, taxes, etcetera, of the corporation. And then any surplus remaining, I assume, would go to Mr. Marcus.

When this format changes to the corporation becoming the seller, this paragraph can't take on the same meaning and is therefore stricken out. And your Honor will notice that the equivalent of it is then taken care of in Paragraph 7, where you will notice what they do with Paragraph 7. The buyer remains answerable only for what? (1091) For the obligation consisting of the mortgage, taxes and insurance of Milmar. And you will notice that the rest is all stricken out. And that makes sense.

I was puzzled as your Honor was. It has to all make sense to you in the end—

The Court: That's right.

Mr. Brigadier: —in order for you to decide the case, and I thought—your question was, frankly, one that

puzzled me as well, as to what the third paragraph meant.

Mr. Grosman: I don't think it is up to the witness to try and reconcile these things or to interpret them.

Now, if they are what Mr. Brigadier says they are, by some stretch of the imagination, why, your Honor will determine that when you read both instruments.

The Court: That's right.

Mr. Brigadier: Except, Judge, on direct examination you asked him of every document, on September 14, what it meant. And he told you, when he was able to tell you, what it meant. Now, I want to prove what it does mean. I am not bound by what he says on direct.

Mr. Grosman: He wants a legal construction placed on these documents by the witness. That is not his function.

(1092) Mr. Brigadier: Then wait till I finish my question.

The Court: Will you proceed with the question?

Q. Mr. Marcus, when your young lady, your secretary, spoke to you about this memorandum, did she tell you that in this memorandum there was this provision, the one that I have just directed your attention, "You are authorized to pay," etcetera—I don't want to repeat it at length. Did she tell you that? A. No, she did not.

Q. Did she tell you that the memorandum consisted of an offer addressed to you by Al Bierman to purchase all of your shares in Milmar Estates, Inc., consisting of approximately 62½ per cent of the outstanding shares described as all those shares not held by Bill Miller or Al Bierman for the sum of $125,000, payable as follows—did she tell you that? A. She did not.

The Court: Apparently she didn't tell him anything.

Q. Then I think the easiest question would be: What did she tell you?

The Court: That's right.

A. She merely told me she had typed a memorandum for one of the lawyers embodying some terms.

(1093) The Court: But—my heavens—this memorandum is addressed to Mr. Sam Marcus, her employer, and she didn't tell you what was in it?

The Witness: She told me, "Mr. Marcus, the lawyers asked me to type a memorandum for them."

The Court: That's right.

The Witness: That's all she told me, sir.

The Court: Well, didn't she ever tell you what was in it? It was addressed to you.

The Witness: She didn't recall what was in it, your Honor.

The Court: All right. Did she tell you who took your copy, if she didn't give you one?

The Witness: She said each lawyer asked for a copy, that someone asked her to make two copies, one for each lawyer.

The Court: All right. Then Mr. Schwartz sent you a copy.

The Witness: Mr. Schwartz had a copy and—

The Court: Did he ever show it to you?

The Witness: No, your Honor, he did not.

The Court: Well, you better make a charge before the Ethics Committee against Mr. Schwartz. I'll bring this to a head before we get through with it. We'll find out who the liar is in this case, if I can find out.

(1094) Q. Did you ever ask Mr. Schwartz prior to September 14 for a copy? A. I did not.

Q. Did you ask him on September 14? A. I did not.

Q. Can you tell us why you did not? A. Frankly, it completely escaped my mind. My secretary merely says, "Mr. Marcus, they asked me—" I said, "What happened? Where are the boys?" She says, "They left. They asked me to type a memorandum for them. And they left." I didn't think there was anything strange about it.

The Court: Didn't she tell you, Mr. Marcus, that the memorandum was addressed to Mr. Sam Marcus?

The Witness: No, your Honor, she didn't.

The Court: She did not?

The Witness: No, sir. She merely—

The Court: All right. I don't want to hear any more. What did she merely tell you, that they done it?

The Witness: She merely told me—the boys had asked her to type a memorandum for them, and that's all.

The Court: That's all?

The Witness: That's all.

The Court: You didn't ask, "Does it concern me?" or anything else?

The Witness: I wouldn't have asked her. It wasn't (1095) important enough for me, your Honor.

The Court: It was not?

The Witness: I didn't sign nothing on the thing there. I didn't think it was important.

The Court: You didn't have to sign it. It was addressed to you and signed by somebody else, apparently.

Mr. Grosman: It wasn't signed, your Honor.

The Court: I noticed that. I said apparently.

Q. Mr. Marcus, when you left on August 26 of 1948 had you made any specific proposal to William Miller, or Judge Liberman, or Al Bierman as to what you would sell and for what? A. I did.

Q. Will you tell us what the specific proposal was? A. There were three specific proposals.

Q. Were they all made, all to be accepted, or did one replace the other? A. One or the other, either one of the three.

Q. All right. Let's hear the three. A. The first proposal was the fact that Kevelson would pay me $125,000 for my stock, and that Miller and Bierman would pay me cash for the 500 shares that I held of Miller's.

Q. How much? Let's get it specifically tied down. A. The $50,000 note plus interest.

Q. Plus interest? (1096) A. That's correct.

Q. That was proposal one? A. Proposal one.

Q. Was that rejected, in your presence? A. It wasn't rejected. It was accepted, if I would take pink notes, and green notes and yellow notes.

Q. And you wouldn't take different colored notes? A. That's correct.

Q. So was it then rejected? A. I rejected it, that's right. When Miller said he couldn't bring up the cash, I rejected the plan.

Q. All right. So that that proposal was not accepted? A. That's right.

Q. Now, let's get the next proposal. A. The next proposal was that Al Bierman would buy—would I be willing to give Mr. Kevelson a majority of the stock; in other words, would I be willing to sell 62½ per cent of the stock. And I said I would.

Q. At what price? A. I don't know if price was mentioned. I think we said something about—well, we definitely said $125,000 for the—

Q. Fifty per cent? A. Fifty per cent.

Q. How much for the 12½? (1097) A. There was no mentioned made of the price—of the 62½ per cent, but there was discussion—Miller brought up something about

Bierman said he will buy 12½ per cent at that figure—at a valuation of what the property is worth.

Q. And that figure was five hundred thousand, right? A. I think I mentioned the figure. I said I believe the property is worth $500,000.

Q. Let's get that proposal nailed down. It was $125,000 for 625 shares, plus 12½ per cent of $500,000 for an additional 12½ per cent? A. No, no, that wasn't the deal. The deal—

Q. You tell us what it was. A. I don't say that, I say one of the proposals were that Bierman would offer to buy 12½ per cent. The 62½ per cent, when the suggestion came up there, there was no particular price put on that. The question was just put to me, would I be willing to sell 62½ per cent because this man Kevelson wanted controlling interest.

Q. And what was your answer? A. My answer says yes, I would be willing to sell 62½ per cent.

Q. And were you asked for a price? A. There was no price asked or mentioned.

Q. So that you never arrived at any conclusion on (1098) the second proposal, is that right? A. That's correct.

Q. If no price was asked and no price was given. A. That's correct.

Q. Then that's all it consisted of? A. That's right.

Q. A proposal to buy 62½ per cent, right? A. Right.

Q. Then what happened next, was it the third proposal? A. Well, I said—when the meeting started getting hot, and warm, and yelling, and hollering, I said, "Why don't yet let Kevelson buy his half interest and let things go at that?" And the third proposal was that Kevelson was to buy 625 shares of stock.

The Court: Whose, yours?

The Witness: My 625 shares of stock, yes, your Honor.

Q. For $125,000? A. For $125,000.

Q. And it was at that point that Miller got angry and walked out? A. At that point Miller got angry, and dumped over the apple cart. He wanted no further negotiations.

Q. And also made various threats that you have already (1099) testified to, is that right? A. That's correct.

Q. And he left the room? A. He left the room.

Q. And you then left the room? A. When he left the room, a few minutes later I felt the negotiations had been completed, and several people—

Q. Completed or ended? A. Ended. I felt negotiations had ended there. And somebody was waiting for me down in the store. I went down in the store.

Q. So at the moment that you left, as far as you understood, there not only was no deal, there certainly was no kind of agreement, is that right? A. That's correct.

Q. On the contrary, whatever proposals had been made had all been either discarded or rejected and there was no understanding between you and Miller? A. That's correct.

Q. And then when you got back you found out the two lawyers who had remained behind had drawn a memorandum? A. From what I understood, they was talking, and Miss Pat—I call her Pat—she tells me that they were trying to jot down what they thought was some sort of a basis of an agreement, and they asked her would she take some notes. (1100) And it didn't seem important enough for her to—if the lawyers asked her, I didn't ask her—if she had done it for me she would have made me a copy. Mr. Schwartz or Mr. Lieberman asked her to make the memorandum.

Q. I wish you would answer my question. All right, fine. I thought I did.

Q. We will be here two weeks if you go on like this and we are all going to get exhausted. So that at this

point you had no agreement, no understanding of any kind with William Miller or Al Bierman, is that right? That's all I want to know. A. That's correct.

Q. On August 26, right? A. That's right.

Q. Now, the following day, on August 27, Exhibit DME-1 is signed by you, right? A. Yes, sir.

Q. Now, as I understand it, Mr. Marcus, you corrected the deposition, or the testimony you gave at the deposition at the outset of your direct examination, didn't you? A. I did.

Q. In other words, you read your deposition before this trial, is that right? A. I did.

(1101) Q. And you discovered in the course of reading that deposition your testimony about Exhibit DME-1, is that right? A. No, sir; it is not right.

Q. When did you discover it? A. I discovered that when you told me a falsehood.

Q. When I— A. When you told me a falsehood.

Q. What was the falsehood I told you? A. The occasion of that was a few days ago, right in the courtroom here, during recess, you approached me and said, "Mr. Marcus, off the record, isn't this your writing here?" And I said to you, "Mr. Brigadier, on the record, believe me, it doesn't look like my writing, and I don't think it is my handwriting."

You said to me, "I have got the greatest handwriting expert in the country, Mr. Osborn, who is willing to testify that this is your handwriting."

And you had me worried. You had me bothered. I was upset. You intimidated me, because I didn't know whether —"Golly," I says, "how can I stand up against the greatest handwriting expert in the country?" And I went—luckily for me Miss Bergler was here. I didn't bring Miss Bergler here as a witness. She was merely here to sit and listen and see in what way she could help me in my

recollections (1102) of some of the things that happened.

Miss Bergler came over and for the first time she saw this piece of paper, and she looked at the paper, and she called me aside and she says, "Why, Mr. Marcus, I typed this paper and this is my handwriting."

Q. Mr. Marcus— A. And now, Mr. Brigadier, unless you bring Mr. Osborn—bring him here to testify—

The Court: That's up to him. Don't you worry about that. You worry about yourself.

Q. Mr. Marcus, you say I told you a falsehood? A. Yes, sir; I do.

Q. You mean that Mr. Osborn never said that to me? A. Frankly, unless Mr. Osborn will testify to that, I will have to consider it a falsehood.

Q. Suppose I give you Mr. Osborn's opinion in writing, as long as you think I told you a lie? A. I want Mr. Osborn here on the stand.

Q. You said I told you a lie, that Mr. Osborn never told me that. If we are going to make it an issue of whether I told a lie—

The Court: You wouldn't know what Mr. Osborn told him.

The Witness: If you want to bring Mr. Osborn here—

(1103) Mr. Brigadier: I don't think that is what he meant. That is why I wanted to give him a chance. I don't think he meant I told him a lie. But he said I told him a falsehood. And I have questioned him: Do you mean that I did it?

Q. Let me ask you again. You didn't mean that I told you a lie. A. Well, Mr. Brigadier, excuse me. If Mr. Osborn did tell you that, and will testify to that, I will apologize to you. But unless you do get Mr. Osborn here

on the stand to testify to that, I will have to say it's a falsehood.

Q. Mr. Marcus, you said to me—you said in answer to a question that I told you a falsehood, off the record. I notice you have no hesitancy in putting it on the record, but I have no objection to it. Didn't you say that? A. I did; yes, sir.

Q. Then did you mean to imply by that that I made up the lie? A. Well, Mr. Brigadier, unless Mr. Osborn comes here and testifies, I will have to say you did make it up.

Q. And if I show you an opinion from Mr. Osborn, that won't change your mind? A. No, not unless Mr. Osborn will come here and testify, I won't change my mind.

(1104) Q. Now, Mr. Marcus, you say that Miss Bergler called this to your attention for the first time when I had this conversation with you, off the record, which you have now put on the record, is that right? A. That's correct, sir.

Q. Was Miss Bergler present at the taking of your deposition? A. She was present at one of the depositions. She brought some papers out.

Q. Do you remember at what deposition she was present? A. I do not.

Q. Don't you know she was present at the taking of the deposition when you were questioned about DME-1? A. I do not know that is a fact; no, sir.

Q. Look at it. A. Look at what?

Q. Look at DME-1. Wasn't Miss Bergler in the room at the time that Mr. Chazin examined you concerning this receipt? A. I don't know whether she was or not.

Q. That is your best answer? A. That is my best answer.

Mr. Grosman: Now, if your Honor please, there is certainly nothing on the Exhibit to indicate that Miss Bergler was—

(1105) Mr. Brigadier: But looking at the Exhibit might refresh his recollection as to how he was examined.

The Court: He relies strictly on his recollection. How many times were you deposed?

The Witness: Oh, about seven, I believe, seven times.

Mr. Brigadier: And on almost every one of these times he was questioned about this document, as I will prove when we put the depositions in, on every one of the occasions that he testified.

Q. At any rate, you do know this, that she was present at the taking of one of your depositions? A. Yes, sir; she was.

Q. And you do not recall at the time that she was present ever asking her anything about what is now DME-1? A. I do not recall ever asking her about any Exhibit that was exhibited at those—she was only present at one.

Q. Now, you do know that you testified in the depositions, as you admitted on direct examination, that Mr. Bierman went upstairs himself and brought back DME-1, isn't that right? A. That was my recollection; yes, sir.

Q. And you now know that was not correct? A. That is so.

Q. That he went up with Miss Bergler? (1106) A. That's correct.

Q. And that Miss Bergler typed DME-1, you now know that? A. That's correct.

Q. Now, do you also know that you testified in your depositions that DME-1 was signed at the bar? A. I did.

Q. And that is not correct? A. That is correct.

Q. Didn't you hear Miss Bergler testify that this was not signed at the bar, but was signed at a table in the cocktail room?

Mr. Grosman: She didn't say that.

The Court: Somebody said it. I don't know.

The Witness: The table is right next to the bar, your Honor.

Mr. Grosman: She said signed at a table adjoining the bar, as I remember, which might mean at the bar.

Mr. Brigadier: I thought "at the bar" means at the bar. Let him tell us where it was.

The Court: Do you remember where it was signed?

The Witness: Right at a table at the bar, just about three feet from the bar, four feet from the bar. I call that the bar.

(1107) Q. You weren't standing at the bar? A. I was not.

Q. Now, is it true that Miss Bergler typed an original and a copy of this Exhibit? A. I don't know what Miss Bergler typed.

Q. Did you hear Miss Bergler testify that she handed you a copy and that she was at the point of writing this into the original—or the one that is before you, when you came along and grabbed it? A. I don't remember her—I remember her saying that she had two copies, but I don't remember her saying that she handed me a copy.

Q. Did she hand you one? A. She handed me a copy to look at, and I made my corrections. I don't recall taking a copy with me.

Q. You don't know what happened to that copy? A. I do not. I have never found one amongst my effects.

Q. Does Miss Bergler tell you whether she kept it? A. I haven't asked her. And evidently she hasn't, because if she did she would have told me.

Q. Now, I direct your attention to DME-1, will you look at the first paragraph and read it to yourself, first.

(Witness examines document.)

Q. Had you read that before you signed it? A. I did not.

(1108) Q. You signed this document without reading it? A. I was receiving $10,000 cash, and it was a friendly arrangement between two people. We had discussed it orally. We were just going to make a binder. If the attorneys don't agree, your money comes back. There was no legal document being prepared. I wasn't looking for any legal shenanigans in there. I merely was getting $10,000. I gave the man a receipt for $10,000, subject to the attorneys getting together and drawing up some papers.

Q. And that is why you didn't read it? A. That's correct.

Q. So that you did not know when you signed it that it contained this statement, "For the purchase of my stock of the Milmar Estates, Inc., which includes all outstanding stock, except that stock owned by William Miller and Al Bierman"? A. We had a discussion—

Q. Just answer my question. A. No, I did not.

Q. You did not know when you signed it? A. I did not read that thoroughly; no, sir.

Q. Now, you have read it since, have you not? A. Yes, sir; I have.

Q. When did you first read it? A. I first read it when you submitted it in the depositions.

(1109) Q. And you found that this language which I read to you was contained therein, right? A. That's correct.

Q. The language, "excepting that stock owned by William Miller and Al Bierman." Now, do you say that that statement is not true? A. That's correct.

Q. Because William Miller—well, at least William Miller didn't own any stock, is that right? A. That's correct.

Q. Although Al Bierman did, the 20 shares? A. That's right.

Q. And your only explanation again is that you did not read this before you signed it? A. That's correct.

Samuel Marcus—Defendant—Recalled—Cross

Q. Now, again looking at this Exhibit, you will note that it originally called for $19,000, did it not, at the top it read, "Check for nineteen thousand," and then that was modified to read, "Received two checks of five thousand each and nine thousand in cash," isn't that right? A. That's correct.

Q. And that's when you came along and saw that there was to be nine thousand in cash, is that right? A. That's right.

Q. So you read that part, didn't you? (1110) A. I saw—when Mr. Bierman came down he had an envelope, and he had two checks and $9,000 in cash. When I saw the cash I says to Bierman, "No cash."

Q. Well, you were the one that crossed out the $9,000? A. That's correct, after I told Mr. Bierman, "No cash."

Q. So you at least considered this receipt important enough to strike out that line, didn't you; I mean, you read that much? A. I am enough of a businessman not to—to see what I am signing for in dollars and cents. I wasn't going to sign a $19,000 receipt and take $10,000.

Q. Right. That's all I want to know. I want to know if you read that part. A. He handed me $19,000. I saw the $19,000 figure, I made the correction.

Q. Now, actually, he didn't hand you a check for nineteen thousand, did he? A. He did not.

Q. So that he was handing you checks totaling ten thousand and cash nine, right? A. That's correct.

Q. Did you strike out the "19" that appears on the first line? A. I did.

Q. And you wrote the ten thousand above it, didn't (1111) you? A. I did.

Q. So you read that much, didn't you, you read the first line? A. I saw the $19,000 there and I immediately scratched out the $19,000 and changed it to ten.

Samuel Marcus—Defendant—Recalled—Cross

Q. All right. Then you didn't read anything that followed it in the typewritten part, is that right? A. That's correct.

Q. But your eye caught the handwriting at the bottom, "Received two checks at five thousand each and nine thousand in cash." A. My eye caught the $9,000 in cash and I immediately struck that out.

Q. Did you read "Received two checks at five thousand each"? A. I imagine I couldn't have helped reading that line, it is so close together.

Q. I want you to tell me. A. I am trying to tell you.

Q. Now, you said you wouldn't take the $9,000 because it was cash, right? A. That's correct.

Q. I think in answer to a question Judge Modarelli put to you you said, "I didn't want to have anything to do (1112) with cash, with a cash transaction. I am the kind of person who doesn't like to deal in cash." A. That's correct.

Q. But you subsequently did take cash, didn't you? A. When?

Q. On September 14. A. When Mr. Schwartz told me, "Marcus, cash is a legal tender and you have got to take this with the deal," and then I was assured that the cash was kosher, as they say, and I didn't have to hold it, and didn't have to hide it, I could deposit it in the bank, and the source was satisfactory.

Q. Were you told on August 27 that the $9,000 in cash was not kosher? A. I didn't ask about it.

Q. So there was nothing suggested to you that this was money that you would have to conceal, was there? A. I didn't ask about it.

Q. I am asking whether you were told that. A. No, sir; I was told nothing about it.

Q. Bierman didn't say, "This is nine thousand in cash that you can't disclose ever that you got from me in cash," did he? A. No, he said no such thing.

Q. And was there anything at all said by Mr. Bierman (1113) to suggest that this cash was something that you might have to worry about if you took it? A. Not a word.

Q. But still you wouldn't take it? A. Still I wouldn't take it.

Q. Because you thought there might be something you would have to worry about, isn't that right? A. I didn't like my deposits in my bank to show any large deposits in cash, always subject to examinations later on. And my accountants won't let me do it.

Q. Mr. Marcus, have you totaled the amount of cash that is represented in the claim that you have made against Milmar for the $46,000, cash deposits? A. I haven't totaled it. I imagine it's probably, over the two-year period—I think it is probably three or four thousand dollars worth of cash over the two-year period.

Q. In cash? A. I believe so.

Q. And only that amount? A. Only that amount, approximately that. I don't think it's any more than that.

Q. But you do know that you have made claims here for cash deposited by you as high as a thousand dollars at a time? A. That's correct.

(1114) Q. I just wanted to make sure that you knew that.

Now, after August 27—rather, when you were handed DME-1 to sign—that's the paper in front of you, the receipt of August 27, 1948—did you call Robert Schwartz or any other lawyer before signing it? A. This Exhibit right here? (Indicating.)

Q. That's right. A. I did not.

Q. You didn't think it was necessary to consult counsel at that point? A. It was about 12 o'clock at night. I don't think I'd take him out of bed to call him and tell him about that.

Q. Did you then communicate with Mr. Schwartz after August 27, 1948, to tell him that you had received this deposit? A. I did.

Q. Will you give us all your best recollection as to when it was that you called him after this date of August 27? A. This was either the following day or the next day. Now, I still don't recall whether I called Mr. Schwartz or Mr. Schwartz called me. My recollections are that Mr. Schwartz called me and told me that he had heard from Miller and his—and Judge Lieberman that I had agreed to a sale of my stock, and is that so? I said yes. And I believe I told him, "I got a deposit last night from Mr. Bierman. Will you (1115) arrange for a conference?"

Q. Didn't you tell Mr. Schwartz how much stock you had agreed to sell? A. I believe I told Mr. Schwartz that I made an arrangement to sell my stock. Now, whether—

Q. Didn't you mention—I am sorry. A. Now, whether I told him 625 shares or whether I mentioned only "my stock" I frankly cannot recollect at this time.

Q. Didn't you testify in the depositions that you told Mr. Schwartz "I was selling 625 shares for $125,000"? A. I did.

Q. And didn't you file an affidavit in connection with the receivership application in which you made the same statement? A. I did.

Q. Now, does that fresh your recollection that you told Mr. Schwartz over the phone that you were selling 625 shares for $125,000? A. I am frankly indefinite in my recollections right now. At first I thought—I am not definite—I know I told Mr. Schwartz, "I am selling my stock." I think I told him 625, and I may not have. I don't definitely want to pin myself down that I did definitely make the statement of 625 shares.

(1116) Q. But you do know—I don't want to repeat this again and again—in a number of places in your deposition you answered as follows—"you made it clear to your attorney that the papers that were to be drawn were to sell only 625 shares of stock? Answer: That's correct." A. I

believe in another part of my testimony I have also said I am indefinite whether I did tell him 625 or not. My first recollection was that I told him 625, and then I tried—I tried to remember now did I honestly tell him 625 or did I merely tell him "my stock," and I haven't pinpointed it down whether I did or not. But I definitely did tell him I was selling "my" stock.

Q. I see. And you mentioned the price? A. I mentioned the price, yes.

Q. A hundred and twenty-five thousand. A. No. There again, I don't recall whether I mentioned the price to him or not, because—I just simply said to him to arrange for a conference. I don't believe we spoke enough about price. He said to me—if I am not mistaken, his words to me were, "I understand you were out at the Riviera last night and straightened things out with Bill Miller." That seems to be my recollections of what he said to me, that "you straightened things out with Bill Miller and you are going to sell your stock." And I says, "That is correct." That's the best of my recollections as of today.

(1117) Q. I am not clear about one thing. On August 27, the day before you speak to Mr. Schwartz, when you received this deposit, had you arrived at an agreement as to the amount? A. We did not.

Q. What had you arrived at? A. No agreement whatsoever. A complete disagreement.

Q. What was the $10,000 for? A. $10,000 was for a binder. Mr. Bierman told me that they are liable to lose this guy if they don't do something and satisfy him that he has got a deal. "Take a binder, Sam. Take a deposit, just so's I can go back to this guy, show him you have got a deposit, and a deal is in the course of negotiations."

Q. I am sorry. When you are through—I didn't mean to interrupt you. A. I am through.

Q. You have used the word "binder." Do you know what the word "binder" means? A. Not the full legal—

Q. What did it mean when you used it? A. What it means to me? It means some type of a deposit and receipt for it, so a man would know there is a deal cooking, that there is something—

Q. Is that what the word "binder" means to you when (1118) you use it? A. That's what it means to me, yes.

Q. A receipt with some kind of deposit to show something is cooking? A. In my layman's language, I consider a binder whereby a man wants to know is somebody ready to do business? And—

Q. I am sorry. A. What is your question, Mr. Brigadier?

Q. Were you through? A. I thought I was through.

Q. All right. So that when you took this $10,000 and signed this paper, DME-1, no agreement had been arrived at between you, Bierman and Miller as to a sale, is that right? A. That's correct.

Q. No agreement had been arrived at as to the quantity of stock to be sold, is that correct? A. That's incorrect. An agreement had been made where I was going to sell my stock, my 625 shares of stock. That was my agreement with Mr. Bierman when I accepted this receipt.

Q. That's what I am trying to find out. A. That's correct.

Q. Let's get this straight. When you signed this receipt you had already arrived at an oral agreement, is (1119) that right? A. That's correct.

Q. With Mr. Bierman? A. That's right.

Q. That you were to sell 625 shares of your stock for one hundred and twenty-five thousand? A. That's correct. I don't know whether we mentioned—we mentioned 50 per cent of the stock, that he was going to buy 50 per cent of the stock for—that Kevelson was—he is giving me a binder, a $10,000 binder for Kevelson. He is represent-

ing this guy, he was going to buy 50 per cent of the stock. And I took that receipt on that basis.

Q. For a hundred and twenty-five thousand? A. There was no dollars and cents mentioned at the time. We had been carrying it over from the previous meeting where it was—the suggested price was $125,000, but I don't know whether Bierman and I discussed price. Bierman merely asked me to take a deposit "and then we will go to the lawyers and draw up contracts."

Q. Mr. Marcus, a few moments ago didn't you, in answer to a question I put to you, say that before DME-1 was signed that you and Bierman had arrived at an oral agreement, is that right? A. Of selling 50 per cent of the stock.

Q. Did you say that? Now, what did the oral agreement (1120) consist of? Is what I am trying to find out. A. That I would be willing to sell 50 per cent of the stock.

Q. With no price mentioned? A. No price mentioned.

Q. And on that statement, that you would be willing to sell 50 per cent of the stock, with no price mentioned, you received a deposit of ten thousand, having been offered nineteen, is that correct? A. That's correct.

Q. And you signed DME-1, is that right? A. That's correct.

Q. Now, I ask you when you spoke to Mr. Schwartz on the following day, the 28th, or you said it might have been the day thereafter, the 29th, and you said you might have spoken to him either because you called him or your best recollection was that he called you, isn't that right? A. That's correct.

Q. And he said to you he understood from Mr. Miller, or Lieberman—you weren't sure which—that you had sold something, right? A. No, I didn't say that.

Q. I am putting the "something" in because— A. I didn't say "sold." He says he understood from Mr. Lieberman that I had agreed to the sale of my stock.

(1121) Q. Now, that is what I want to know. Did you then tell him how much stock? A. Frankly, I believe, to the best of my recollections, I told him I was selling my stock.

Q. Without specifying a figure? A. Whether I did specify the figures or not, I don't want to make a definite statement at this time. I may have, I may have not.

The Court: Let's settle that. Did Mr. Schwartz know the number of shares you had?

The Witness: Yes, sir; he did.

The Court: He knew all about it?

The Witness: He knew all about it. He was secretary of the corporation, knew everything about it.

Q. Did you tell him the price? A. I don't recall whether I did or not. I told him to arrange for a conference.

Q. To discuss the terms? A. To discuss the terms.

Q. So that what you literally told Mr. Schwartz was, not that you had arrived at an agreement, but that you wanted a conference arranged to discuss the making of an agreement, is that right? A. That's correct.

Q. Now, from that date, which you place at August 28 (1122) or 29, until September 14, as I understood your direct testimony, you never met with Mr. Schwartz in that interval? A. That's correct.

Q. Did you phone Mr. Schwartz in that interval? A. I don't—I have no recollections. It is possible he may have phoned me, or I might have phoned him, but I have no definite recollections of any conversations with Mr. Schwartz.

Q. Do you have any recollections of sending him any kind of communication with instructions? A. I have no recollections of sending him anything at all.

The Court: The answer is no.

Q. So that other than this conversation on August 28 or 29, the next meeting that you had with Mr. Schwartz of any kind was on September 14, is that right? A. That's correct.

Q. Now, before I get to the 14th, just one other question. In the interval between August 27 and September 14, were there any kind of negotiations going on between you and Bierman or you and Miller? A. Yes. I mean—any time I came to the Riviera, Miller or Bierman would always approach me, tell me how terrible conditions are, that, "Frankly, Sam, don't hesitate about—get this deal closed up quickly. We don't have the money (1123) to pay your rent. You know you can't get any more rent money for the rest of this season."

Q. I know all that, Mr. Marcus, and the Judge has heard it many times. A. That's the conversation that happened on every occasion when I visited the Riviera.

Q. Let me direct your attention to what I am trying to find out. I want to find out whether any of these terms that were not mentioned on the 27th became mentioned between you, between the 27th and the 14th? A. No, no terms were discussed whatsoever, other than telling me how bad business conditions were.

The Court: That's not a term.

Q. I am talking in terms of the agreement. A. No terms of the agreement was discussed between us at all.

Q. So there was nothing between you and Miller and you and Bierman carrying out any further—with any certainty—the terms to be arrived at, is that right? A. That's correct.

Q. That's all I wanted to know. A. That's my best recollections.

Q. Now, I call your attention to the second letter attached to DM-19, which you have put in evidence. In this

a letter which you sent to Mr. Miller? (1124) A. I believe I did. Yes, sir; I did.

Q. And that was dated on what date? A. September 3.

Q. Now, does that serve to refresh your recollection as to anything that might have occurred on September 3? A. No, sir; it does not.

Q. It doesn't serve to refresh your recollection that you had a meeting on September 3? A. No, sir; we did not.

Q. But you did know that there were negotiations pending, is that right? A. Yes, sir; I did.

Q. What negotiations are you referring to? A. The negotiations that I called Mr. Schwartz up two or three days after the receipt from Mr. Bierman.

Q. That which you have already testified to, a few moments ago? A. That's correct.

Q. Now, on September 14 how did you happen to come to Mr. Schwartz' office? A. Mr. Schwartz called me at my store.

Q. When did he call you? A. To the best of my recollections now, I was in the store behind the counter pinch-hitting for one of my salesmen out for lunch. So the period must have been between one and 2 o'clock.

(1125) Q. Yes. What did he say to you?

Mr. Grosman: I object to that, what his attorney said to him.

Mr. Brigadier: Why?

The Court: Is it confidential?

Mr. Grosman: Do I have to tell you why?

Mr. Brigadier: Well, he has already testified in the depositions, and in the affidavits that he has filed in this cause, as to the instructions he gave to his attorney. He can't just open the door to his part, and keep it out. He says, page after page in the deposition, and in the affidavit on the receivership application, "I gave my attorneys instructions. This is what

I told Mr. Schwartz." I have a right to elicit what he told Mr. Schwartz. He can't just open—

The Court: I am sure you both know the Rule. Once the door is open it stays open.

Mr. Grosman: If your Honor please, on depositions, of course, he has got to answer whatever he is asked.

Mr. Brigadier: Oh, no, cases to the contrary. The cases are that if it is privileged he should have refused to answer and come before the court. He didn't refuse to answer, and we have a federal case holding that having testified in the deposition the door is opened, even at the trial.

(1126) Mr. Grosman: Will you point out in the deposition where he waived the privilege?

Mr. Brigadier: Sure.

Mr. Grosman: Go ahead.

Mr. Brigadier: As a matter of fact, your Honor has had this in a memorandum that is in your file, because we have argued this at great length. Your Honor has already decided it. Mr. Schwartz has testified already throughout these things, because of your Honor's instructions to him. But if we have to go through it again—

The Court: I have already held—

Mr. Brigadier: You have already ruled. And he has a copy of my memorandum, which your Honor has, which shows every one of these—

The Court: Mr. Schwartz wouldn't answer till I made him.

Mr. Grosman: Your Honor's ruling was that any dealings between Mr. Marcus and Mr. Schwartz, any business dealings—that the relationship between him and Schwartz, as attorney and client, were priviliged. That's my recollection of your ruling.

Mr. Brigadier: Do I have to read it? I will read it.

Excerpts from Deposition Read Into Record

Mr. Grosman: Everybody knows what he is talking about.

(1127) The Court: What are you reading from?

Mr. Brigadier: From the depositions. Page 51 to 52.

"Question: I ask you whether this contract provides for the sale by Milmar Estates, Inc., of all of its issued and outstanding capital stock consisting of 1,250 shares to Miller and Bierman?

"Mr. Tepper: The same objection goes to the repeated question.

"Mr. Chazin: Your objection has been noted.

"Question: Answer the question.

"Answer: That is not correct.

"Question: What is the correct fact?

"Answer: The correct fact was that I was selling my stock for $125,000."

You are giving me the wrong part. The paragraph on page 180: "Question: And it was made clear that that was all you were selling?

"Answer: I believe it was made clear. At least, I made it clear to my attorney what the sale was to be."

Then on page 54. "Question: Will you explain to us why you signed that contract?"

Mr. Grosman: Just a moment, Mr. Brigadier. Give me a chance to turn to it.

All right.

(1128) Mr. Brigadier: "Answer: I am not a lawyer. I am a layman. I had a lawyer representing me at the time. I called my lawyer what the deal was, and I relied on him to carry through the transaction of the deal legally. I don't know terms. I don't know corporations, how it is handled and what is done. I explained to my lawyer exactly what the agreement was.

what was my intention, and the lawyers drew up the agreement, which was handed to me, and I signed it."

The Court: All right. Now, in that posture, if he repudiates what Schwartz does, does that say Mr. Schwartz can't tell me what he told him.

Mr. Brigadier: No, that is what they are contending.

The Court: What kind of a rule of law is that?

Mr. Grosman: I don't understand it.

The Court: It can't be that way. If a client expressly says, "My lawyer didn't do what I told him to do," how can the lawyer defend himself?

Mr. Grosman: Now, if your Honor please, if you will have the stenographer read back the question, you will find that it is not limited to this. He wants to know generally, "What instructions did you give your client?" That's what I object to.

Mr. Brigadier: What are we asking him to testify (1129) to? This transaction—

The Court: He only asked him a simple question when this objection came. Just read the question.

Mr. Grosman: The general question, "What did you tell your lawyer—what instructions did you give your lawyer?"

Mr. Brigadier: If your Honor please, this was given in connection with my asking how he happened to come there September 14.

The Court: That's as I recall.

Mr. Brigadier: He said, "I received a telephone while I was waiting on a customer." "What call did you receive?" That's what I am asking him, what did he say to Schwartz over the telephone.

(Record read.)

The Court: That was the question.

Mr. Brigadier: What did Schwartz say to you when he called you on the telephone? Because this is in connection with how he gets—

The Court: Yes, that's what I understand. You didn't call him that day, he called you.

The Witness: That's correct, sir.

The Court: What's confidential about that?

Mr. Grosman: He might have said something to him concerning a subject wholly disconnected with this transaction.

(1130) Mr. Brigadier: All right. Then I will ask him:

Q. What did he say to you in relation to this case, the subject matter of this case? That's what we have been disputing. A. He said, "Sam, come right over. I have Judge Lieberman and Miller here waiting to close the deal," or, "to make a deal," or, "close a deal," I don't recall just what the exact—

The Court: That's what he said?

The Witness: That's what he said.

Q. Incidentally, since we have had such a fuss, don't tell us what it was, but was there anything in that conversation but that? A. Yes, I said to him, "Say, Bob, you got me at a bad time. I can't leave the place right now." He said, "Well, you must come over. The men here have been here quite some time and they want to get this thing over with."

Q. What I meant, Mr. Marcus, was, without telling me what it was, was there any conversation pertaining to some other litigation? A. No, just strictly to this.

Q. Just this? A. Just strictly to this.

The Court: In other words, the purpose of the call (1131) was to get you up to Schwartz' office?

The Witness: That's correct.

The Court: Did you tell him you would have to wait till you got relief at the store?

The Witness: I did, but he says, "You have got to come over. The men are impatient. They have been here quite some time. And they want to finish this thing up."

The Court: So what did you do?

The Witness: And so I—his office is just two blocks from my store, so I—I had to go over, so I simply left the store and went over.

The Court: Did you leave someone in the store?

The Witness: Well, I have 15 employees, but I was just pinch-hitting for one of the employees who was out for lunch at the time.

The Court: I see.

We will take a short recess now.

(Short recess.)

Mr. Brigadier: Will you please read the last answer or two he gave before the recess.

(Record read.)

'Q. Now, prior to this telephone call, as I understand your testimony, you didn't even know they were meeting, isn't that right? (1132) A. That's correct.

Q. And the first word that you had of their meeting was this call, right? A. That's correct.

Q. Now, you heard what the stenographer just read as your answer before the recess, about the men being impatient, and they wanted to finish it up? A. That's correct.

Q. Did you say to Mr. Schwartz, "What is this all about, Mr. Schwartz?" A. I did not.

Q. Did you say, "I don't know anything about any meeting, Mr. Schwartz"? A. I did not.

Q. "This is the first I hear that they are meeting, Mr. Schwartz"? A. I did say something, as I mentioned before, "You have caught me unawares."

Q. And beyond that it didn't occur to you to say anything to Mr. Schwartz about the fact that nobody had informed you that there was any meeting? A. That's correct.

Q. And when he said, "Finish up," did it occur to you to ask Mr. Schwartz, "What are you finishing up"? A. It didn't occur to me over the telephone. I could (1133) always talk to him when I got over there.

Q. But remember, Mr. Marcus, you testified that up to this point you had no information, or knowledge, that any kind of meeting was taking place, right? A. That's correct.

Mr. Grosman: I object to that question as being argumentative. He is arguing with the witness.

The Court: It's silly. The man insists he didn't know about the meeting, apparently there were no prior arrangements made, no definite meeting. You can question him all afternoon, you are going to get the same answer.

Mr. Brigadier: All right. Then I will go to the meeting, sir.

The Court: You know he won't change. If that's his statement, that's his statement. Only on television or movies do they break down when lawyers ask them enough times.

Mr. Brigadier: I thought he might come to recognize that on the face of it this called for further explanation.

The Court: I don't want to foreclose you. Isn't that so, you had no prior knowledge of a definite meeting that day, did you; is that right?

The Witness: That's correct, your Honor.

(1134) The Court: So, as I take your testimony, you were rather surprised when Mr. Schwartz called you up.

The Witness: That's correct, sir.

The Court: So what is the use of going along any more on it?

Q. But you told him that you would come up and you did? A. That's right.

The Court: He did go up. He tells you he did go up there and found Judge Lieberman there, his lawyer, and Mr. Miller, right; they all were there when you got there?

The Witness: That's correct, sir.

Q. I direct your attention to page 58 of the deposition, the middle of the page, you were asked this question:

"Question: Well, was Mr. Miller and was Mr. Bierman present at that time, when you gave Mr. Robert Schwartz instructions as to what were your intentions?

"Answer: Well, frankly, I don't think so. No, I don't have any sharp recollections of whether I told him the day before the signing of the contract or two days before, but all I do know was I conveyed my intentions to Mr. Schwartz in the selling of my stock."

Does that serve to refresh your recollection as to (1135) whether you had any conversation with Mr. Schwartz the day before or two days before? A. Mr. Brigadier, I think that is a misstatement I made. I corrected my statement on that in other parts of that testimony.

Q. You say that this statement is in error, is that it? A. That's correct.

Q. And that you believe you corrected it in other parts of your deposition? A. Yes, sir; I did.

Q. Do you know in what other parts you corrected it? A. No, I don't, but I know the question was asked of me again and I told them that the information I conveyed to Mr. Schwartz was right after I got the receipt from Mr. Bierman.

Q. This is the 28th or 29th. A. Somewheres around the 28th or the 29th, that's right.

Q. Now, when you walked into Mr. Schwartz' office you found Judge Lieberman, Mr. Schwartz, Mr. Miller already there, right? A. That's correct.

Q. And, as I recall your direct testimony, when you walked in you found that they were examining, or looking at, or working with, I don't remember the exact expression (1136) you used, the stock book, is that right? A. I didn't say that at all.

Q. No? What did you say you found when you came in? A. I said when I came in, if I remember correctly, the first thing that Mr. Schwartz said to me was, "I understand the deal is going to be for the sale of all the stock, is that correct, Sam?"

Q. And what did you say? A. And I turned to Bill Miller and I said, "Is that so?" And Bill Miller nodded his head, that that was the deal.

Q. But up to that moment, before you walked into Schwartz' office, you had made no deal with Mr. Miller for the sale of all the stock, is that right? A. That's correct.

Q. All right. And what happened next, you found out that now the deal was for all the stock. When you say "all" you mean what, twelve hundred and how many shares? A. Well, frankly, I don't know what it meant, whether it meant all of my stock, whether it meant including Schwartz', I don't know what the deal meant. Schwartz said to me, "I understand the deal is going to be for all the stock."

Q. And you turned to Miller and said, "Is that right"? A. And I turned to Miller and I said, "Is that correct?" and Miller nodded his head.

(1137) Q. Did you then turn to Schwartz and ask how much stock? A. No, I did not.

Q. What did you do next? A. As we sat down I said, "It's okay to me." We sat down and then either Judge Lieberman or Mr. Schwartz said, "We are cleaning up this stock book mess. Will you sign a couple of these certificates?"

Q. Now, was the stock book already there when you arrived? A. I believe it was, yes.

Q. You didn't bring it with you? A. I did not.

Q. What was this box that you said you brought with you? A. I didn't bring any box with me.

Q. It was a box you took away with you, is that it? A. That's correct.

Q. And that box is the box that contained what? A. A regular box that contains the general transfer book, minute book, and the stock book. A regular corporation outfit box.

Q. The book was in that box, the stock book, when you left, was that in that box? A. I didn't open the box when I left. I merely saw it (1138) on the desk, picked it up, took it out with me.

Q. Later did you look at the box? A. I did not.

Q. You have never looked at it? A. I never looked at it.

Q. So you don't know what was in the box? A. I don't know what was in the box.

Q. Now, did you testify on direct examination, "This box was laying there, and I put that under my arm, because I always had possession of that, and I took that back with me"? A. I believe that is what I said.

Q. Now, did you see them open up the stock book, Exhibit DME-21, while you were there? A. All I can recol-

lect—I can't recollect every little detail that was done there, all I recollect—

The Court: Answer one simple question.

The Witness: Yes.

The Court: Did you see them open up the stock book while you were there?

The Witness: If I recall correctly, the stock book was laying on the table, opened, with the rest of the papers.

Q. I see. Now, when you arrived there, you had with you all the stock certificates, except those of Mr. Schwartz'? (1139) A. I did. And excepting that of Mr. Bierman's.

Q. And excepting Bierman's. A. That's right.

Q. Do you know where that stock certificate of Mr. Bierman's is? A. I do not.

Q. At this moment? A. I do not.

Mr. Brigadier: (To Clerk) Will you produce the stock certificates that were put in evidence?

(Documents handed to counsel.)

Q. You had with you at the time Certificate No. 1, 10, 11, 12, 13, marked Exhibit DM-26? A. I did.

Q. And in addition to those certificates, by looking at the stock book, can you tell us what other stock certificates you had with you? A. No. 2—

Q. Will you read off the number of the certificate, to whom made out, and the number of shares. A. No. 2, Sam Marcus, nine shares. No. 5, Sam Marcus, four hundred—there again I wouldn't know some of these. I had 625 shares, but this stock book here—the records got some figures in here which I wouldn't know whether—I don't think I had this share, No. 491.

(1140) Q. I am asking you, Mr. Marcus, to look at the book and tell us what you know. A. Can I have a pencil,

please, so I can number the number of shares, because this stock book record here is kind of mixed up.

Q. Do you want a sheet of paper, too? A. Yes.

(Paper handed to witness.)

Q. Just go through that and make a list for us—Mr. Marcus, will you please listen so that we get this done as expeditiously as possible. I want the certificate number, to whom the certificate was made out, and the number of shares of each certificate that you had with you and produced, in addition to those that are already in evidence as Exhibit DM-26. A. You want these called off?

Q. Yes, please. A. I had Certificate No. 2, made out to Sam Marcus, nine shares. Certificate No. 6, made out to Sam Marcus, 125 shares. Certificate No. 7, made out to Sam Marcus, 91 shares. Certificate No. 8, made out to Sam Marcus, 300 shares. Certificate No. 9, made out to Sam Marcus, 100 shares.

Q. Totaling how many? A. Totaling 625 shares.

Q. Now, in addition to those you also had those, you (1141) have already testified, DM-26, is that right? A. Yes, sir; I did.

Q. And how much do those total? A. Five hundred shares.

Q. So that you had a total of eleven hundred and twenty-five shares with you, right? A. Yes, sir; I did.

Q. Now, you had the certificates, all these certificates, in your possession, right? A. I did.

Q. Were they in your pocket? A. They were in my pocket.

Q. Did you make it a custom to walk around with these certificates? A. No.

Q. Where had they been? A. In my safe in my office.

Q. In your office? A. That's correct.

Q. And when Mr. Schwartz called you, you then went to your safe— A. That's correct.

Q. —and you took out how many shares? A. I took the entire envelope that contained all the certificates and put them in my pocket.

(1142) Q. How many shares of those which you took out of the safe did you believe that you were going to sell at that moment? A. I didn't know.

Q. Was it more than 625? A. I didn't know what the deal was going to be, because we had set up no deal.

Q. But you brought along with you all the stock you had in your name, or in William Miller's name, all except the 125 owned by Schwartz, right? A. There was one envelope containing all the stock. I took the envelope out of my safe, put it in my pocket and went along.

Q. Now, when you got to the meeting, September 14, you produced all those certificates, didn't you? A. I did.

Q. Not only those which you have identified now, but also those that are in evidence, DM-26, is that right? A. That's correct.

Q. Now, those that you have testified to now, totaling 625 shares, are the certificates which you testified you delivered to Judge Lieberman, is that right? A. That's correct.

Q. In the presence of William Miller, Robert Schwartz, you delivered certificates that you have just identified by (1143) number, totaling 625 shares, to Judge Lieberman? A. I did.

Q. And you understood my question, in the presence of William Miller and Robert Schwartz? A. I did.

Q. Now, the remaining certificates, which you put in evidence in DM-26, you also exhibited at this meeting, did you not? A. As I explained it yesterday, if that's what you mean by "exhibiting."

Q. You showed them. A. I didn't show them, no.

Q. You had them with you? A. I had them with me, yes.

Samuel Marcus—Defendant—Recalled—Cross

The Court: He said he put them out and h separated them, is that right?

The Witness: Yes, your Honor.

Mr. Brigadier: Well, he took them all out of the envelope.

The Court: That's right.

The Witness: That's right.

Q. At the table? A. At the table.

Q. In the presence of the others? A. Yes, sir.

(1144) Q. So that they could see that you had these other certificates, couldn't they? A. They could.

Q. If they had eyesight, they could have seen it? A. That's correct.

Mr. Brigadier: That's what I wanted to make clear.

Mr. Grosman: Or if they were observant.

Q. Well, they were all at this table with you, weren't they? A. All the other three gentlemen were sitting at the table with me.

Q. So that actually at one point or another at this meeting, at this table, all the certificates were placed on the table? A. No.

Q. They were not? A. They were not.

Q. What was done? A. Bob Schwartz' stock wasn't placed on the table.

Q. I am talking of these. A. You said all the certificates.

Q. I said all the certificates that you have testified to today as being in your possession. A. That's correct, sir.

Q. We have already gotten your testimony that you did (1145) not have Schwartz' 125, you say; is that right? A. That's correct.

Q. Now, you have testified that you delivered these certificates 2, 6, 7, 8, 9—totaling 625 to Judge Lieberman? A. That's correct.

Q. And DM-26 you put back in your envelope? A. That's correct.

Q. And in your pocket? A. That's correct.

Q. And you walked out at the end of the transaction? A. At the end of the transaction I walked out.

Q. Now, I direct your attention to the stub for Certificate No. 16, and ask you whether you saw the word "canceled" written on that stub? A. I did not.

Q. Do you know whose handwriting that was? A. I couldn't be sure. It looks like Mr. Schwartz', but I wouldn't be—care to identify it.

Q. Well, you heard Robert Schwartz testify in the deposition, didn't you? A. I don't recall what he said, whether it was his or not.

Q. You don't recall whether he admitted that this is his signature, his handwriting? A. I don't recall whether he did or not.

(1146) Q. Let's see how good your memory is, then. Take Certificate No. 15, the word "canceled," do you know whose handwriting that is in? A. I believe it looks like Mr. Schwartz', but I wouldn't be in a position to testify as to his signature.

Q. Was that written in your presence? A. I don't recall seeing it written.

Q. And again you heard Mr. Schwartz testify that he had written that? A. I don't recall what his testimony was on that. I believe he said he did, but I don't recall his testimony fully.

Q. This is 1954 we are talking about, Mr. Marcus.

Mr. Grosman: If your Honor please—

A. I can't remember everybody's—

Mr. Grosman: Will you wait, please.

The Court: Mr. Grosman.

The Witness: I'm sorry.

Mr. Grosman: I don't think it is up to this witness to evaluate his testimony against that of Schwartz.

Mr. Brigadier: I didn't ask him to.

Mr. Grosman: Now, if Schwartz testified to that, it is in the record, and the record will show it.

The Court: It's an issue of fact.

Mr. Grosman: Yes, sir.

(1147) Mr. Brigadier: I am not asking him, sir, as to whether or not what Schwartz said is true, I am merely asking whether or not he heard Schwartz say it, for a very obvious reason. This man was present in this room when this was done. He doesn't have any recollection. He was present when the deposition of Mr. Schwartz was taken and Mr. Schwartz testifies "that is my handwriting." Certainly I have the right to use that to see whether or not this man's recollection can be refreshed or whether he is credible. To me it's fantastic that I shouldn't be permitted to do it.

The Court: You know what you can do on credibility, don't you? You can ask almost anything.

Mr. Grosman: I heard Mr. Schwartz' testimony. I will tell you frankly, I don't remember what he said.

Mr. Brigadier: Then you ought to read the deposition, Judge Grosman.

The Court: Well, if he doesn't remember, he just says "I don't remember," that's all.

Q. I direct your attention to the stubs for Certificates Nos. 14, 13, 12, 11, 10, 9, 8, 7 and 6, and you will notice the handwritten word "canceled" on each one of these, is that right? A. That's right.

Q. Did you see that written on September 14? (1148) A. I did not.

Q. Did you hear Mr. Schwartz' testimony in the deposi-

tion? A. I don't recall what his testimony was in the deposition.

Q. You don't recall his testifying that that is his handwriting? A. I don't recall definitely whether he testified to such.

Q. But you were there? A. I was there

Q. Now, I direct your attention to Certificate 3—I am sorry—the stubs for Certificates 3, 2 and 1, and the word, handwritten word, "canceled" on each of these, and ask you whether you saw that word written on September 14? A. I did not.

Q. And it was not done in your presence? A. It was not.

Q. Or do you have no recollection, which is it? A. I have no recollection whatsoever.

Q. There is a difference between the two. We want to get that clear. Which is it? A. I have no recollection of seeing these signed in my presence.

Q. But you are not prepared to swear it was not done in your presence. Do I understand you correctly now? A. Yes, I will swear it wasn't done in my presence.

(1149) Q. All right. That's what I want to find out. A. That's right.

Q. It was not done in your presence. A. It was not done in my presence.

Q. Again, you don't recall Schwartz' testimony that that is his handwriting and that it was done in your presence on September 14? A. I do not recall what his testimony was on that.

Q. Now, you say that they said the stock book was in a mess, right? A. Yes, that's the word that was used.

Q. And that in order to straighten it out something had to be done? A. All the words I can recall was that they said, "We want to straighten out the stock book mess."

Samuel Marcus—Defendant—Recalled—Cross

Q. Did you hear any plan suggested as to how it could be straightened out? A. I don't recall any particular plans, other than the next word to me was, "Sam, will you sign these three, four or five certificates"—whatever it was that they asked me to sign—and I signed them.

Q. When you say they asked you, you mean Mr. Schwartz? A. Mr. Schwartz and Judge Lieberman. Just which one was the moving factor there, or told me, I don't know.

Q. Well, it was Mr. Schwartz who was your lawyer. (1150) Would you have signed papers because somebody else asked you, other than your lawyer? A. Well, they were both—they both chimed in together. I wouldn't say definitely which one. They were both working together. And the book was put there and, "Sam, we are cleaning up the stock book mess."—"we" are—"we are cleaning up the stock book mess. Will you sign these few certificates?"

Q. And the few certificates you signed are Exhibits 19A, B, 20A and 20B, right? A. Right.

Q. Totaling 1,250 shares? A. That's correct.

Q. Did you know when you signed these four certificates that they totaled 1,250 shares? A. I didn't particularly take notice.

Q. Well, did you take any kind of notice, particular or otherwise? A. No, I don't know whether there was anything written on these shares when I signed them or not. I was just asked to sign some new certificates.

The Court: Wait a minute. Do you realize the grave accusation that you are making against two members of the bar? Do you realize that they could be disbarred, if you could prove that, both of them, or don't you care (1151) what you say about people?

The Witness: Your Honor, I care—

Samuel Marcus—Defendant—Recalled—Cross

The Court: Just a minute. Do you realize what you are saying?

The Witness: I realize what I am saying, yes, your Honor.

The Court: All right, sir. That is all I want to know, because if I am convinced otherwise, when this case is over I will make plenty of trouble for you. You won't need those two lawyers to make it for you.

Q. Will you look at—

The Court: I just want to make sure he realizes what he is saying, that those were not filled in when he signed them, is that right?

The Witness: Your Honor, I haven't said that.

The Court: What did you say?

The Witness: I said I don't recollect whether they were filled in or not.

The Court: Hold it. Read what he said.

(Record read.)

The Court: But you do mean to imply by that that maybe there was nothing written on them, is that right?

The Witness: Your Honor, I don't imply anything at all.

The Court: Well, what do you mean?

(1152) The Witness: I imply, sir, that I signed these certificates based upon a certain deal that was going to take place.

The Court: What do you mean about whether or not they were filled in, I want to know.

The Witness: I haven't—

The Court: Somebody has got to pin you down and I am going to do it now.

The Witness: Yes, your Honor.

Samuel Marcus—Defendant—Recalled—Cross

The Court: What do you mean by that? Were they filled in or were they not filled in?

The Witness: I have no recollection.

The Court: That's enough then. All right. That's a saving clause for you. That's what they all hide behind. That's like the Fifth Amendment.

Now you have no recollection.

The Witness: I have no recollection.

The Court: So that they might have been filled in?

The Witness: They might have been filled in; yes, sir.

The Court: And they might not?

The Witness: And they might not, definitely so.

Q. Let me refresh your recollection. Paragraph 18 of the affidavit of Samuel Marcus—that same affidavit that (1153) was used in the receivership proceeding, December 21—Mr. Marcus, in Paragraph 18 of this affidavit that you made on December 21, did you swear to the following, "I deny that four new certificates of stock in the total amount of 1,250 shares of Milmar Estates, Inc., were to be issued to anyone. The certificates annexed to Miller's affidavit bear my signature. I must have signed them unwittingly and unknowingly in the 'group of papers' referred to on the last line of Paragraph 5 of William Miller's affidavit, on page 2 thereof, and the execution of said certificates of stock was accomplished by trickery, fraud and device, there being no agreement anywhere or at any time for the execution and delivery of such certificates."

You made that affidavit, right? A. I believe I did.

Q. Do you charge Judge Lieberman and Robert Schwartz with that fraud and trickery—

Mr. Grosman: I object to that. The facts speak for themselves.

Samuel Marcus—Defendant—Recalled—Cross

Mr. Brigadier: I think we have a perfect right to ask that question, sir.

The Court: It goes to the very basis of the charge of fraud. Who perpetrated the fraud, I have to find out.

Q. Do you charge Judge Lieberman and Robert Schwartz (1154) with being the parties to this fraud and trickery recited in that paragraph of the affidavit?

Mr. Grosman: Now, if your Honor please, may I again object, that it isn't up to him to characterize their conduct. Now, he says that he signed these documents, they weren't supposed to be delivered to anybody, and he can't explain how they got into circulation, except, as he says, as part of one of the discarded plans.

Mr. Brigadier: That is not what he said. I read the affidavit. The affidavit says that he swears under oath that he signed these as the result of fraud and trickery.

The Court: Don't I have to know whose fraud and trickery it is, if I am to pass judgment on whether he was induced to fraudulently sign? He certainly has to specify who the persons were who fraudulently induced him to sign.

He has to. Suppose it's somebody who has nothing to do with this transaction at all. Could I hold the principals then if Joe Shmoe told him in the men's room of the Riviera to sign it? Certainly I have to know who is supposed to have perpetrated the fraud.

Mr. Grosman: If your Honor please, my understanding is that when he went in there, this meeting—

The Court: I heard everything he said, Judge Grosman, and it is all fresh in my mind.

Colloquy

(1155) Mr. Grosman: —he thought they were going to buy all of the stock. They are cleaning up the stock book mess and he signed these certificates.

The Court: You are a former judge. The man charges somebody wih inducing him by fraud and deceit. Doesn't the Court have to know who induced him by fraud and deceit? Who? Judge Grosman? Mr. Schwartz? Bill Miller? Al Bierman? Who fraudulently induced him to sign these documents?

Mr. Grosman: I think it was Bill Miller, when he says—

The Court: Let him answer it. From reading that affidavit, it looks like he means more than Bill Miller.

Let me see that affidavit, please. I thought I heard the name of Judge Lieberman and Mr. Schwartz read in there.

Mr. Brigadier: It comes in later on. Not in that paragraph.

The Court: Let's see who he says in there.

Mr. Brigadier: There is another one I haven't taken yet. Eighteen is the one I just read.

The Court: It is just a general statement in there. Later on does he specify who perpetrated the fraud?

Mr. Grosman: He said he doesn't know.

Mr. Brigadier: That's what I am trying to find out. That's what I have the right to ask him.

(1156) The Court: That's like if I charge somebody with murder, but I don't know who did it, but I am going to charge you with it.

Mr. Brigadier: He was gotten to do a specific act by—

The Court: Wait a minute. Fraud and deceit is a quasi-criminal act, don't you know that, under the law, and may amount to crime sometimes, under the Cases.

Mr. Grosman: If your Honor please, this man doesn't know what happened to him. All he knows is when the smoke of battle cleared up—

The Court: He had signed a lot of documents.

Mr. Grosman: —he wound up minus about a hundred thousand dollars.

The Court: Don't sum it up, Judge. Save it for later.

Mr. Grosman: All right.

The Court: I want to know now: Nobody is specifically charged with committing fraud and deceit on him?

Mr. Grosman: Well, the only one who can be charged would be, I suppose, the principal.

The Court: Well, let's see who of the principals did it.

Mr. Brigadier: All I want to know, Judge, is who (1157) got him to sign these papers by fraud and trickery. That's all.

The Court: A perfectly proper question.

Q. Who practiced the fraud and trickery referred to in Paragraph 18 of your affidavit by which you found yourself signing these Exhibits, 19A, B, 20A and 20B? A. Frankly, there was no fraud and trickery intended when I signed these certificates, because—

The Court: Are they all made to you?

The Witness: Yes.

The Court: Are they all endorsed by you?

The Witness: Yes, sir.

A. (continuing) —because the understanding at that particular time was that the deal was going for all the stock. So I don't believe the attorneys intended any fraud or trickery when they asked me to sign the stock.

Samuel Marcus—Defendant—Recalled—Cross

Q. Then what did you mean by this statement in Paragraph 18, "and the execution of said certificates of stock was accomplished by trickery, fraud and device, there being no agreement anywhere or at any time for the execution and delivery of such certificates," you have just told us at this time that you thought the deal was for all the stock; didn't you just say that in answer to the Judge's question? A. Yes, sir.

(1158) Mr. Grosman: May I register an objection here at this time? What he is charging there is the legal effect, your Honor, which we may do under the Rules. He says there was no intention to deliver this stock after Miller repudiated his agreement to buy all of the stock.

The Court: Isn't the Rule that you allege the facts which the Court must find, whether or not they are fraudulent and deceitful? That's a conclusion you have got in that affidavit. We want the facts upon which he bases that charge.

Mr. Grosman: We may plead according to legal effect.

Mr. Brigadier: Not on fraud.

The Court: Oh, no.

Mr. Brigadier: This Rule expressly says that fraud cannot be pleaded—

The Court: Do we have to look up that elementary question of law now? We don't have to, because you know better.

You realize that just because he says that, that doesn't mean anything. We have got to get the facts that constitute this fraud and deceit, and who perpetrated it.

Mr. Grosman: I still say that it was Miller.

Mr. Brigadier: You are not the witness.

The Court: If he says so, I will take it from him.

(1159) Mr. Grosman: I am talking to the Judge. Now, he went in there. Miller said he was going to buy all the stock. He signed the stock certificates. He didn't buy it.

The Court: You answer. You heard what Judge Grossman said. Do you agree with him?

The Witness: Yes, sir.

The Court: You say it is Mr. Miller?

The Witness: Yes, your Honor.

Q. All right,now let's see. You say it was Mr. Miller. Who actually filled in Certificate 19A, the name Samuel Marcus? A. I don't know, sir.

Q. Don't you know that that is Robert Schwartz' handwriting? A. I don't know with any assuredness. I am not an expert on Mr. Schwartz' signature.

Mr. Grosman: My recollection is that it is not written, it is printed in there.

Q. Ali right. You heard Mr. Schwartz' deposition in which he said he wrote it in? A. I do not recall his deposition.

Q. Did you hear Mr. Schwartz' deposition that he filled in the figure 500 and the date? A. I don't—

(1160) Q. And the handwriting—the word "September" is in his handwriting? A. I don't recall Mr. Schwartz' deposition.

Q. Did you see Mr. Schwartz sign as secretary? A. I did not.

Q. But you know that you signed it? A. Correct, sir.

Q. And that's your answer as to each one of these certificates? A. It is, sir.

The Court: Please identify them.

Q. 19A, 19B, 20A and 20B. A. That's correct.

Q. You have the same answer? A. That's correct, sir.

Q. Now, who presented these certificates, 19A, B, 20A, B, to you for signature? A. Either Mr. Schwartz or Mr.—Judge Lieberman. I don't know which gentleman gave them to me to sign.

Q. Then aren't they the gentleman that you are accusing of this fraud and trickery, when you say that the execution of the same was accomplished?

Mr. Grosman: He asked that question a half dozen times.

Mr. Brigadier: I have a right to get an answer.

(1161) Mr. Tepper: I would like to be heard, your Honor.

Mr. Brigadier: Let me finish my question.

Mr. Tepper: I think the time has come to call a spade a spade. It is impossible for any human being to sit on that witness stand and get the pressure that Mr. Brigadier insists on giving this witness, without being completely confused about anything.

Now, in my judgment—and I have been at the bar many, many years—I have never seen this type of a cross examination. Now, this man has testified that insofar as he is concerned somebody other than the lawyers had perpetrated this fraud. Mr. Brigadier would like to have this record show that, in order for your Honor to decide this case in favor of Mr. Marcus, you must hold that two lawyers had perjured themselves and should be reprimanded, disciplined or disbarred. And I don't think that that is fair at all.

Now, by no standard is Mr. Brigadier on firm ground here. This witness has testified to the best of his recollection. It was he who found himself minus his money, not Mr. Miller. It was he who found himself with a stock book here that totals 1,272 shares and not 1,250 shares. It was he who found himself in a

meeting there, in an atmosphere where there are a lot of papers on the desk, and when you add up the whole thing, as Judge Grosman said, and (1162) the smoke of battle cleared away, he found himself, to use the vernacular, sucking his thumb. That's exactly what happened to him.

Now, what are we supposed to do here? Now, this witness is on the stand. He is trying to recall what happened. Now, if Mr. Brigadier has any contradictory evidence given by anybody in the depositions, let him produce them and confront this witness with those contradictory statements.

And I respectfully submit to your Honor—I know that your Honor has been very, very lenient, and has afforded a wide latitude to counsel on both sides—

The Court: For which I have to suffer and listen over and over again.

Mr. Tepper: Judge Modarelli, I can't do anything but smile at you when I say it would take the patience of a saint—

The Court: One saint?

Mr. Tepper: —without, to use the vernacular again, without your Honor stripping a gear and blowing a valve and a gasket.

The Court: I wouldn't be human if I didn't.

Mr. Tepper: But, unfortunately—I know you don't mean it—

The Court: Remember I was a prosecutor.

Mr. Tepper: You know the high regard that I have (1163) for you personally, but you must admit that the record shows that at one time there, Judge, you on one side of Mr. Marcus, Mr. Brigadier on the other side of Mr. Marcus, waving affidavits in the air—it's really confusing. I sat here and I had all I could do to contain myself. I didn't want to say a word during this examination.

The Court: All right.

Mr. Tepper: Let's proceed in an orderly fashion, quietly—

The Court: That's all very good. Now, let's analyze what you said, sir. Doesn't it follow, as night follows the day, that if the charge doesn't include the two lawyers, then the lawyers must have been very stupid. They were just made the tools of Mr. Miller. Is that what I am to believe.

Mr. Tepper: Judge Modarelli, if you can find—I regret to say this about brother attorneys—if you can find that this document which was prepared by these men—one who claims to have written a textbook—and the other one who was a—

The Court: Who wrote a textbook?

Mr. Tepper: This man Schwartz wrote a textbook.

The Court: What book did he write?

Mr. Tepper: I don't know. He testified on deposition that he is, to use again the vernacular, a (1164) "professor from languages"—law. He wrote the code somewhere. I don't know. He wrote a textbook. And Judge Lieberman—

The Court: And you are a Bronx lawyer he said. Let's stop today. We are all reaching the point—

Mr. Tepper: Just one more second, please. And Judge Lieberman, against whom I am saying nothing, if your Honor can figure out that there was a contract here for this man to buy and for those people to sell—

The Court: That's not fair to say at this point. I have got to keep an open mind till I hear every witness.

Mr. Tepper: But this is a contract with a corporation, Judge. So if there wasn't stupidity here, there was something wrong somewhere.

The Court: You better save that.

Mr. Tepper: All right.

Colloquy

The Court: I just want to say this. This is what happens in every long trial. When it gets near 4 o'clock everybody's nerves are torn, everybody gets irritable, and everybody starts quarreling with each other. And if we ever went to 5 o'clock—I would hate to tell you what would happen by 5 o'clock. Although I will say that Judge Grosman is keeping very calm today. I noticed that. And you are smiling, which is good for you. You look better.

(1165) Now, we will adjourn until tomorrow morning. And Mr. Marcus, take a good rest for yourself. You have got a good cross examiner there.

Ten fifteen, gentlemen.

(Whereupon, the hearing in the above-entitled cause was adjourned until 10:15 o'clock A. M., Tuesday, February 8, 1955.)

(1166) Newark, New Jersey, Tuesday, February 8, 1955.

(Hearing resumed pursuant to adjournment.)

(Appearances as previously noted.)

The Court: Are you ready?

Mr. Brigadier: Yes. If your Honor please, you will recall that the 4 o'clock adjournment prevented me from making a reply statement to the objection noted on the record, and I feel in all fairness, not only to my client, but to myself, that I should be permitted a brief reply.

The substance of Mr. Tepper's objection, as I recall, was that they have not raised an issue that Schwartz and Lieberman had resorted to trickery, fraud or deceit, and that I seem to be pressuring this witness by my cross examination into raising that

issue, so that your Honor will be called upon to decide, I guess, as he put it, Marcus versus Lieberman and Schwartz.

May I direct your Honor's attention to the pretrial conference, dated December 21, 1954, at the bottom of page 4 of the transcript.

Before I read the transcript your Honor will recall that Judge Grosman, as the transcript itself indicates, (1167) came in with a writing in which he had listed, I think, approximately 26 issues that he said he wished tried. Your Honor asked for a copy of that writing, and I asked for a copy of it. I am handed a copy of it.

As he reads it he alters one of them. The one he alters you will see is at the bottom of page 4. It reads with the alteration as follows—

Mr. Grosman: Now, will you wait until I get it, please?

Mr. Brigadier: Sure. The pretrial conference dated Decem' -- 21, 1954.

Mr. Grosman: All right. I have it.

Mr. Brigadier: The bottom of page 4. This is Judge Grosman reading from his sheet.

"Did William Miller, Al Bierman and Al Kevelson, or any of them"—this is not included, your Honor, because in the printed paper that he handed us, the typewritten one, it simply read, "or any of them, their agents or servants."

Notice how it now reads. "This is not included, your Honor,"—meaning it is not included in the written paper. He now inserts, "their attorneys, their agents or servants induced Samuel Marcus by fraud, trickery or deceit to agree to the sale of his stock holdings, or any part thereof, in Milmar Estate, Inc."

I remember very well what happened, if your Honor please, (1168) when this came about. The paper he handed me, and the one he handed you, did not have

the word "attorneys" in it. As he started to read it, Mr. Sam Marcus, who was sitting behind him, nudged him. There was a slight interruption. He turned to Mr. Marcus, then turned back to us, and used these words, "This is not included, your Honor," meaning not included in the written part, and he inserted "their attorneys."

So I submit, Brigadier isn't the one who made this issue, Judge Grosman made the issue.

The Court: Now, as I understand it, the attorneys are removed from any part of this.

Mr. Tepper: I want to make this very clear. As was stated time and time again, Mr. Marcus has always taken the position that he didn't know what happened to him. When he came to, this is what he found himself—the position he found himself in. And we enumerated what it was.

Now, in filing Pleadings and making statements, it is not the unusual thing to say agents, or servants, or attorneys, or anybody. So that if there is any testimony anywhere in the case which would require taking a certain position, representing a client, we would most certainly be required to take any position which the proof required us to take. We don't know. But there has been no contention on the part of Judge Grosman or myself, at any time that (1169) any attorney specifically and with his eyes wide open perpetrated any unlawful, illegal or criminal act in connection with this transaction.

What we did say was that as a result, let us put it, of the draftsmanship, the handling, the loose fashion in which certain things were put together, as a result of that, perhaps on the part of the attorneys—and I very frankly say to your Honor there must have been negligence here on the part of the attorneys, or else

a contract could never have been fashioned in the manner in which this contract was fashioned.

The Court: I know, but charges of negligence against a lawyer is one thing, but a charge of fraud and deceit is another thing.

Mr. Tepper: That's right, sir. So we hasten to say very clearly, once and for all, and I am the last man in the world who would point a finger at anybody without 100 per cent proof, and your Honor knows that if you found wrong doing on the part of an attorney, irrespective of who the attorney might be, your Honor would find it his duty to be, having been a former prosecutor, having been a former magistrate—

The Court: And on the Ethics Committee for 14 years.

Mr. Tepper: —and on the Ethics Committee, to (1170) act in accordance with the dictates of your conscience and what your duties prescribe under those circumstances.

The Court: I would have to report them.

Mr. Tepper: So let us not put ourselves in the position now—and I say to your Honor, so that there is no mistake abou' this thing—there need not be a determination here that any attorney committed an unlawful or criminal act in order to find for Mr. Marcus. I want that clear, once and for all.

The Court: All right, sir.

Mr. Brigadier: You specifically withdraw the word "attorneys" from this charge about inducing Samuel Marcus by fraud, trickery or deceit?

Mr. Tepper: Attorneys—

Mr. Brigadier: Before you do, so that I am not later accused of having tricked you, Mr. Tepper, please let me make a further statement to the Court.

The Court: Why did you have to add in there, so that you wouldn't be accused?

Colloquy

Mr. Brigadier: You will see why when I finish, sir. I think you will say tha. I was justified in making the statement. They are on the horns of a dilemma. I don't know whether they know it. I am going to put myself in the position of informing them of that dilemma, so it can't later be said, "You had no business not warning us."

(1171) The horns of the dilemma that they find themselves on at this moment is this. Unless they charge Schwartz with fraud, they must know that it is elementary law that anything which was known to the lawyer, acting for the client, is attributable to the client, and that the only exception is that where the attorney, the agent, was acting in defraud of his client.

Now, I think you mentioned that when he got through yesterday. You said, "Are you aware,"—or something to that effect, "Mr. Tepper, of what you have just said?" I assumed that that was what your Honor had in mind.

The Court: I certainly did.

Mr. Brigadier: That he was putting himself in that dilemma. I don't want later to be told that while he said this, and while I asked him, "Are you withdrawing the word 'fraud' " that I knew all along the other horn of his dilemma, because I do know it. And I want him to know that I do know it at this moment. And I intend to make that contention in this case.

Mr. Tepper: We are not in any dilemma. We are not vague about what we say. We are very specific in our contentions. There is a very, very great distinction, in law, and in equity, between fraud, as such, criminal fraud and equitable fraud. The effect of something may constitute equitable fraud, without there having been any criminal act (1172) upon the part of an attorney. Negligence which results in damage to this man, as we allege resulted here, may very well

constitute equitable fraud within the meaning of the Cases and the Statutes.

Now, when we use the term, and the language, "this does not include, your Honor, their attorneys, their agents or their servants"—is that what counsel referred to on top of page 5?

Mr. Brigadier: I am calling your attention to the fact that at the top of page 5 you have included "their attorneys" in the charge that they induced Samuel Marcus by fraud, trickery or device, or deceit—I don't see a word about equitable fraud only—to agree to the sale of his stock holdings.

The Court: Wait. You understand his position now. He says that due to their negligence he believes that under the Cases that they amount to equitable fraud. Is that right?

Mr. Tepper: Yes, sir. And I may also say to my good friend, Mr. Brigadier—and I am very fond of him, and he knows it. You saw what happened one day in this courtroom between Mr. Brigadier and myself—he labors too hard the point. I don't want the Court to be of the state of mind that we are trying two lawyers here. If we had to try them, I would be the first to try them, but (1173) I didn't see anything which required us to do that. Equitable fraud is something entirely different than regular fraud. And we say now, we do not charge any criminal act, and an act which would constitute fraud within the meaning of the Criminal Statutes.

The Court: In other words, you eliminate from the minds of the two attorneys willfulness, is that it?

Mr. Tepper: That's right, sir. And also from the Court's mind.

The Court: All right, sir.

Mr. Brigadier: I am not going to eliminate it, sir. I am making it an issue.

The Court: You can do what you want about it.

Mr. Brigadier: I am the one that is doing the examining, sir.

The Court: All right, sir. You understand now what the contention is. Whether it is sound or not, I don't know. That is their contention, that through the negligence of the attorneys—

Mr. Brigadier: Is there negligence involved in the testimony that Judge Lieberman gives that there were no shares delivered to him at all?

The Court: Now, wait, please. I am trying to get to the trial of this case, not arguing academic questions at this time.

(1174) Mr. Brigadier: All right.

SAMUEL MARCUS, resumed the stand.

Cross examination by Mr. Brigadier (continued):

Q. Mr. Marcus, will you look at Exhibit 19A, on the reverse side, where the blank appears for the assignment. I ask you is that your signature on the back? A. Yes, sir; it is.

Q. I show you Exhibits 19B, 20A and 20B, and I ask you if that is your signature on the back of each of those Exhibits? A. Yes, sir; it is.

Q. Do you recall having signed it on the back? A. I now recall signing them, yes.

Q. Can you explain to us why you would have endorsed them on the back if, when you signed them, there was no intention that these should be in any way delivered? A. When they were signed the intentions were that they were to be delivered.

Q. That these four certificates were to be delivered? A. When those were signed—

Samuel Marcus—Defendant—Recalled—Cross

The Court: Don't go through the whole thing. Was it your intention that they be delivered?

The Witness: When they were signed, I believe the intentions were they were to be delivered.

Q. Didn't you testify yesterday that when you signed (1175) these certificates, they were signed by you merely because they told you it was necessary to straighten out the mess of the books, and that there was no intention of delivering any of these certificates? A. I don't—

Mr. Grosman: If your Honor please, may I object. He didn't testify to that.

The Court: He didn't say a word about delivery. I don't know if he knows what it means, legally.

Q. What did you say yesterday was the purpose of your signing these certificates?

The Court: He did say to clean up the mess, but he didn't use the word "delivery" at all.

Mr. Brigadier: Well, I would like to find out now what he meant by "clean up the mess."

The Court: All right, sir.

A. That's the attorneys' expression to me, they were going to clean up the mess. That was at the moment when I was told the deal was going to be for all the stock.

Q. I see. And at that time you signed these certificates, is that right? A. Yes, at that time I signed them.

Q. Because you understood at that time that there was to be a wiping out of the old certificates, the issuance of these new ones, and that these were to be delivered if (1176) the deal were the sale of all the stock? A. I understood nothing of the kind.

Mr. Grosman: He didn't say that.

Mr. Brigadier: That's my question on cross.

Samuel Marcus—Defendant—Recalled—Cross

Mr. Grosman: I don't think he ought to put—

Mr. Brigadier: Can't I ask him—

Mr. Grosman: Will you wait, please, and let me get my objection in? He didn't say a word about that. Now, I don't want Mr. Brigadier to mislead this witness into believing that he testified to that effect yesterday. He said this was in pursuance of a discarded plan, not as Mr. Brigadier just stated.

The Court: Just a minute. Will you read the question, and you pay attention to it.

(Question read.)

A. Nothing was said to me at all, other than, "Sign these—we are cleaning up the stock book mess. Sign these certificates."

Q. Mr. Marcus, didn't you testify this morning that when you signed these certificates you signed them with the idea that they were to be delivered, that is why you endorsed them on the back? Did you so testify this morning? A. I assumed—I assumed—

Q. Just answer my question. Did you so testify this morning?

The Court: Well, I will answer that. He did.

(1177) Mr. Brigadier: All right. Well, can I ask him whether he did?

The Court: I know, but you keep pounding. You want him to make certain answers which you know he is not going to make. I will determine the facts from what he says and how he testifies.

You may inquire in your own way, I don't care, but I am trying to get finished with this.

Mr. Brigadier: That's exactly what I am trying to do.

The Court: But you can't nail him down sometimes.

Mr. Brigadier: Judge, suppose this case goes up on appeal. I have to have a record to support your

conclusion. You just told me your conclusion, right? But I have to have something—

The Court: I just told you what he said. Do we have to go back and have Mr. Bremer read it?

Mr. Brigadier: No, but I have to find out why this witness, who just testified a few minutes ago, can't recall what he said three or four minutes ago.

The Court: He said, one, that he intended they be delivered, and that was predicated upon the fact that he was selling all the stock. Is that right?

The Witness: That's correct.

The Court: That's what he said.

(1178) Mr. Brigadier: Now I want to know, sir, when and what time that took place. I haven't been able to ask these questions.

The Court: All right. Proceed.

Q. Was it when you signed these certificates, both on the front and the back, that you signed them with the understanding that they were going to be delivered; was it at that time you had an understanding? A. I assumed—there was nothing said to me—I assumed that that was the deal.

Q. And that when you signed these certificates they were to wipe out the others that had been issued before, is that right? A. There was nothing said to me about wiping out anything. I was merely asked to sign these certificates and I did.

Q. Yes. But, Mr. Marcus, I still want the answer to my question.

When you signed them, did you sign them with the intention that they were going to be delivered? A. I signed them assuming they were going to be delivered.

Q. Now, I direct your attention to Paragraph 50 of your affidavit, dated September 21, 1953, and in particular the third sentence of that paragraph, "What I signed I do not recall, but I do know that there was never any talk of

cancellation of the old stock, and the issuance of new stock. (1179) I had 625 shares of stock of Milmar Estates, Inc., with me at the time. I delivered the stock, which was all the stock involved, to Abraham Lieberman to hold in escrow."

Do you remember making that statement in your affidavit, Mr. Marcus? A. I believe I did.

Q. Is there any doubt about it? Do you want to be shown the affidavit? A. No, I believe—I did make that statement.

Q. You know you made it? A. Yes, sir; I do.

Q. Why can't we get that answer from you?

Mr. Grosman: If your Honor please, I object to his arguing with the witness.

Mr. Brigadier: I have a right to get an answer from a witness which goes beyond "I believe," if he knows, sir. I am put to the trouble each time of establishing what he knows when he answers "I believe."

The Court: He has a habit of saying "I believe" when he means he knows.

Mr. Brigadier: I have to get that into the record. Will he make that statement, that when he says "I — believe"—

Q. —that you mean I know? A. I don't care to—I will try to discontinue the words "I believe", when I know.

(1180) The Court: You have been saying "I believe"—

The Witness: I will try to discontinue the use of that word.

The Court: It is probably a habit of a lifetime.

Q. Now, you do recall at this moment that there was talk of the cancellation of certificates and the issuance of new ones, don't you? A. I don't quite get your question.

Q. You do know—

The Court: Why don't you let the reporter repeat the question and save your breath?

(Question read.)

A. I do not. At this moment I do not recall any such conversation.

Q. But you have just testified that you do recall that when you signed the back of these certificates you assumed that they were for delivery. A. I said I assumed.

Q. And on what did you base the assumption? A. On no definite conversation other than the fact that I was told the deal was for all the stock and I was asked to sign these certificates. I didn't ask any further questions.

The Court: Now, will you tell us in layman's English, if you don't understand legal terminology, what (1181) did you think was going to happen to those certificates after you signed them?

Mr. Brigadier, will you pay attention to the question I put? Will you repeat it for Mr. Brigadier?

(Record read.)

The Court: Now, you tell us in your own language.

The Witness: Frankly, I don't know what was to happen to them. I don't know what, how and where the lawyers were going to handle it. All they said to me was—

The Court: Now, not what they said. What did you think, from what they said to you, was going to happen to the stock certificates?

The Witness: I didn't have any particular thought at that moment.

The Court: All right. You knew they weren't going to give them to Mr. Tepper

The Witness: Yes, that's true.

The Court: What did you think they were going to do with them?

The Witness: Frankly, your Honor, I just didn't think. I simply was doing as the lawyers asked me to do.

Q. Mr. Marcus, I direct your attention to page 171 of a deposition given by you on February 13, 1952.

Mr. Brigadier: Line 16, Mr. Grosman.

Mr. Grosman: All right.

(1182) Q. "Question: Now, on September 14, 1948, did you, as an officer of Milmar, Inc., sign certificates of stock for 1,200 shares of stock in Milmar Estates, Inc., made out to Samuel Marcus?

"Answer: I don't understand that.

"Mr. Chazin: Will you repeat the question?

"Answer: I don't recall signing any such papers."

Do you remember making that answer? A. Yes, sir.

Q. Just answer the question. A. Yes, I do.

Q. I call your attention to page 172 of the deposition on the same date. Do you recall being asked this question, "Do you recall whether or not you signed new certificates on that day?

"Answer: I am fairly certain that there were no certificates of stock signed there that day.

"Question: There were no certificates of stock signed that day?

"Answer: There were no new certificates of stock signed that day."

Did you give those answers? A. I did.

Q. On page 173 of the deposition of the same date, were you asked this question and did you give the following (1183) answer. "When, to the best of your recollection, was the last certificate of stock of Milmar Estate, Inc., issued?

"Answer: The last certificate of stock was issued to Mr. Al Bierman for 20 shares of stock."

Samuel Marcus—Defendant—Recalled—Cross

Remember giving that answer? A. I did.

Q. Further down on the same page, 173. "You do not recall any stock being issued after that?

"Answer: There was definitely no stock issued after that."

Remember giving that answer? A. I did.

Q. Now, you were examined again on deposition on February 25, 1952. So there was an interval of time had elapsed, right? A. That's correct.

The Court: You agree on that, there was an interval of time.

Mr. Brigadier: Well, you understand why I have asked that.

The Court: Yes, I know why.

Q. On page 228 of the deposition you were asked this question, "You did not sign any certificate of stock?

"Answer: I don't recall signing any certificate.

"Mr. Tepper: You mean after a certain date?

(1184) "Mr. Chazin: No, I am saying on September 14 of 1948."

Well, since he doesn't answer that, let's take the question he answers.

"Did you, on September 14, 1948, sign any certificates of stock?

"Answer: I don't recall signing any.

"Question: I did not finish my question. Did you at any time during the month of September, 1948, sign certificates of stock of Milmar, Inc.?

"Answer: I don't recall signing any certificates of stock."

You gave that answer, did you not? A. I did.

Q. Also at the bottom of 228, "Did you at any time during the year 1948 sign certificates of stock of Milmar Estates, Inc.?

"Answer: I can't place the last day, but all I do know, the last shares of stock which I did sign was the 20 shares of stock given to Al Bierman.

"And after you signed the certificate for 20 shares for Al Bierman, you signed no further certificates of stock of Milmar Estate, Inc.?

"Answer: To the best of my recollection, I did not."

Those were the answers, right? (1185) A. That's correct.

Q. On page 240 of the deposition—page 241—"Did you sign Certificate No. 17 for 500 shares to Samuel Marcus?"

That's in front of you now, isn't it, Mr. Marcus? A. Yes, it is.

Q. I just want to make sure you know which certificate I am referring to. And you answered, "I don't recall signing that certificate.

"Question: Do you believe that you did or did not sign it?

"Answer: I don't recall signing any such certificate.

"Question: I am asking you whether you believe you did or did not sign such certificate?

"Answer: I don't recall signing any such certificate."

Further down, "Did you sign Certificate No. 17 for 500 shares to Samuel Marcus?

"Answer: I do not have any recollection on the signing of the certificate."

Now, you were then questioned—I would like to telescope this, if I can, because it is somewhat lengthy—on pages 241, 2, 3 and 4—about the remaining certificates that are in front of you now, Certificates 18—18. Then it continues on 245 about Certificate 19, and on 246 about Certificate 20. And as to all of these certificates on (1186) each of these pages you repeated, did you not, "I have no recollection of signing any of these certificates at this time." Is that right? A. That's correct.

Q. Then came this question on page 246, where they are all lumped together, "What is your best recollection as to whether or not you signed Certificates 17, 18, 19 and 20?

"Answer: I have no recollection of signing any of those certificates at this time."

Is that your answer? A. That's correct.

Q. And that was in February, 1952--February 25, 1952, isn't that correct? A. That's correct.

Q. Now, at the time that you were questioned about these certificates, 17, 18, 19 and 20—you were shown, were you not, you were shown Exhibit DME-21, the stock book, isn't that right? A. Yes, I was.

Q. And your attention was directed to the stubs, was it not, for these certificates? A. Yes, it was.

Q. And when you looked at these stubs, your answers repeatedly were, "I have no recollection of these shares (1187) of stock being issued," isn't that correct? A. That's correct.

Q. And no recollection that you signed any such certificates, isn't that correct? A. That's correct.

Q. Now, you were examined on deposition on February 26, 1952, and on page 285 you were asked this question, "Now, have you also searched and probed your memory as to whether or not you signed as an officer of Milmar Estates, Inc., any new certificates of stock on September 14, 1948?"

And you answered, "I have no recollection of signing any new certificates on that date."

Mr. Grosman: Now, may I ask that you read the next two questions?

Mr. Brigadier: You will, when you get to your redirect, Judge.

Mr. Grosman: All right. They seem to be tied up together.

Mr. Brigadier: I said you will, in the proper manner, when you get to the redirect.

Mr. Tepper: It seems that in order to handle this in an orderly fashion it ought to be done, because—

The Court: No, that is not the Rule. I know he objected. I am not worried about the inconsistency of lawyers. I have been facing that all my life. They only (1183) read what suits their convenience. Unfortunately, they haven't changed the Rules yet so that I can say, "Read some more."

Mr. Brigadier: Will your Honor allow me just about a two-minute period for a conference?

The Court: I will allow you five minutes, if you wish it.

Mr. Brigadier: I want to locate something that will facilitate the examination.

The Court: Go ahead. We will take a five-minute recess.

(Short recess.)

Mr. Brigadier: Before I continue, I had meant to ask Mr. Marcus whether or not, pursuant to your direction, he is now willing to concede that DME-2 was typed by his secretary on the typewriter in his office.

The Court: Yes, he was supposed to consult Mrs. Maginn.

The Witness: Judge Grosman forgot to give me that copy yesterday. You were supposed to give me a copy of that letter and you forgot to give it to me.

Mr. Grosman: What letter?

The Witness: The copy of this letter.

Mr. Grosman: DME-2?

Mr. Tepper: It is not in evidence.

(1189) Mr. Brigadier: What do you mean, it is not in evidence? I gave you a photostat of this months ago.

Mr. Grosman: All right.

The Witness: Will you get me a copy of that, Judge?

The Court: She will have to see it before she can tell him.

Mr. Tepper: Yes.

Mr. Grosman: Let me see the original. You want him to tell—

Mr. Brigadier: I understood he was to see Mrs. Maginn.

The Witness: Will you let me see the original again, please? I am going to see Mrs. Maginn. I want something to take out.

Mr. Brigadier: You can't take the original, sir. The original is an Exhibit. He has a photostat, your attorney has.

The Witness: Will you let me have it?

Mr. Grosman: Yes, I will give it to you now.

The Witness: You better give it to me now so you don't forget it.

Mr. Brigadier: He thought you were ready to admit it now.

The Witness: No.

(1190) Mr. Brigadier: All right.

Q. Now, Mr. Marcus, before the recess, when I read to you the various portions of the depositions that you had given during February, you know that up to that point you had not yet been shown any stock certificates, isn't that right?

Mr. Grosman: To what point?

Mr. Brigadier: Up to the point of the depositions that I had read.

Mr. Grosman: In February?

Mr. Brigadier: In February.

Q. You had not yet been shown the stock certificates; you had been shown the stock book, but not the stock cer-

tificates. A. I believe you are right. I am not definitely certain. If you say so, I will take your word for it.

Q. That's why I am asking you that. You were shown those certificates—

Mr. Grosman: Now, just a moment, please. He is trying to answer. I want his answer on the record.

The Court: How far did he get?

(Record read.)

The Court: That's the answer.

Mr. Brigadier: I will also represent to the Court that that is the fact, to save a lot of time.

(1191) Mr. Grosman: Well, now, if your Honor please, it's all right for Mr. Marcus to take his word. I don't question Mr. Brigadier's word, but there is a lot of stuff going on here, and he may be mistaken, too, you know.

Mr. Brigadier: This is helpful to Mr. Marcus. This isn't harmful. I'm trying to show that up to this point he didn't see the certificates, when he answered, "I don't recall, I don't recall."

I'm now going to take him to the next month when he was shown the certificates. Can there be anything fairer than that?

The Court: It sounds eminently fair to me.

Mr. Grosman: I don't know anything about that.

Q. I direct your attention, Mr. Marcus, to the deposition of March 18, 1952, page 357.

"Question: I show you a photostatic copy of Certificate No. 17 of Milmar Estates, Inc., purporting to be made to Samuel Marcus for 500 shares, dated September 14, 1948, and purporting to bear the signature of Samuel Marcus, president, and Robert J. Schwartz, secretary-treasurer, and purporting to have an endorsement in blank

of Samuel Marcus. I want to ask you whether the signatures on the front righthand corner bottom, and on the back, are your signatures?"

Mr. Grosman: Three fifty-two, you say?
(1192) Mr. Brigadier: Three fifty-seven.
Mr. Grosman: I am sorry. All right.

Q. "Answer: I believe they are." They are then put in evidence.

"Question: I want to ask you the same question with regard to Certificate 19 for 125 shares.

"Answer: This appears to be my signature.

"Question: Mr. Marcus, do you remember signing this Certificate No. 17?

"Answer: I do not have any recollection of signing them."

Do you remember that answer? A. Yes, sir; I do.

Q. That's the answer you gave after you looked at the photostat, right? A. I did.

Q. "Question: And do you remember signing this Certificate No. 19?

"Answer: I do not have any recollections of signing it, no."

That is your answer after you looked at the photostat of 19, is that right? A. That's correct.

Q. "Question: Do you remember endorsing in blank Certificate 17?

(1193) "Answer: I do not."

That was your answer while you were looking at the photostat of the signature on the back, right? A. That's correct.

Q. "Question: Do you remember endorsing in blank Certificate No. 18?

"Answer: I do not."

And that was also your answer while you had in front of you the back of Certificate No. 19? A. That's correct.

Q. "Question: Mr. Marcus, I call your attention that these two certificates bear the date of September 14, 1948. Do you have any recollection at all as to how your signature came to be on these certificates?

"Answer: I don't recall signing those certificates."

That was your answer? A. That's correct.

Q. "Question: Do you have any recollection at all as to how your signature came on the back of these certificates?

"Answer: At this moment I have no recollection of signing these certificates."

Is that right? A. That's correct.

Q. "Question: Does seeing these certificates refresh your recollection at all as to how your signature got on (1194) them?

"Answer: They do not."

That was your answer? A. That's correct.

Q. "Question: So that you have no recollection at all of having signed these certificates?

"Answer: I can't recall signing those certificates at all."

That was your answer? A. That's right.

The Court: Just a minute. Off the record.

(Discussion off the record.)

Q. "Question: Do you recall signing any other paper on September 14, 1948?

"Answer: Oh, I signed a raft of papers that day."

You remember giving that answer, right? A. Yes, I did.

Q. "Question: Do you recall signing any other certificates of stock of Milmar Estates, Inc., on that date?

"Answer: The only thing I recall is endorsing those certificates that I held and turning them over to Mr. Lieberman."

Do you recall that answer? A. Yes, I do.

Q. And that refers to the certificates that you (1195) identified yesterday as being in your possession by number and which you delivered to Judge Lieberman, isn't that right? A. That's right.

Q. Totaling 625 shares, is that right? A. That's right.

Q. That does not refer to the certificates in front of you, 19A, B, 20A and 20B, isn't that right? A. That's right.

Q. "Question: When you say these certificates"—actually, if I had read a little more, I could have saved myself some breath—"When you say these certificates you held, certificates of what number are you referring to?

"Answer: That would represent Nos. 2, 6, 7, 8 and 9."

Isn't that right? A. Yes, I believe that's right.

Q. Those are the certificates you testified to are the ones you delivered to Judge Lieberman totaling 625? A. That's correct.

Q. "Question: You do not recall signing any new certificates?

"Answer: i do not."

You recall giving that answer? A. That's right.

Q. Now, just one other thing about this deposition that I want to call your attention on another point. (1196) You were questioned yesterday by me on cash transactions. You had been questioned about it, you will recall, originally on direct, and you said you don't like to do business in cash transactions, is that right? A. That's correct.

Q. And in connection with the September 14 closing your testimony was that you took the cash because Mr. Schwartz told you it was all right, it was legal tender, you had to take it, is that right? A. That's correct.

Q. Something to that effect. I call your attention to your deposition, page 429, of March 26, 1952. Do you recall these questions and your answers?

"Question: Do you have any recollection as to whether you had in your possession $25,000 in cash at the time you came to the Netherlands to see Mr. Marden?

"Answer: Did I have that much in cash? Well, it could be possible. At that time I cashed a number of my bonds which I owned. I do not know how much money I had in my possession at that time.

"Question: But you say it was—" I am sorry. You gave that answer, did you not? A. What was the answer to that?

Q. Do you want me to read it again? A. Yes, please.

(1197) The Court: About cashing bonds and so forth, that's where you got the cash.

The Witness: I said I had a lot of bonds at that time, Treasury Bonds, and so forth.

Q. I am asking you whether you made that answer. Do you want me to repeat it? A. Yes, will you repeat it, please? I want to make sure.

(Question repeated.)

Q. Did you make that answer? A. That's correct.

Q. "Question: But you say it was possible that you had $25,000 in cash?

"Answer: Oh, I often kept large sums of cash in my possession. I needed it in my business."

Did you make that answer? A. Yes, sir; I did.

Q. "Question: It is possible that when you came to the Sherry-Netherlands you had carried $25,000 in cash?

"Answer: No, I did not say I did. I said there have been times in my business when I would have that much cash in my possession."

Did you make that answer? A. I did.

Q. Mr. Marcus, in the transaction of September 14, 1948, Robert Schwartz' stock of 125 shares was not included (1198) in the sale, is that right? A. In the final sale it was not included.

Q. That's what I mean, the sale, the final sale that took place on September 14. A. In the final deal, it was not included.

Q. It was not included? A. That's correct.

Q. You are positive of that? A. Yes, sir; I am.

Q. You have heard Mr. Schwartz' deposition to the contrary, have you not?

The Court: Now, don't say you have unless you have.

A. I don't recall. Mr. Schwartz was very vague in his deposition, as I recall.

Q. Did you speak to Mr. Schwartz prior to September 14 with respect to his participation in the sale to take place? A. I did not.

Q. Did you hear Mr. Schwartz testify in the deposition that he had received a call from you? A. I do not not recall what Mr. Schwartz testified. He testified hot and cold and I am not prepared to say what his definite testimony is.

Q. Well, let me put it this way. Did you prior to September 14 call Mr. Schwartz on the telephone and tell him (1199) that you had a deal for the sale of the stock for $125,000, which was to include the 125 shares of stock held by Mr. Schwartz, and that Schwartz and you would receive approximately 70 per cent of your investment through the figure one hundred and twenty-five thousand? A. I never had such a conversation with Mr. Schwartz prior to September 14.

Q. Now, I ask you, you were at the deposition when Mr. Schwartz testified, on July 7, 1954? A. I believe I was present at most of his hearings.

Q. And you do not recall Mr. Schwartz testifying that that was what happened? A. I do not definitely remember what Mr. Schwartz testified to.

Q. I show you Exhibit DM-32 and I ask you whether that contains your signature? A. It does.

Q. And whose handwriting appears above your signature? A. I believe it is the handwriting of Robert Schwartz.

Q. Do you recall when this was signed by you? A. It was signed some time after September 14.

Q. Well, will you look at the date on the Exhibit, which you yourself produced, incidentally; what date does it bear? A. I want to correct you, Mr. Brigadier. I don't think (1200) we produced this paper.

Q. I didn't mean "produced." You are right. You offered it in evidence. A. We did not. You did.

Q. I am sorry. It is DM-32.

The Court: It is your Exhibit, Mr. Marcus. You can take my word for that.

The Witness: Well, sir, I thought it was—what was the question?

Mr. Brigadier: Will you read the question?

(Question read.)

A. It bears the date of October 1, 1948.

Q. Does that serve to refresh your recollection as to when this was signed? A. It wouldn't, necessarily. It could be on that date and it might be some other date. But it is definite that it is after September 14.

Q. Will you give us just the widest range of time in which it could be— A. I'd say within a month, somewheres within a month after September 14.

Q. That will satisfy me. Now, will you tell us the circumstances under which this came to be signed by you? A. Yes. Mr. Schwartz came up to my office one day and said, "Say, Sam, as long as you are no longer the big (1201) majority stockholder over at the Riviera, I don't know whether I want to stay in or not. What do you think?"

I said, "Bob, this Riviera deal is a deal for a long pull. We got no hope of making any money out of there maybe for five or ten years. Ultimately this piece of property will be valuable. There is that condemnation going through—the roadway going through our property, which should give us a nice piece of change."

So Mr. Schwartz said, "Well, I don't know. I will see what I will do. In the meantime, Sam, give me some security."

Before he said that, he said, "Would you be willing to buy my stock?"

I said, "I don't have any money right now, Bob, but I would be glad to buy your stock providing you will extend payments to some time next year."

He said, "All right, Sam, supposing we make a little memo on that and you have a mortgage in your name on the Riviera, give me the security—give me a little security on this mortgage for my money and then I will make up my mind in the next couple of days whether I will stay with you for a long pull or whether I will sell out to you."

Q. Then what happened in the next few days? A. Nothing happened in the next few days. Some time later—I believe it was before the first of the year—

Q. The first of 1949? (1202) A. I believe it was before the first of 1949, Mr. Schwartz came up and said, "Sam, I have been thinking it over. I think maybe I will take a tax loss this year—"

Oh, I forgot something that took place during our first conversation, with reference to this one. Mr. Schwartz said to me, "How did you come out on this deal, Sam?"

I said, "Well, here is how we stand, Bob." I said, "My investment in here, investments in the stock, the loans I made to Milmar, the loans I made to Riviera, and the other money I have laid out, runs to roughly about—I have calculated roughly about $200,000. I am presently getting about 70 per cent on the dollar. If you want to take 70

per cent on the dollar, I will be glad to make a deal with you right now, and when I get any more money from the Riviera, which, believe me, will not be any sooner than five, six, seven or eight years, why, I will be glad to make up the difference to you in what you are losing in this stock."

And when we set that figure, he said, "I think I invested about $11,000."

I says, "Well, all right, then the price will be $7,700."

Q. Now you are talking of the time of Exhibit DM-32, is that right? A. The Exhibit that is in front of me right now.

Q. Which you say is within a month after September 14? (1203) A. Roughly—this could be the exact date, and it may be after. But I will take it—this could be the exact date that is on this paper here.

Q. And it was at that time that you said to him you were getting—or under the arrangement you were receiving $140,000 for the sale of your stock? A. That's correct.

Q. And that is what you said to him, the one hundred and forty thousand was for the sale of your stock? A. Yes, I said—

Q. And that roughly amounted to 70 per cent of $200,000 you had put in, isn't that right? A. That's correct.

Q. And that is how the figure of 70 per cent came up, as far as Mr. Schwartz' return, isn't that right? A. That's correct.

Q. Now, you understand that, that that is what was said? A. Yes, we both based our figures—he asked me, "What did this whole thing cost you, Sam?" And I got some papers out of my desk, and picked up some little items here and there, calculated what the Riviera owed me, what the Milmar owed me, what loans I had made to Bill Miller, and it all calculated up to about $200,000.

Q. So that on September 14, when this transaction (1204) was closed, Mr. Schwartz knew not only that you

received a hundred and forty thousand, but that the hundred and forty thousand was for the sale of the 625 shares of stock, is that right? A. I believe he thoroughly understood it.

Q. Now, we asked you before not to use the word "believe," if you know. Do you know? A. I don't know what Mr. Schwartz knew at that particular moment.

Q. Did you tell Mr. Schwartz that you were receiving $140,000 for the sale of 625 shares of stock? A. I told Mr. Schwartz that I was—that the deal was for 625 shares of stock.

Q. I am talking about the money, Mr. Marcus, a hundred and forty thousand. A. Mr. Schwartz knew the money I was getting.

Q. Let's see. Under the contract itself you were getting a hundred and twenty-five thousand, right? A. That's correct.

Q. And the other fifteen thousand was in the form of this note, right? A. A sweetening up proposition.

Q. That's what I want to know. Did Mr. Schwartz know that that was part of the purchase price; had you told him that? (1205) A. Frankly, I don't remember any conversation between us on that particular thing. He was handling all the papers, he knew what was going on, and I took it for granted he knew what it was all about.

Q. And he knew you were getting $140,000 for the stock? A. When the deal was finished, he knew I was getting $140,000.

Q. Now, Mr. Marcus, the Exhibit that you have in front of you, DM-32, as you corrected me, was not produced by you, was it? A. I don't believe it was.

Q. No, it wasn't. I used the wrong word. It was introduced in evidence by you, but not produced by you. It was produced by Robert Schwartz, wasn't it? A. That's correct.

Q. In the taking of a deposition? A. That's correct.

Q. At which you were present? A. That's correct.

Q. And at which your counsel objected to the production in evidence of this document, is that right? A. I don't know what my counsel did.

Q. Now, at the same time didn't Mr. Schwartz produce a second document? (1206) A. Yes, he did.

Q. A photostat of which is in your possession, or in your counsel's possession, right? A. I believe it is.

Mr. Brigadier: Will you produce the photostat that is in your possession, Mr. Grosman?

Mr. Grosman: What photostat? I have got dozens of them.

Mr. Brigadier: Of the second document. Mr. Schwartz only produced two documents.

Mr. Grosman: Well, now, is there a deposition number?

Mr. Brigadier: DM-229.

Mr. Grosman: All right. I will look for it. If I have it, you may have it.

Mr. Brigadier: Judge, will you stipulate that you have a photostat of this in your possession and I can use mine to save time?

Mr. Grosman: Let me see it.

(Document shown to counsel.)

Mr. Grosman: Why, I think so. I don't know whether I have it in my possession, but it was introduced at the hearing. It is marked.

Mr. Brigadier: I want to establish the fact that this is in your possession. It's very important.

(1207) Mr. Grosman: All right.

Mr. Brigadier: That you have had in your possession since Schwartz' deposition a photostat of the second paper that was put in evidence, that he produced.

Mr. Grosman: If I have it, I will tell you; 229?
Mr. Brigadier: That's right.
Mr. Grosman: I have it.
Mr. Brigadier: Will you produce it, please?
Mr. Grosman: Here.

(Document handed to counsel.)

Q. Mr. Marcus, you have just seen your attorney produce the photostat that I exhibit to you, have you not? A. Yes, I see it.

Q. Did you know he had possession of this? A. I did not.

Q. During the direct examination? A. I had no knowledge of what my attorney had in his possession.

Q. Did you see that produced by Robert Schwartz at the taking of the deposition? A. I believe I recall this instrument being produced.

Q. And in your direct examination there isn't a word of testimony about this instrument, is there? A. I really don't recall whether Mr. Grosman asked me about it or not.

(1208) Mr. Brigadier: I wish to mark it in evidence. Will you hand it up to the Court, please?

(Document handed to the Court.)

Mr. Grosman: Well, now, just a moment. I want to be heard on that. I object to this going in evidence. That is not the way to prove this document. It is produced by a hostile witness on a deposition and—

Mr. Brigadier: Do you want me to prove it? I will prove it in a minute.

Mr. Grosman: All right, go ahead.

Q. Mr. Marcus, is that your signature on it? A. Yes, sir; that's my signature.

Mr. Brigadier: I offer it in evidence.

Mr. Grosman: All right.

The Court: It may be marked.

The Clerk: DME-52, photostat of letter dated May 13, 1948.

(Received and marked Exhibit DME-52.)

Q. Mr. Marcus, when you gave your direct evidence—

The Court: I better correct something. I see a notation on the back, "Schwartz admits that the date of this letter is erroneous. He says it should be 1949."

In other words, the date should be May 15—

Mr. Grosman: That's my notation, your Honor.

Mr. Brigadier: That's what I wanted to develop.

(1209) The Court: All right, go ahead.

Mr. Brigadier: I am just offering the face of that letter.

The Court: Well, I want Judge Grosman to know what is written on the back of it.

Mr. Brigadier: Oh, we all know that. That came out in the deposition. That's what I want to question him about.

The Court: All right.

Q. Now, when you gave your direct evidence, you knew of the existence of this document, signed by you, dated May 13, 1948, did you not? A. I knew of some document available.

Q. Mr. Marcus, you knew that you had signed this Exhibit, DME-52? A. Yes.

Q. Let's not quibble. You know your signature is on there? A. Yes. I didn't quibble.

Mr. Grosman: Now, if your Honor please, may I ask that Mr. Brigadier not quarrel with the witness?

Apparently he wants the witness to answer in a peculiar way that he wants him to answer. The witness is not required to do that. He has identified the signature. The paper is in evidence. What more does he want?

(1210) Q. Now, at the time that you gave your direct evidence you knew that there was this Exhibit, and that it had the date May 13, 1948, on it, did you not? A. Well, I didn't recall every piece of paper in evidence. When you show it to me, I can recall it. But I can't call out to you every piece of paper that is in evidence.

The Court: Hold it a minute. Read the question he asked him.

(Question read.)

The Court: That calls for a yes or no.

Mr. Grosman: If your Honor please, he has a third alternative. He may not have remembered.

The Court: Well, no one knows better than he when to say that in this case.

Mr. Grosman: But you gave him only two alternatives, yes or no.

The Court: I want him to answer. If the answer is no, it is no. If he doesn't remember, he says, "I don't remember."

The Witness: I thought my answer carried that through.

A. I knew—when you show this to me, it refreshes my memory immediately. When I don't see it—there is about 100 Exhibits here, your Honor, and I don't remember each Exhibit, what's in the Exhibit.

(1211) The Court: Mr. Marcus, that I can understand very well.

The Witness: I don't want him to pin me down, making me say something that isn't so.

Q. Mr. Marcus, you were present at the taking of the deposition of Mr. Schwartz, right?

The Court: He said he was present at most of them.

A. I was.

The Court: He said it about half a dozen times.

Q. Were you present when Mr. Tepper asked Mr. Schwartz this question, "I am reluctant about asking this question, but I am compelled to do so upon the insistence of my client, Sam Marcus."

Mr. Grosman: What page are you reading from?

Mr. Brigadier: Page 327 of Schwartz' deposition. Let me repeat it again.

The Court: Wait until he gets it.

Mr. Grosman: Where?

Mr. Brigadier: Let's start on 327, at the second question from the bottom.

Q. "Mr. Schwartz, I am compelled to ask you this question under the insistence of my client, Sam Marcus.

"Mr. Kesselhaut: I didn't hear that.

"Mr. Tepper: Question: I am reluctant about asking (1212) this question, but I am compelled to do so upon the insistence of my client, Sam Marcus. Did you have any discussion with Sam Marcus after the delivery to him of this paper which appears to be a copy of DM-229—"

Your Honor will observe, and you will, that this bears the number DM-229 on it. A. That's right.

Q. "—regarding the date of May 13, 1948—"

Then there is a discussion between counsel. I don't know that it is necessary to read it. Let's get down to the answer.

Continuing with the question at the bottom of 328, Mr. Tepper's question, "—at which time Sam Marcus charged that that date of May 13, 1948, was filled in where there was no previous date at all, and that the date should have been some time in November of 1948 and not May 13, 1948?

"Answer: I know we had a discussion, but I don't think he said anything like that."

Did you hear that testimony given? A. Yes, sir; I did.

Q. Did you hear this given, "Did he say anything that resembles what I just asked you?

"Answer: I don't have any specific recollection. I don't think anything of any importance occurred. There was a couple of minutes discussion. You ask Mr. Marcus if we (1213) are thinking of the same thing. Or was there anybody present there?

"Question: Yes, we will come to that in a little while, but did not Mr. Sam Marcus say to you that, 'If you insist on using this date here, I will most reluctantly have to go to the New York Bar Association'?"

Schwartzs' answer, "No.

"Question: Did you have any such talk with him?

"Answer: No.

"Question: And, as I said before, Mr. Schwartz, I personally have nothing to back this statement up with. I merely am asking the question as I am directed to do so by my client who says the conversation took place.

"Answer: I will be delighted to go with Mr. Marcus to the Bar Association on this particular point any time he makes an appointment with me."

Now, you were present when this took place, right? A. Yes, sir; I was.

Q. And was it at your insistence that Mr. Tepper was asking these questions?

Mr. Grosman: Now, your Honor, may I object to this? I don't know what Mr. Brigadier is trying to do here, whether he is trying to have Mr. Marcus evaluate Mr. Schwartz' testimony. Now, it can't be done this way. And this is not cross examination. He said absolutely (1214) nothing about that paper on direct examination.

Mr. Brigadier: That is why I am asking it. I have a perfect right to find out on cross why a witness who testified as to part of a transaction didn't testify as to the whole transaction, why there is concealed from your Honor another document as to which this witness knew—not only knew, but during the taking of the deposition had participated, apparently against the wish of counsel, in asking certain questions, because you have gathered how reluctant Mr. Tepper was to put these questions.

Can there be anything more clearly relevant in cross examination than a witness who tells only part of a transaction.

Mr. Grosman: Now, if your Honor please, Mr. Marcus, contrary to the statement of Mr. Brigadier, is not in charge of the presentation of his case. Mr. Tepper and I are.

Now, I didn't consider it important at this time to ask Mr. Marcus about that letter, Exhibit DM-229. At the proper time, and on rebuttal, I intended to do so.

Colloquy

I expected they would have Mr. Schwartz here, and I intend to question Mr. Schwartz about this date, that obviously can't be right, because he has got—I think it is May, 1948, and the agreement wasn't drawn until September, 1948—or '49, I don't remember. There is a (1215) conflict in the dates there, a year apart.

What has this got to do with the man, the witness?

The Court: I suppose if Judge Grosman had asked Mr. Marcus about this particular Exhibit, DME-52, he would have answered, probably, as he is answering now.

Mr. Brigadier: Sir, he has testified, as to the transaction with Mr. Schwartz, that he acquired the stock after September 14.

The Court: That's what he says.

Mr. Brigadier: In that connection, he put into evidence the other paper. He not only didn't put in evidence this paper, he made no reference to it.

Did you know anything about this, sir, until I produced it?

The Court: No.

Mr. Brigadier: You hadn't the vaguest notion that there was such a paper and such an agreement. Doesn't that touch on the question of the sale of stock?

The Court: It certainly does.

Mr. Brigadier: It would appear that I certainly have a right not only to question this witness about it, but to find out why, when he narrated the transaction, he made no reference to this document.

The Court: We will settle that right away, without going through a long debate again.

(1216) Can you tell us now, Mr. Marcus, why you did not mention this during your narration of the transaction involving the sale of stock from Schwartz to you?

The Witness: Judge Grosman asked me questions. I answered his questions, your Honor.

The Court: That's exactly what I thought you were going to say. In other words, had you been asked, you would have answered, is that right?

The Witness: Yes, your Honor; I would have.

Mr. Grosman: I still object to it, not propert cross examination.

The Court: Well, I wouldn't say that exactly, when the man told us about the sale of stock, when it happened, everything else. And I suppose I can believe that had you asked him about this he would have answered you. I think probably he didn't think of this at all.

Is that right?

The Witness: That's right.

The Court: He can't remember everything. That's impossible. Nobody can. In a case where you have so many documents, it is physically impossible for a man to remember everything, mentally impossible.

Mr. Grosman: Your Honor will remember that I didn't go into detail about the purchase by Mr. Marcus of—

The Court: No, I think you hardly touched on (1217) it, as I recall.

Mr. Grosman: Because, at the proper time, when Mr. Schwartz is produced, we go into that. And I object to this letter going in at this time.

Mr. Brigadier: Sir, I submit that he did question him, and that he testified that he had entered into an agreement with Mr. Schwartz to purchase the stock from him.

The Court: Just sit down till he gets through.

Mr. Brigadier: At any rate, the record will speak for itself.

Samuel Marcus—Defendant—Recalled—Cross

The Court: Now, do we have to go through the record to find that out?

Mr. Brigadier: No, I am satisfied that it is there.

The Court: All right, sir.

There is an objection to marking this into evidence at this time.

Mr. Brigadier: Well, I submit that it is absolutely relevant. The witness has testified about the transaction by which he acquired the stock from Mr. Schwartz. Here is a document that deals with that subject matter.

The Court: That's right. It may be marked. It is marked, in fact. Now we will go to the next question.

Q. Now, I direct your attention to the date of (1218) May 13, 1948, Mr. Marcus, and ask you whether that date or any date was on it when you signed it? A. I don't recall what date was on there. I never noticed whether it had a date or didn't have a date when I signed it.

Q. Did you at any time accuse Mr. Schwartz of inserting a date when there was no date on it? A. I told Mr. Schwartz that that date could not be possible.

Q. Meaning what, the May 13 or the 1948? A. 1948.

Q. Didn't you accuse him of inserting the whole date after the document was signed by you, without your knowledge?

Mr. Grosman: I object to the conversation between Mr. Marcus and Mr. Schwartz with respect to this document.

* * *

(commencing at 1223-23)

The Court: Did you see this prior to the taking of the deposition?

(1224) The Witness: Yes, sir.

The Court: Did you ever discuss it with Mr. Schwartz?

The Witness: I did, your Honor.

The Court: Did you ever call his attention to the fact that that date was wrong?

The Witness: I did, your Honor.

The Court: All right. He did.

Q. When was this that you did this, Mr. Marcus? A. Mr. Tepper came to me one time, Mr. Brigadier—and I think there is another case of trying to intimidate me—Mr. Tepper came to me and told me that he had heard from the attorneys on the other side that I was a perjurer and a liar, that they had evidence beyond doubt that I had purchased Bob Schwartz' stock prior to September 14. Mr. Tepper said to me, "Marcus, do you know what you are doing?" He said, "Look, they claim without question that they are going to put you in jail." He said, "Do you know what you are doing? They claim without doubt Brigadier knows and seen papers to the effect that you have bought Schwartz' stock prior to September 14."

I don't know what Mr. Tepper thought at the time of me, whether he thought he had a liar for a client, wanted to run away on me, or what. I assured Mr. Tepper at the time, "Mr. Tepper, I do a lot of crazy things in my life, (1225) and I do a lot of things hasty, but I know damn well I never bought Mr. Schwartz' stock before September 14."

He said—

The Court: You are repeating exactly what you said to Mr. Tepper?

The Witness: That's right.

The Court: Including "damn well," too?

The Witness: That's right. So I says, "Let them tell you everything in the world they have got," I

said. "Believe me, Mr. Tepper, I don't know anything else that happened at that time, but I do know I didn't own Bob Schwartz' stock at that meeting."

Well, after my persuasion to Mr. Tepper that I knew something what I was talking about, he said, "I don't know what it is they have got, Marcus, but they seem to be so cocksure that you are a liar."

And I says, "I am not afraid of one thing in this transaction, Mr. Tepper."

The Court: Now, wait a minute. What did you do after Mr. Tepper called that to your attention?

The Witness: I went back and called up Mr. Schwartz. I said, "Bob, do we have anything in writing with respect to my purchase of your stock?"

He says, "Yes, we had a letter between us."

I says, "You know, you never gave me that letter."

(1226) "Well, I will send you a copy," he said. And he sent me a typewritten copy. The typewritten copy had this—

Mr. Brigadier: Which document, will you identify which one?

The Court: The one we have been talking about for ten minutes now.

The Witness: He sent me a typewritten copy of this here, with my name typed in here and his name typed in there.

The Court: To make sure that there is no doubt about it, DME-52. Go ahead.

The Witness: When I received that letter I immediately got on the phone and I says, "Mr. Schwartz," I says, "what is the meaning of this letter?"

He says, "Come down and see me, Sam."

Well, I left my business immediately. I had my business up on 89th Street. And I took a taxicab and I went down there in ten minutes. I was in Bob

Schwartz' office and I said, "Mr. Schwartz," I says, "what is the meaning of this 1948?"

He says, "I don't know, Sam. This is your signature, isn't it?"

I says, "Yes, Mr. Schwartz, this is my signature, but my God—"

The Court: I am not asking about "my signature," (1227) I am asking about the date.

The Witness: (Continuing) "—I am asking you about 1948." He says, "I don't remember anything, Sam. That's the date and that's the time. I can't tell you anything. I don't remember anything about it any more."

I says, "Listen, Bob, you know damn well that this amount of money here never could have—" I said, "do you know what this amount of money represents on this slip?"

He said, "Well, that's the price we agreed upon." I said, "Do you know how we agreed on that price?"

"No, how did we agree on the price?" I said, "That's the time you came to my office and told me you thought you might want to sell your stock, and maybe you wouldn't. And I got my records out and I showed you that I had approximately $200,000 invested in this enterprise, and you said—I think your check was $11,000 and I said, 'okay, it's 30 per cent. Your share will be $7,700.' Then later when you decided you did want to sell your stock you came to me and you told me what the actual check was, $11,250, and we rectified it and made the correct amount in there."

I says, "Now, Mr. Schwartz, do you want to tell me that this is the correct date on that?"

Mr. Schwartz said, "Well, Sam, seeing the way you tell me now, let's forget this paper is in existence. I (1228) won't say anything about it."

I says, "Mr. Schwartz, this paper is known to be in existence. I am certain the other attorneys—and you produce this paper, or I will make you produce this paper." I says, "If you don't produce this paper, I am going to the Bar Association in New York and have them make you produce this paper."

The Court: You told that directly to Mr. Schwartz?

The Witness: At his office.

The Court: At his office.

The Witness: That's correct.

The Court: Did he have no record to show when he actually wrote you that letter?

The Witness: All he had, sir, was this letter with my signature. And he attempted to convince me that that was the correct date. And only when I proved to him by the figures in here how impossible it would be to be, then he realized he could no longer use that date.

The Court: So he did speak to him about it before, if you believe what he says.

Mr. Brigadier: I do, that he spoke to him.

Q. Now, Mr. Marcus, who else was present when you talked to Schwartz? A. No one but Mr. Schwartz.

Q. Was there any occasion when Mr. Roth was present (1229) with you? A. Not on the occasion I spoke to Mr. Schwartz, no.

Q. On any subsequent occasion? A. On subsequent occasions, yes.

Q. And on this subsequent occasion was this date discussed again? A. I don't recall. I appeared—oh, then another paper—oh, yes, something was said about some other documents that Schwartz had had in his possession. I told Mr. Roth, my New York attorney, that Mr. Schwartz has evidently shown the opposing counsel certain papers which he has which I have no copies of. "Mr. Roth, won't you

please contact Mr. Schwartz and ask him to give you whatever papers he has, or copies of papers he has?"

Mr. Roth called him, or wrote him, I really don't know. But I know he told Mr. Roth—

The Court: Who is "he"?

The Witness: Mr. Roth told me that Schwartz had definitely told him that he had no papers whatsoever that I didn't have copies of. And Mr. Roth, believing him, asked him no further, or wrote him a letter to some effect, acknowledging. But I kept insisting upon Mr. Roth that he must have some other papers, because certain words had come through the grapevine about certain types of documents. Finally I had (1230) several telephone conversations with Mr. Schwartz. I told Mr. Schwartz—I insisted he turn over the documents he has, anything pertaining to me, or the Riviera transaction, that he must turn them over to Mr. Roth.

He told me Mr. Roth has no standing in this transaction, "your attorneys are in Jersey," words to that effect.

I again said to him, "Do you mean to tell me that you are not going to turn those papers over to me?"

I don't know what happened. He finally agreed—he finally agreed that Mr. Roth and I could come down and he would show Mr. Roth what papers he had.

Subsequently, Mr. Roth and I went down to Mr. Schwartz' office and he showed us this paper, of which he had already given me a typewritten copy.

Mr. Grosman: Wait a minute. We would like you to identify that paper, please.

The Witness: DME-52.

The Court: That you had a copy of already.

The Witness: That he had sent me a copy of through the mail.

The Court: What else?

The Witness: And then he produced this copy, which he did not ever send me a copy through the mail.

The Court: What is the number of that? Look at the back.

(1231) The Witness: That's DM-32. And Mr. Roth at that time made copy in Mr. Schwartz' office—Mr. Roth, I believe, made copies of these papers.

The Court: Did he show you anything else that day when you went down with Mr. Roth?

The Witness: That is all, just these two papers.

The Court: All right.

Q. Will you give us the approximate date when you were there with Mr. Roth? A. Well, frankly, I believe maybe my attorney, Mr. Roth, may have it in his diaries. I wouldn't know exactly.

Q. The year in which it happened. A. Yes, I could refresh it from my telephone conversations. I believe some of these conversations we monitored, and we would have that from the date of the telephone conversations. I can't recall—

The Court: About when, was it last year, '54, '53?

The Witness: It would be—the telephone conversations run from '50 to '52. We have had numerous telephone conversations between 1950 and 1952 with Mr. Schwartz.

Q. Yes, but I am asking you the dates of the conversations that you are referring to now on these documents, give me the year of those. That wasn't 1950, (1232) and it wasn't 1951, and it wasn't '52. A. Mr. Brigadier, the best reflection—the best recollections I would know would be upon the dates of our monitored telephone conversation, which Judge Grosman has that.

Mr. Brigadier: Will you get those monitored telephone conversations? The date is very important. I want it.

Mr. Grosman: I haven't get them, to my knowledge.

The Witness: I thought I turned them over to you. Didn't I give them to you at the deposition? I thought I did.

Mr. Grosman: I don't recall ever having seen them.

The Witness: I may have them at home. I thought I turned them over to you. I may be wrong.

Mr. Brigadier: I may say, Judge Grosman, the transcript shows you made a statement that you are in possession of one of them. You said, "I have a transcript here of the conversation."

Mr. Grosman: If I said so—I don't remember, of course. I don't profess to have an infallible memory.

The Court: Maybe Mr. Roth could help you, if he was supposed to be there.

The Witness: Mr. Roth would have it.

The Court: Any memorandum or—

(1233) Mr. Roth: May I speak off the record?

The Court: Off the record.

(Discussion off the record.)

Mr. Grosman: If your Honor please, may I present Mr. Roth of the New York Bar?

The Court: I met Mr. Roth. I just thought he could help us fix the date.

Mr. Brigadier: I would still like the introduction of the monitored conversations that Mr. Marcus has, conversations with the attorney Schwartz. I think they should be produced so I can question him about it.

Mr. Grosman: Now, if your Honor please, you see where this thing is leading us to. It is leading us off on a tangent as to what transpired between Mr. Mar-

cus and Mr. Schwartz, which is really not in issue here.

The Court: It may be.

Mr. Grosman: It isn't the primary issue. The primary issue is this contract of September 14, 1948. Now, whether or not Mr. Marcus bought Mr. Schwartz' stock on the 28th of May, 1948, or '49, is really beside the question momentarily. But I will look for the monitored conversations if he wants them.

The Court: Well, all Mr. Brigadier would like to know now, as I get it, is what the date was when Mr. Roth and Mr. Marcus called at Schwartz' office and he (1234) produced these two documents. Is that right?

Mr. Brigadier: Yes.

The Court: What that date was.

Mr. Brigadier: Sir, I insist that you must let me protect myself. I have been made the subject here—involved in this case. If you listen to the testimony you heard that he has said he was informed by Mr. Tepper that I had gone to Mr. Schwartz and Schwartz had shown me certain documents.

Mr. Grosman: He didn't say that.

Mr. Brigadier: I am personally involved at this point and I ask for a point of personal privilege to be permitted to prove that this is a fantastic tissue of lies.

The Court: Now, nobody is going to tell me what he said. The record will be read back and see if he said that.

Mr. Grosman: He never said that. He never mentioned Mr. Brigadier's name.

Mr. Brigadier: Read back the part where he mentioned my name specifically in connection with this. And that's why I ask for this opportunity to prove this is not true.

Colloquy

The Court: Read back, will you, please, whether he charged that Mr. Brigadier spoke to Tepper and Tepper told him, because I think he did.

(1235) I agree with you. I can hear very well. And I am in a position where I don't have to make out that I didn't hear something a witness said.

Will you read back what he said a little way back about this grapevine business.

Mr. Grosman: What is it you are trying to prove, that you are not being charged with anything?

(Discussion off the record, after which the record was read.)

The Court: All right, he would like to correct himself. He says he will straighten it out.

The Witness: I used Brigadier's name—sitting right in front of me, Mr. Tepper didn't mention Mr. Brigadier's name. Mr. Brigadier says "they". He used the word "they". I mean, he didn't mention any name. I am sorry that I used Mr. Brigadier's name.

The Court: You see what you caused for 40 minutes?

Mr. Tepper: I was going to get up and agree with Mr. Brigadier that that was not what was said to me.

The Court: All right. That ends it.

Mr. Grosman: In order to satisfy Mr. Brigadier's feelings—

Mr. Brigadier: I am now satisfied.

Mr. Grosman: —and to have the record straight, we accused Brigadier of no impropriety at any time, anywhere, (1236) any place.

Mr. Tepper: Except being a good lawyer.

Mr. Grosman: Well, that's not improper.

The Court: Well, now, Mr. Marcus said he is sorry he mentioned Brigadier's name, because it wasn't mentioned by Mr. Tepper.

Samuel Marcus—Defendant—Recalled—Cross

The Witness: A slip of the tongue is all it was.
Mr. Brigadier: Off the record, please.

(Discussion off the record.)

By Mr. Brigadier:

Q. I show you, Mr. Marcus, Exhibits DME-5, DME-6 DME-7, DME-9, DME-10, DME-11, DME-12, DME-13, DME-14, DME-15, DME-17, 22, 23—these are all DME—DME-24, DME-25, DME-26, DME-27, DME-30, DME-19A, 19B, 20A, 20B—

Mr. Grosman: Wait a minute. 20A—
Mr. Brigadier: 20B.

Q. —all of which purported to have been signed on September 14. You see them in front of you? A. I do.

Q. Now, let us take the ones that have signatures of yours on them, Mr. Marcus. DME-19A, 19B, 20A and 20B all have your signature on the face and on the back, is that right? A. That's correct.

Q. And they were all signed by you on the 14th, right? A. They were.

(1237) Q. DME-5 has your signature at the end of it under Milmar Estates, Inc., by Samuel Marcus, president, is that right? A. That's correct.

Q. And that was signed by you on September 14? A. That's correct.

Q. DME-6? A. It was not signed with these.

Q. I didn't ask you whether it was signed with the insertion in it. We don't have to go over that each time. We know what your testimony is. A. I don't want to make a wrong answer.

Q. Listen to my question. The question simply was whether that is your signature and whether you placed your signature on it on September 14. A. I did, sir.

Samuel Marcus—Defendant—Recalled—Cross

Q. And your answer is yes to both? A. Yes.

Q. I want to take all the papers that you signed on that day. DME-9 has your signature on it, right? A. It does, yes, as president.

Q. Also signed on that day, September 14? A. That's correct.

Q. DME-11 has your signature on it? A. It does.

(1238) Q. And was signed on that day? A. That's correct.

Q. DME-14 has your signature under the word "accepted," is that right? A. That's correct.

Q. Samuel Marcus, that's your signature? A. That's right.

Q. And was signed by you on that same day? A. That's right.

Q. Now, DME-15 has your signature at the bottom? A. As president of Milmar, yes.

Q. Is that your signature, Sam Marcus? A. It is.

Q. That was signed by you on that day? A. This one here, I wouldn't be definite whether that was signed on that day or not.

Q. Do you recall whether the date, the 14th, at the top of it, was in there when you signed it? A. I do not recall.

Q. What is your best recollection now? A. I don't have any recollection. I have signed so many papers that day that I couldn't recall what and when and where I signed.

Q. But that is your signature? A. It is my signature.

(1239) Q. And it does bear the date, at the top, of September 14? A. That's correct.

Mr. Grosman: What Exhibit is that?

Mr. Brigadier: DME-15, Judge Grosman.

Mr. Grosman: All right.

Q. DME-23 also bears date of September 14, 1948, does it not? A. It does.

Q. And does it bear your signature? A. It does.

Q. DME-24 bears date of September 14, 1948? A. It does.

Q. And it bears the signature of whom? A. I wouldn't —it has written Robert J. Schwartz, but I don't know his signature good enough to identify it.

Q. You don't know his signature, I see. Mr. Marcus, before I forget. I better ask the question now. When you turned over the file to Judge Grosman, that you obtained from Mr. Schwartz, didn't the file contain a duplicate of each of the documents I have exhibited to you today, except the stock certificates? A. I don't know what the file contained.

Q. You mean to tell me that you have never gone through that file with Judge Grosman since you obtained it (1240) from Mr. Schwartz?

Mr. Grosman: That wasn't the question. Or do you want an answer—

Q. Did you go through that file? A. I turned the file over intact to Judge Grosman.

Q. And didn't you find in that file a copy of each one of these papers? A. I don't know what was in the file.

Q. Haven't you ever looked at it since? A. I have looked at some of the papers in the file that Judge Grosman has shown me, or questioned me about, but I don't know what the complete file contained.

Q. Except for the stock certificates, isn't it a fact that you have in your possession an executed copy of every one of these documents that I have produced in front of you today? A. I don't know what is in the file.

Q. All right. You don't know. Now, I show you Exhibit DME-25, dated September 14, 1948, and under the words "accepted, Milmar Estate, Inc., by," does that appear as your signature? A. It is.

Q. Was it signed on that day? A. I believe it was.

Q. And I show you Exhibit DME-26, and under "Milmar (1241) Estates" appears the signature of Sam Marcus, and ask you if that is your signature? A. It is.

Q. Signed by you on that day, September 14? A. It is hard for me to definitely state what papers were signed on that day, but we signed so many pa, rs. If you want me to assume it was, why—

Q. No, I don't want you to assume. A. Well, I believe it was probably signed that day.

Q. Mr. Marcus, did you sign any papers on any other days prior to September 14? A. No, I do not recall signing any papers any other day.

Q. Is it your testimony that you didn't sign any papers on any other day between August 27 and September 14? A. To the best of my recollections, I did not sign any other papers any other day.

Q. I see. I show you DME-27, bears date September 14, 1948, and ask you whether that is your signature, Sam Marcus, on it? A. It is.

Q. I show you Exhibit DME-30, which bears date September 14, 1948, and ask you whether the signature under "Milmar Estates, Inc.," Sam Marcus, is your signature? A. It is.

Q. Now, I want you to look at these documents—just

(1242) Mr. Grosman: Are you through identifying the documents? I would like to make a statement. Are you through identifying the documents?

Mr. Brigadier: What do you mean, identifying?

The Court: All those of September 14.

Mr. Brigadier: Oh, have I taken all of the—no, I haven't taken all, because I haven't taken those on which his name doesn't appear. I have yet to question him about those.

Mr. Grosman: I want to make a statement, your Honor, to this effect. I don't want it to appear, when

he said yes to his signature, that it was his individual signature, and that he is bound by the contents of all of these documents, because some of these signatures appear in a representative capacity. He signed as president of Milmar. And others of these documents he claims were altered after his signature was attached. So, when Mr. Brigadier said to him, "Is this your signature to this document?" I don't want it to appear that he acknowledges the authenticity of the document.

The Court: All that Mr. Brigadier wanted to bring out was that it was his signature, at this point, is that right, and try to establish the date?

Mr. Brigadier: I want to show how many documents actually have his own personal handwriting on it, no matter (1243) who was to be bound by it, whether it was him or the corporation, or somebody we don't know anything about.

Q. Now, in addition to those which have your signature on, there were other documents signed on September 14, were there not? A. I believe there were.

Q. I show you DME-10, that's the signature of William Miller, isn't it? A. It looks like it. I wouldn't be an expert to—

Q. You didn't see William Miller sign it? A. I didn't particularly notice to see him sign a paper.

Q. What do you mean, "particularly," did you or didn't you— A. I wasn't standing over his back.

Mr. Grosman: One at a time, please.

Q. What about DME-6? A. It appears to be Miller's signature.

Q. Didn't you testify on direct examination that you recalled this document, DME-6, with the insertion that was put in there? A. I recall the document, yes.

Samuel Marcus—Defendant—Recalled—Cross

Q. Do you recall the insertion, "and 50 per cent of Bill Miller's Riviera," going into that? A. Yes, I do.

Q. And did you see William Miller sign it? (1244) A. I didn't particularly see William Miller signing any. I saw him signing papers. I don't know what he signed.

Q. Now, this is the escrow receipt, right, DME-7, signed by Judge Lieberman? A. It appears to be Lieberman's signature.

Q. Were you furnished with a copy of this? A. Yes, I was.

Q. It is in your file that you delivered to Judge Grosman? A. I believe it should be in there. I think it came up—

Q. DME-22, that's signed by William Miller? A. President.

Q. Yes. A. Yes. It looks like his signature.

Q. It's William Miller's signature. I am not worried whether he signed it president, vice-president or— A. It looks like his signature.

Q. Do you remember seeing it signed? A. I can't definitely recall seeing what he signed, what papers he signed.

The Court: Except that you know he did a lot of signing.

The Witness: I know he did a lot of signing, yes. I am not an expert on William Miller's signature for that purpose.

(1245) Q. I show you DME-17 and ask you whether you saw that signed that day? A. The answer is the same on all questions, Mr. Brigadier.

Q. What is it? A. I didn't see Mr. Miller sign any particular document. I saw him sign papers.

Q. But you have a copy of this? A. I really don't know.

Mr. Grosman: "This" is what?

Samuel Marcus—Defendant—Recalled—Cross

Mr. Brigadier: DME-17, the $15,000 note.
Mr. Grosman: All right.

Q. You don't know whether you have that $15,000 note? A. I don't know of my own accord. Whatever was in the file, I turned over to Judge Grosman.

Q. And you don't know? A. I am not definite.

Q. And this DME-24, did you see Robert Schwartz sign that? A. I did not.

Q. Now, Mr. Marcus, will you take the Exhibits in front of you that have your signature on it—I am referring particularly to the—not the main contract, which has been referred to as the contract, DME-5, but the collateral writings that were executed on the same day. I call your (1246) attention to DME-9—that one let's put aside for a moment. I will come to that next.

I call your attention to DME-27. This is signed by you, right? A. That's correct.

Q. You know what it is? A. Yes, I recall what this was—I recall what this was in reference to.

Q. What was it in reference to? A. When Miller came back from the Kevelson call he said something about, "Well, Kevelson told me to sweeten up the deal with $15,000. But," he says, "I don't want to be personally responsible for this. If this guy don't go through with the deal, you can't hold me responsible for this $15,000."

I said, "That's perfectly satisfactory to me." And I believe this document was written so that I would not hold him responsible if Mr. Kevelson didn't finish the deal.

Q. I see. So that this document is a document which Bill Miller wanted from you, and which you gave him, right? A. To the best of my recollections, that is what occurred.

Q. And it is signed by you, right? A. That's correct.

Q. Now, I show you DME-26. Will you look at that? A. Yes, I seem to have a recollection of what that is.

(1247) Q. I asked you whether you remember. You do? A. Yes, I have a recollection.

Q. Just answer the question. A. Yes.

Q. You will observe from looking at this document that this is something which you are giving to Bill Miller's Riviera, right? A. Frankly, I don't know what the document is. I know what was spoken about with reference to that document.

Mr. Grosman: Wait a minute. I object to that.

Mr. Brigadier: Now, look—

Mr. Grosman: That document is not something he was giving to Bill Miller's Riviera. It's Milmar giving it.

Q. I meant Milmar, signed by Samuel Marcus, right, is giving to Bill Miller's Riviera, is that right? A. Samuel Marcus, president.

Q. It is something you are giving to them, an agreement, in other words, in which they are going to get a break on the rent, right? A. No.

Q. That they would otherwise have to pay? A. No, no. From my recollections of this—

Q. Let's read it. A. My recollections of this transaction—

Mr. Grosman: Wait a minute. Let him answer, (1248) please. Go ahead.

A. My recollections of the purpose of that particular letter, as I can recall it, was that Miller wasn't sure of this guy Kevelson. He was a new-found friend, or something or other. And in the event—he came to me and said—he always wanted to be protected against the other guy. He knew what he was trying to do and he wanted to make sure the other guy wasn't going to do it to him.

He said, "Listen, Sam, in case this guy Kevelson now is going to be the big owner there now. Let's have something

understood," or so—no, "in case Kevelson walks out," or so, "I want to be sure that I get my same lease that I have with you before," or just words, something that he wanted to be protected against something—I don't recall what it was.

Q. That's what I asked you, whether it was something that he wanted from you. A. Yes.

Q. And doesn't it provide that what he wanted from you was that in the event of default, and the lease went back, he was only to be answerable for 25 per cent of the rent provided for on July 15 pursuant to the lease of July 23? A. I don't recall the entire—

Q. Well, look at it. (1249) A. The paper doesn't refresh—

The Court: Oh, hold it, hold it a minute. Why do people sign papers and then they don't know what is in them? What's the use of signing things? Then you might have all relied on your memory and make it worse than it is now.

We will adjourn for lunch.

(Noon recess.)

AFTERNOON SESSION

SAMUEL MARCUS, resumed the stand.

Cross examination by Mr. Brigadier (continued):

Q. I call your attention to—I think I questioned you about this, DME-27, didn't I, Mr. Marcus?

Mr. Grosman: Yes, you did. The $15,000 note.

Mr. Margulies: It is not the note.

Mr. Brigadier: That's right, you were already questioned about this, as I remember it.

Samuel Marcus—Defendant—Recalled—Cross

Q. Now, DME-23, which was signed by you, was something that you were giving to the other side of the tranaction, is that right? A. I don't recollect any conversations pertaining to the (1250) contents of this Exhibit.

Q. But it purports to be, at any rate, your resignation, right, from Milmar Estate? A. If that is what it is, I don't know.

Q. Look at it, Mr. Marcus. A. It doesn't say—

Q. See if I can't shorten this and you will understand what I am trying to find out. I am going through these documents with you to figure out which of these are documents that you would have given the other side and which of these are documents which the other side would have given you. Do you understand what I am driving at? A. Frankly, I don't know enough about these documents to tell you which is which. I merely signed the documents that were given to me.

Q. You can't tell now by looking at this whether this is one you would have given to the other side? A. The contents of this, I don't recall any conversation pertaining to that whatsoever.

The Court: What, about resigning as a director of Milmar?

The Witness: That's correct, your Honor.

Q. Now, I show you document, DME-15, which is signed by you, right? A. Yes, sir.

(1251) Q. This is something which you gave them, right, that you gave William Miller? A. It is something I signed. I don't know whether I gave it to Miller—

Q. You have read it now and— A. I have signed it.

Q. Will you listen to the question? It purports to be something which you have signed for Milmar Estates, which you have given to William Miller, right? A. Something my attorney prepared, which I signed, yes.

Q. And it is addressed to William Miller? A. Yes, sir; it is addressed to William Miller.

Q. And it purports to give him something, doesn't it? A. Yes, it does.

Q. It purports to give him a credit of some kind, is that right?

Mr. Grosman: Mr. Brigadier, please, I can't hear you.

Mr. Brigadier: I am sorry, Judge.

Q. It purports to give him a credit, right? A. Yes.

Q. On certain terms and conditions? A. That's correct.

Q. That's all I wanted. Now, I am not sure whether I questioned you on the next document, DME-11.

(1252) Mr. Margulies: You did not.

Q. Now, this is signed Milmar Estates, Inc., Sam Marcus, president, right? Just answer the question. A. Yes, it is.

Q. And it is addressed to Al Bierman and William Miller, right? A. Yes, sir; it is.

Q. And again, when you read it, you will find that it is something which you are giving to them, right? A. Well, it is a paper that was prepared by Mr. Schwartz, evidently, which I signed.

Q. And it reads—you can read it, can't you? A. Yes, I have just read it.

Q. "This is to confirm our understanding in relation to a certain bond and mortgage" etc. And then comes the second paragraph, "In the event of a default in the terms of said bond and mortgage the undersigned corporation agrees to look only to the land, buildings and chattels, and not to hold you personally liable under the terms of said bond and mortgage." So that you were giving them a

promise not to hold them personally liable? A. I didn't give them any promise. This was a paper prepared by the attorneys and I signed it.

Q. All right. But that is what this paper purports to say, doesn't it? (1253) A. If you say so, I take your word for it.

Q. You see it. A. I don't know enough about the terminology of these papers and exactly what the terms—I can read sometimes in layman's language and it doesn't mean what it says. I don't know how to—

Mr. Grosman: May I interpose an objection to the witness being asked to interpret the documents. They speak for themselves.

Mr. Brigadier: May I answer that?

The Court: When he tells you in the simplest English that he doesn't understand, why are you wasting time? He didn't even understand a resignation before. "Hereby resign as director." What is technical and legal about that? This is getting ridiculous.

Mr. Brigadier: I just want to remind you, sir, that Judge Grosman spent a great deal of time having him interpret every one of these papers on direct examination, and he interpreted those parts which he said he understood, wherever they were favorable to him, in his interpretation.

But I will drop that.

The Court: Don't you think that I observe what witnesses do?

Mr. Grosman: Now, may I object to that statement? I didn't ask the witness to interpret anything. I merely (1254) asked him if he signed those documents.

Q. Mr. Marcus, I now show you Exhibit DME-14, which was signed "Bill Miller's Riviera, by William Miller." You will notice that that is addressed to Milmar Estates, right? A. It is.

Q. And it was accepted by you, at the bottom, right? A. That's correct.

Q. Now, will you read it and tell me whether this was a document by which you or Milmar was getting something from Bill Miller's Riviera?

Mr. Grosman: Now, may I make the same objection? It is not up to him to interpret that document. It speaks for itself. It is up to the Court to interpret it.

Mr. Brigadier: I am simply asking what his understanding is of these various documents that he signed, because I point—

Mr. Grosman: I object to it.

Mr. Brigadier: Let me finish, please, Judge Grosman. I have nothing up my sleeve. I made known exactly what it is I am trying to do. I am trying to establish which of these documents constitute things that Marcus and Milmar were going to give to the other side of the transaction, and what the other side was to give to Marcus, because—

(1255) Mr. Grosman: And I say—

Mr. Brigadier: Can't I finish?

The Court: Will you let him finish? You object when he interrupts.

Mr. Grosman: I am sorry.

Mr. Brigadier: Because when we get to DME-9, which is the document which Marcus did interpret at Judge Grosman's request, and said that he insisted on this when he found that Paragraph 3 was stricken out—you recall that testimony.

The Court: Yes, sir.

Mr. Brigadier: —I am going to ask him why—and I am telling him now—why it is that this document, which he says was something that he was getting, purports to be a document of something he is giving.

Now, isn't that in the correct line of examination?

The Court: It would seem so.

Mr. Brigadier: That's all I want. I will go right to this document and ask the question.

Mr. Grosman: If your Honor please, he explained it.

Mr. Brigadier: But I have a right to cross.

Mr. Grosman: All right, but you are asking him to interpret every one of the papers that were signed on September 14, and I object to it.

(1256) Mr. Brigadier: And I pointed out the reason.

The Court: It seems so futile to ask him about it. He always gives the same answer.

Mr. Brigadier: But you understand why I was doing it, sir.

The Court: Yes, sir; I know what you are leading up to.

Mr. Brigadier: I have now come to the document in question, DME-9.

The Court: Don't take too tortuous a road up.

Q. That is the document signed "Milmar Estates, by Sam Marcus," right? A. Yes, sir; it is.

Q. And it is addressed to Al Bierman, right? A. That's correct.

Q. Now, will you tell us what that document was given for? A. That document was given to me to promise me to repay me any loans and obligations that Milmar Corporation owed to me on the books of Milmar.

Q. That's what I understood your testimony on direct examination. Yet it is a document which is signed by you, right?

The Court: As president.

Q. As president of Milmar, is that right? (1257) A. Yes, sir.

Q. And it is addressed to Al Bierman, care of Bill Miller's Riviera, right? A. Yes, it is.

Q. It isn't signed by Al Bierman or William Miller, is it? A. It is not.

Q. In other words, you say that this document, which you signed yourself, on behalf of Milmar Estates, addressed to Al Bierman, was a document that was executed in order that you would have their obligation to you to see to it that the corporation paid the legal fees and other obligations and loans to Samuel Marcus personally, is that right? A. That was the understanding of that document; yes, sir.

Q. That's what I wanted to make sure. Now, I direct your attention to the third paragraph of DME-5, that's the paragraph that the line was stricken out, right? A. Yes, sir.

Q. And wasn't your evidence on direct examination that when you walked in and found this line was stricken out—

Mr. Grosman: Not a line, it is a paragraph, as I remember it.

Q. —found the paragraph stricken out. (1258) A. I didn't say I found it stricken out.

Q. What happened? A. Mr. Schwartz told me he had deleted that paragraph upon Mr. Miller's and Mr. Lieberman's advice that I had agreed to said deletion.

Q. Now, as I understood your testimony—correct me if I am incorrect about it—when you came there this Exhibit was already prepared, right, was already drafted? A. Yes, sir; it was.

Q. Was it shown to you? A. It wasn't particularly shown to me, no.

Q. What do you mean by "particularly," was it shown or was it not shown? A. The first thing that I can recall, pertaining to this contract, as we were signing the papers,

was Mr. Schwartz telling me that Mr. Lieberman—Mr. Miller and Judge Lieberman, one or the other—I don't recall—but he was told that this paragraph, this Paragraph 3, was to be deleted, with my understanding, and was that a fact?

And I said to Mr. Schwartz, "What does that mean? Does that mean that I am not going to get the loans—money that I have loaned to Milmar and Riviera?"

He said, "Yes, if that paragraph comes out, that's what it means." And I believe I have testified to the fact that we had quite a commotion about it and that I insisted (1259) that the arrangements were that I was to be repaid any loans and advances I had made to Milmar and the Riviera.

Q. And it was upon your insistence that DME-9 was then prepared, right? A. I told Mr. Schwartz, I insisted upon a paper being drawn that I would be repaid any loans and advances that I had made to Milmar and Riviera.

Q. And I said, and thereupon DME-9 was then prepared, right? Look at it. Do you have it in front of you, Mr. Marcus? That's that letter I have been questioning you about. A. Frankly, I don't recall the paper that was prepared towards it. This may be it and may not be it. There may be some other paper. But I do know that arrangements were made, a letter was written, that I would be paid loans.

Q. Mr. Marcus, didn't you on direct examination tell Judge Modarelli, when he questioned you, that that was why this paper was drawn, because of the Paragraph 3 that was stricken out? A. I believe it's the paper. I don't recall reading it completely. Mr. Schwartz assured me that this paper takes care of my loans and obligations.

Q. Now, Mr. Marcus, will you turn to Paragraph 7 of DME-5. Had you read that paragraph before you signed this agreement? (1260) A. I had not.

Samuel Marcus—Defendant—Recalled—Cross

Q. Have you read it since? A. I don't believe I have even read it since.

Q. You mean up to this moment? A. Up to this moment.

Q. Well, I am sorry, but I am going to have to ask you to read it now. A. I will read it.

(Witness examines document.)

Q. Have you read it? A. I have; yes, sir.

Q. Now, do I understand your testimony, that you did not read it on September 14; that's definite? A. I did not.

Q. And, therefore, did you—let me put the question this way. Was there any discussion on September 14 with respect to striking out any words in Paragraph 7 of this agreement? A. I don't recall any discussion whatsoever. When I arrived there—

The Court: That's the answer.

Q. Was there any discussion about the insertion of the words in handwriting in Paragraph 7, consisting of "first mortgage, taxes and insurance," and also the insertion or the writing of the word "said" in place of the word "all"? (1261) A. I don't recall any conversation whatsoever to any of those changes in that paragraph.

Q. Now, I call your attention, Mr. Marcus, to this paragraph which you have just read, and you will notice that the paragraph provides that "the buyer agrees to assume and perform all outstanding contracts and obligations consisting of first mortgage, taxes and insurance." You see that there, don't you? A. Yes, I do.

Q. And you see stricken out, "of every kind and nature," that has been stricken out, right? A. That's correct.

Q. And if you will also look towards the bottom of the same paragraph you will see that the word "all" has been stricken out, right? A. Yes, sir.

Q. And following the word "claims," or, rather, in place of the word "all" has been written the word "said," is that right? A. Yes, sir.

Q. But then has been stricken out "demands, liabilities, now existing and arising or that may hereafter arise in connection with such debts, liabilities, contracts and obligations whatsoever." You see that, don't you? A. I see those crossed out, yes.

(1262) Q. And this does not refresh your recollection as to whether any discussion took place, or do you say that none took place? A. To the best of my recollections, there was no discussion taking place in connection with any of these corrections.

Q. I suggest to you, Mr. Marcus, that if you read Paragraph 7, together with DME-9, that you will find that DME-9 was intended to absolve the buyer of any responsibility for the loans due you, and that you were to see that those loans on the books of the corporation were to be wiped out.

Mr. Grosman: If your Honor please, may I again interpose an objection that the writing speaks for itself. It is not for this witness to interpret the writing.

Mr. Brigadier: You had him interpret it.

Mr. Grosman: I did not. All he said was that that was the substitution for Paragraph 3 that was stricken out.

Mr. Brigadier: And he went on to say why, that he wanted to make sure he had a promise that they were to pay his loans, that the corporation was obligated to keep his loans alive.

Mr. Grosman: And that's what the writing says.

Mr. Brigadier: Do I have to take what you bring out on cross? I am sorry.

The Court: You get mixed up, too.

(1263) Mr. Brigadier: Am I not allowed to ask on cross to prove what he said is not so, that it was actually intended for the opposite?

Colloquy

Mr. Grosman: He is asking him to construe one document against another. I say he is bound by whatever appears in the documents.

The Court: He is bound by whatever appears in any of the documents in this case?

Mr. Grosman: Insofar as he is able to interpret. You remember what Judge Lieberman said about them. He characterized all of them as being silly, that he knew they were silly, and he still says they are silly.

Mr. Brigadier: I don't remember Judge Lieberman characterizing all the documents as being silly at all. I remember him characterizing the mortgage as silly. This one he said was a mistake. And I think it is borne out—which I will argue at the proper time—by the fact that it does make sense when you look at all the documents and find out who gave who what, and then read this contract as to what this document means and it makes complete sense.

Mr. Grosman: How does he expect Mr. Marcus to reconcile these things so that they do make sense?

Mr. Brigadier: I am asking Mr. Marcus to explain testimony that he gave, Judge Grosman.

Mr. Grosman: All right. If that is what you are (1264) asking, I have no objection.

The Court: Now, if you can find the last question that was pending before all this started—

(Question read.)

Mr. Tepper: Can this witness possibly be expected to answer that question? The answer was simple. He was president of Milmar. He explained that Milmar was supposed to continue to pay him any debts which were due to him from Milmar. He further stated that he insisted upon such a document, and this was prepared.

Now, the form is very simple. He was still president of Milmar. The obligation to pay him by Milmar was to survive the closing of the other transaction, and he wanted to make certain that that was going to be done, so counsel prepared in this form, and still being president of Milmar he signed it, and Mr. Schwartz, if your Honor will recall, attested to the document as secretary. Is that so difficult to understand?

The Court: Not for us, but it would be for him. He can't understand a plain resignation. He says he doesn't know, and all that. Do you expect him to answer this question?

Mr. Tepper: When you take the two paragraphs in this document—

Mr. Brigadier: I would expect him to answer it (1265) now, if your Honor please. He has heard the answer. You heard it, too.

Here was an objection made by Judge Grosman. I responded to it, didn't I? You then turned to the stenographer and said, "Read the question." I assumed you were going to rule. Then we get a speech from Mr. Tepper which tells Mr. Marcus a very good answer that could be made.

The Court: And now he knows what to say?

Mr. Brigadier: How long is this going to go on?

The Court: Did you get an assist from the shortstop? I suppose you know the answer now, don't you, Mr. Marcus?

The Witness: Your Honor, my answer is, I signed the paper that my attorney gave me to sign to carry through my intentions. I still don't know what I have signed, the legal effects of what I signed.

The Court: But you know what you want?

The Witness: I know what I wanted, yes, your Honor.

The Court: Do you think you got it?

The Witness: I don't know now whether I have it. Judge Grosman can't tell me whether I have it or not. I have been asking him continuously what goes on here.

The Court: Suppose you put another question, please.

Mr. Brigadier: I am sorry, Judge. I didn't hear what you said.

(1266) The Court: Put another question.

Mr. Brigadier: Yes, I am going to.

Q. At the September 14 meeting did you present a statement of any kind of the loans that were due to you from Milmar? A. I did not.

Q. Did you present a statement of any kind as to the loans that were due you from Bill Miller's Riviera? A. I did not.

Q. They were very substantial, as we now understand from your testimony, isn't that right? A. That's correct.

Q. In the case of Milmar it was forty-six thousand odd dollars, I think, and in the case of Bill Miller's Riviera fifteen thousand, isn't that right? A. That's correct.

Q. But you did present a paper involving the tabs that you had signed, isn't that right? A. That's all wrong.

Q. Well, were there tabs that you had signed at Bill Miller's Riviera? A. There were.

Q. And didn't you testify that they approximated—I think you said $130.

Mr. Brigadier: Am I wrong about the figure, Judge?

(1267) Mr. Grosman: About $100.

The Witness: Somewhere between $100 and $150.

Q. And you obtained on September 14 Exhibit DME-22, "Mr. Samuel Marcus. Dear Mr. Marcus: This is to con-

firm our understanding that all of your tabs and checks signed by you at Bill Miller's Riviera, Inc., Fort Lee, New Jersey, are hereby canceled and marked paid in our records," is that right? A. I didn't obtain it. It was given to me.

Q. It was given to you? A. That's correct.

Q. But there was nothing given to you signed by William Miller or Al Bierman agreeing to any statement of loans that were due to you from either Milmar or Bill Miller's Riviera? A. I don't believe there was any statements present at that meeting.

The Court: Just hold it a minute. Did you have the tabs with you? I didn't hear any testimony that you had the tabs.

Mr. Grosman: No.

The Witness: No. Mr. Miller just said during the meeting—I think Schwartz said something about, "Bill, how about forgetting tabs?" And Miller said, "Okay. We will forget tabs."

The Court: I didn't recall that you brought one (1268) tabs with you, or that you so testified.

The Witness: No.

Mr. Brigadier: I didn't say he did, sir.

Mr. Grosman: You inferred that he had a statement of the tabs.

Mr. Brigadier: What I said was that while he did not produce any statement of the loans, which ran into forty-six thousand, and fifteen in another, nevertheless he procured a statement which wiped out tabs that only totaled $130.

The Court: Well, that's not the way it would appear. The way you put the question, I thought that he didn't bring any statement about the loans, but he did bring his tabs with him.

Mr. Brigadier: I don't think that you will find that I—

The Court: I am not going to look at it. If you say that I misunderstood you, that settles it. But I would hate to have it read back, because that is the only inference that could be drawn from that question.

Mr. Tepper: You have got precisely the same sort of a document with respect to the debts from Milmar to him surviving and the tabs.

The Court: I don't want these summations every ten minutes. It will be enough to decide this at the end, (1269) without interruption.

Q. Now, Mr. Marcus, will you turn to Paragraph 5 of this agreement?

Mr. Grosman: Exhibit?

Mr. Brigadier: Exhibit DME-5.

Q. In your deposition didn't you testify, Mr. Marcus, that the only paragraph that you read of this Exhibit, before you signed it, was the fifth paragraph? A. I don't know whether—I believe I said that Mr.—towards the end of the meeting, if I can recollect correctly, I said towards the end of the meeting, when I asked Mr. Schwartz—or Mr. Schwartz said to me, "Do you want to read the contract, Sam?"

I said, "Bob, I am in a hurry. I don't want to read the contract. You read it. Is it okay?

He said, "Here. This takes care of everything, doesn't it?" And he suggested I look at Paragraph 5. And I read Paragraph 5, noticed where the stock hereby purchased is being put in escrow. I remembered I gave Mr. Lieberman 625 shares in escrow, and I was satisfied the deal was consummated, as far as I was concerned, everything was set.

Q. Mr. Marcus, I asked you a very simple question for which I did not get an answer. A. I am sorry. I thought I answered the question.

Samuel Marcus—Defendant—Recalled—Cross

Q. In your deposition—do you want to turn to the (1270) page number? One eight t' February 13, 1952, did you testify as follows, "You never read the contract from the time you signed it until the time you gave it to Judge Grosman?

"Answer: All I recall reading in this contract is one paragraph, No. 5. And I relied myself upon the paragraph as the only thing I recall reading and the only thing—"

Mr. Grosman: Pardon me, Mr. Brigadier.

Mr. Brigadier: One eight-three, at the bottom.

Q. "—and I relied myself upon that paragraph as the only thing I recall reading, and the only thing I relied myself on in the entire contract."

Then skipping a few lines, unless you want me to read it all. Do you want me to? All right, let's read it.

"Question: Did you read Paragraph 5 before you put your signature on the contract?

"Answer: I saw Paragraph 5, I read Paragraph 5, and then I felt the rest of the contract was satisfactory and I put my signature to it.

"Question: Did you read Paragraph 5 before you put your signature to this agreement?

"Answer: That's right.

"Question: You did not read Paragraph 4, did you?

(1271) "I read nothing else," was your answer. "I was specifically told, I think by Mr. Schwartz, or somebody, 'Now, is this right, Sam?' and he specifically pointed out Paragraph 5 in there, and I read that paragraph before I signed the agreement."

Now, is it true that that is the only paragraph you read before you signed?

A. Yes, sir; that's the only paragraph I recall reading as a complete paragraph.

The Court: Why don't you please just say yes and stop.

The Witness: Yes, sir.

Q. Now, when you were shown P-5, as it exists in the Exhibit that we have put in, DME-5, you observed that there was an insertion in handwriting "up to 50 per cent," is that right? A. When was that, sir?

Q. When you were shown Exhibit DME-5, in the taking of the deposition it was shown to you, this paper that is in front of you now was shown to you, was it not? A. My contract was shown to me.

Q. No, you were shown mine, too. A. You are right. You showed me yours, that's right.

Q. Make this as easy and as quick as you can. A. That's correct.

(1272) Q. I showed you this very Exhibit? A. I think you are right.

Q. And when you looked at Paragraph 5 you said, "But that insertion was not in it when I signed it." A. I think you are incorrect, counselor. I think you are incorrect in your assumption. When I said that remark I was looking at my contract.

Q. I don't think you understand my question. A. I understand your question.

Q. Just hold it. Listen carefully. A. I am.

Q. I could take advantage of that answer, but I know you don't understand it and I am trying to be fair. I know you don't mean it. So pay close attention.

The Exhibit that is in front of you, will you look at that one? A. Yes, sir.

Q. Will you look at Paragraph 5? A. I do.

Q. You will see it has an insert in handwriting, does it not? A. That's correct.

Q. "Up to 50 per cent." A. Yes, sir.

Samuel Marcus—Defendant—Recalled—Cross

Q. Your copy, or the one that you put in evidence (1273) does not have that in, isn't that right? A. That's correct.

Q. Now, I say to you, when I exhibited this one, DME-5, to you in the taking of the deposition, you then observed, did you not, that it had the insertion "up to 50 per cent," isn't that right? A. I did not.

The Court: Do you get what he means?

The Witness: Yes, sir.

Q. You didn't notice it? A. I didn't read the contract when you gave it to me. You asked me was that my signature, and I merely—you asked me a few questions. You asked me a few questions on the face, and you said, "Is that your signature?" And I said yes. And I believe you took the contract away. I didn't read your contract, if I am correct, at that meeting, when you submitted your contract.

The Court: When did you first notice that in Paragraph 5, that it was the handwriting, "up to 50 per cent"?

The Witness: Judge Lieberman called me one time to Jersey, asked me to sign some papers, or look at some papers, some Pleadings he was making—

The Grosman: You don't mean Lieberman, do you?

The Witness: I mean Judge Grosman. And he said, "Better sit down here and read these things carefully, (1274) Marcus. Stop your careless way of looking at papers. This requires your careful analysis. And this is your story and you are stuck with it."

And I sat down in the corner, and I spent a half hour reading every piece of paper there, for once in my life. And, as I came to this Paragraph 5 in the contract that was attached, I suddenly noticed the words "up to 50

per cent." I called Judge Grosman. I said, "Judge Grosman, I don't believe these words are in my contract. I cannot believe those were there." Because I wasn't too certain.

And I believe Judge Grosman didn't have the contract at that time in his possession. The contract was in Mr. Tepper's possession.

The Court: You have answered my question. That was the first time you noticed it.

The Witness: Yes, your Honor, the first time.

The Court: You went to Judge Grosman's office to look at some Pleadings he had prepared for you?

The Witness: Yes, sir; that's right, your Honor.

The Court: Take it from there, will you?

By Mr. Brigadier:

Q. Mr. Marcus, on page 44 of your deposition, December 19, 1951, do you remember Mr. Abe Chazin saying to you, "Now, I would like you to read that contract"—this (1275) is the one that was marked P-4 for identification in the deposition—and Mr. Grosman saying, "Will you note my objection to the use of this document for the same reason that I advised as to all other documents offered for identification. They should be offered in evidence.

"Mr. Chazin: Your objection has been noted.

"Question: I would like you to read that document. Take as much time as you need to read it."

And the answer appears here "(Witness complies.)"

Did you read it? A. I did not. I read the first page. After all, a document like this, it would have to take me a half hour, three-quarters of an hour, to sit down and digest it. You people were there firing questions at me. I was nervous. I didn't know what's what, and I just simply read the first part of it. You said, "Is that your signature," and I said yes. And that's all I recall reading at that time.

The Court: He wasn't questioning you. Wasn't Mr. Chazin questioning you?

The Witness: He was present at the time, too, your Honor.

Mr. Brigadier: I was present, but I wasn't asking the questions.

The Court: You were not asking the questions. (1276) Mr. Chazin was questioning.

The Witness: But there were questions being fired. Sometimes Brigadier would throw in questions, too. And I was being fired questions from four different lawyers there at the time. And I couldn't read this contract sitting on the witness stand there thoroughly. If they had told me to sit in the corner for three-quarters of an hour, I'd sit down and digest it. But they ask me, "Is this the contract you signed?" And I look at the front of the contract, and, "Is that your signature?" And I said yes, it was. And I let it go at that.

The Court: All right, next.

Mr. Grosman: That's what the deposition shows, substantially.

Q. You say that when you were asked this question and the record shows "Witness complies," that all you did was look at the first page, look at the signature, and within a matter of how many minutes did you tell us—did you do this? A. I would say three—in two or three minutes.

Q. Don't you know that in the presence of all of us you took at least 15 minutes to read this contract? A. I don't think that is true, counselor.

Q. I am not asking what you think; don't you know? A. No, sir; I do not know.

(1277) Q. In the presence of Mr. Chazin, Mr. Margulies and myself.

Mr. Grosman: I was there, too, and I have no such recollection.

Mr. Brigadier: But I do.

Mr. Tepper: I was there, too, and if you read the next question and the next answer, you will get the—

The Court: Now we have an issue of fact between the lawyers. That makes it more interesting.

So, after this, Mr. Bremer, when you sit in a deposition and they tell a witness to do something, note when he starts doing it, will you, please, and then we won't have the lawyers arguing about it.

Q. May I direct your attention to page 47 of the deposition, where this very question was raised at the taking of the deposition, and read what it says there, "Mr. Chazin: The fact is, which I don't think you dispute, Mr. Tepper, that the witness took a considerable amount of time to read this document. That is factual.

"Mr. Tepper: At the direction of counsel and over our previous objections to this procedure."

Does that sound like a denial that that happened, sir? May I read it to you again, not to repeat it in the record—

Mr. Grosman: We can read it.

The Court: It said "considerable time." That opens (1278) up the question, how much is considerable time.

Mr. Grosman: That's it.

Mr. Tepper: The next question and answer answers it. He looked at it—

The Court: What is the next question and answer? See if it does answer it.

Mr. Tepper: "(Witness complies.)

"Question: Now, you signed that?"

Mr. Brigadier: You are reading another page.

Mr. Tepper: Forty-four, where you read.

Samuel Marcus—Defendant—Recalled—Cross

Mr. Brigadier: I am reading 47, three pages later in the deposition.

Mr. Tepper: Forty-four is where you said, "The witness complies."

Mr. Brigadier: That's right.

Mr. Tepper: Why don't you read it there? "Witness complies." And then, "Question: Now, you signed that agreement, Mr. Marcus, the agreement marked P-4 for identification?" The answer is, "That's my signature, yes. "Question: That is your signature? Answer: That's correct."

That's what he said.

The Court: What we are worrying about is what "considerable time" is, how long a period.

Mr. Tepper: His answer is he looked at the first page, and looked at the second page. The next question is, (1279) "Is this your signature?" He said, "Yes."

The Court: I heard what he said.

Mr. Brigadier: Is your Honor aware of the fact that we are reading two different parts of the deposition?

The Court: Yes, you said 47 and he said 44.

Q. Now, Mr. Marcus, I want you to look at that Exhibit now, which you say—that is, this Paragraph 5, this insertion, which you say you didn't notice until after you had given your testimony in the deposition, is that right? A. What is that, sir?

Q. I want you to look at that insertion, "up to 50 per cent." A. Yes.

Q. Now, you have stated under oath, have you not, that this was an insertion that was made without your knowledge, isn't that right? A. That's correct.

Q. That it was made without your consent? A. That's correct.

Mr. Grosman: Now, Mr. Brigadier, please, what affidavit are you reading from?

Mr. Brigadier: I have always read from the one and the same affidavit, so I will repeat once again, the affidavit made by Mr. Marcus on December 21, 1953, filed (1280) by you in this cause.

Mr. Grosman: What was it annexed to? I filed a number of affidavits.

Mr. Brigadier: I have given you the affidavit as I have it, sir. It's an affidavit—

Mr. Grosman: Was it annexed to a Pleading?

Mr. Brigadier: I don't have it annexed to anything.

The Court: Maybe I can help you, sir.

Mr. Brigadier: The answer is that it is not annexed to anything, sir. It is the same affidavit that we questioned him about now on three different occasions.

The Court: It is an affidavit filed on December 28, 1953, just an affidavit.

By Mr. Brigadier:

Q. Did you, in Paragraph 14, of the affidavit, say as follows, "The paper writing annexed to the affidavit of William Miller, and designated in Line 1 of page 3 of this affidavit has a copy of the agreement of sale, is hereby annexed and made a part hereof, in no wise remotely carried into effect the true agreement between Miller and Bierman acting individually and as agents for Al Kevelson, and I deny that the said paper writing referred to by William Miller in Line 1, page 3, of this affidavit is a copy of said agreement, but charge that said agreement was unilaterally (1281) altered after execution without my knowledge or consent by the addition in Paragraph 5, page 2, and again in Paragraph 10 at page 4"—I think that is there—

"of the words 'up to 50 per cent', which alteration is further evidence of the fraudulent intent and purpose with which William Miller and Al Bierman, their agents and servants have sought to defraud and victimize me."

You made that statement? A. I guess my attorney prepared that. I must have signed it.

Q. I said you made that statement, right; who are the servants and agents you are referring to in the paragraph? A. My attorney arranged the legal phraseology of the papers. I couldn't tell you.

Q. You mean when Judge Grosman prepared this affidavit—

Mr. Grosman: What?

Mr. Brigadier: This affidavit. He says his attorney arranged the phraseology. I want to find out.

Q. —you didn't know what the language meant? A. No, I did not know what the language meant.

Q. Do you know now what "servants and agents" mean? A. I am not completely familiar with it. Legal terms seem to mean so many different things to a layman than it (1282) does to a lawyer. And I have full confidence—I have a real good lawyer in Judge Grosman, and anything he tells me, I will sign.

(Comment off the record.)

Q. Mr. Marcus, this is something you swore to, is that right? A. I am willing to swear to anything Judge Grosman prepares for me.

The Court: Wait a minute. Suppose Judge Grosman included William Miller, Al Bierman and Dwight W. Eisenhower, would you sign it?

The Witness: Well, if Judge Grosman felt that Eisenhower was one of the people in the party, I'd sign it; yes, sir.

Mr. Grosman: Now, if your Honor please, Mr. Brigadier knows that in preparing an affidavit that this is standard phraseology, "attorneys, agents and servants." It is very often used. A layman doesn't know it.

Mr. Brigadier: If your Honor please, I am constantly told to sit down when I get up and make speeches. There is no objection even at this point. What is all this going on on the other side of the table? I have asked a question.

The Court: Just padding up the record, that's all. Filling it up with unnecessary, immaterial matter.

(1283) Mr. Grosman: All right. Ask your question. I will make an objection.

By Mr. Brigadier:

Q. You swore to the affidavit which contained the words, "servants and agents," right? A. I swore to the affidavit; yes, sir.

Q. Did you mean by "servants and agents" Judge Lieberman? A. I wouldn't know. After all, I didn't know—

Mr. Grosman: I object to the witness being asked common, standard, legal phraseology.

The Court: I know that. But just a minute. You don't contend that if a man just charges two people, and then because his lawyer puts "and others" in, that it wouldn't be his duty to say, "Well, Judge Grosman, I didn't tell you anybody else did." He knows that that means other people besides William Miller and Al Bierman.

Now, we have the right to find out whether he does mean somebody else.

Mr. Grosman: Where there are a number of people like that, and we don't know exactly who is responsible, that is the proper charge to make. Like a confederation charge in a complaint.

Samuel Marcus—Defendant—Recalled—Cross

The Court: But you know that unless you are named, they can't hold you, even in a conspiracy charge.

(1284) Mr. Brigadier: This is not a Pleading, sir, it is an affidavit.

The Court: Yes, I realize that.

Mr. Grosman: It is still a Pleading.

Mr. Brigadier: It is sworn evidence.

The Court: It is a sworn statement, isn't it?

Mr. Grosman: All right. It is still a Pleading filed—

The Court: Didn't you notice that it said there "their agents and servants"?

The Witness: No, sir; I didn't—I probably noticed it, but, as Judge Grosman says, I often see those things on legal documents, and I am not enough of a lawyer, in spite of Miller thinking I am a Bronx lawyer, and I don't know those terms.

The Court: In other words, you didn't have anybody else in mind when you signed that, did you?

The Witness: No, I didn't particularly have anybody else in mind when I signed that; no, sir.

By Mr. Brigadier:

Q. I direct your attention to the 53rd paragraph of your affidavit, which answers Paragraph 7 of Abraham Lieberman's affidavit—

Mr. Brigadier: Judge, I would like you to see this, since it makes specific reference to Judge Lieberman's (1285) affidavit, that there be no question what he is talking about.

The Court: Yes, I know. I have seen this before.

Q. You are now being shown the original of the affidavit that you filed in this cause. A. Where did you want me to read?

Samuel Marcus—Defendant—Recalled—Cross

Q. Will you look at Paragraph 53, "I deny the allegations of Paragraph 7 of Abraham Lieberman's affidavit as to my intention and again point to the radical—"

Mr. Grosman: Pardon me. You are reading 53 or 54?

Mr. Brigadier: You know, Judge Grosman, this is not the first time you have done this to me. Almost any time I start to read you interrupt me and say, "What paragraph, what page?" Either listen, or if you don't hear, I would be willing to repeat twice in advance, but don't wait till I start—

Mr. Grosman: I understood you to say Paragraph 53.

Mr. Brigadier: That's right.

Mr. Grosman: What you are reading now is not 53, it is 54.

Mr. Brigadier: I am reading 53. Mr. Marcus, is that 53?

The Witness: Yes, 53.

Mr. Grosman: Fifty-four in my affidavit here.

(1286) Mr. Brigadier: Well, Judge Grosman, your office is certainly making mistakes.

Mr. Kesselhaut. This copy shows 53.

The Court: This is 53.

Mr. Brigadier: Well, it's true, Judge Grosman has a copy somebody prepared with the wrong number. Are you looking at the right affidavit?

Mr. Grosman: It is the right affidavit, but my copy is not executed.

Mr. Brigadier: I see.

The Court: Everybody has got 53 there but Judge Grosman. Is it the same paragraph?

Mr. Grosman: Yes, the substance is the same.

The Court: All right, go ahead.

Q. "I deny the allegations of Paragraph 7 of Abraham Lieberman's affidavit as to my intention and again point

to the radical differences between the contracts of September 14, 1948, and Abraham Lieberman's and William Miller's references thereto. The alteration of the contract of September 14, 1948, in a substantial, material respect is merely added proof of my charge that I was defrauded and that I am entitled to have the subject matter of this suit preserved until the final hearing of this cause with all the circumstances around the case heard in detail."

When you swore to that you had specifically in mind (1287) the allegations of Paragraph 7 of Judge Lieberman's affidavit, did you not? A. Did you say when I wrote that?

Q. When you swore to it. A. I didn't write that.

Q. No.

The Court: When you swore to it.

Q. When you swore to it. A. When I swore to it, yes, I had told—I had told Judge Grosman that—

The Court: Just say yes or no.

The Witness: Yes, I told Judge Grosman I had a difference of opinion between me and Judge Lieberman.

Q. Difference of opinion is what you call it? A. Yes, sir; that's what I told Judge Grosman.

Q. On which you say, "This is merely added proof of my charge that I was defrauded," that was a difference of opinion? A. That is not my particular language in there, but—

Q. Whose language was it? A. I didn't write it. I think Judge Grosman wrote it. And I believe it carried through my—it carried through my story as I related it to Judge Grosman. And I left it upon his legal abilities to phrase the questions in the proper fashion.

(1288) Q. Did you read this affidavit in its entirety befor you swore to it? A. I don't recall whether I read it in its entirety. I probably did.

The Court: Now, wait a minute. Don't you try to give me the impression that you sign affidavits that you don't read.

The Witness: I said I don't recall, but I believe I did read it, because Judge Grosman was very careful to me, and when I come to his office, he would make me sit there for a half hour or so, and read it. So I say I believe I did read this, yes.

The Court: That's much better.

The Witness: That's correct.

The Court: Because I don't think Judge Grosman would let you sign it unless he thought you read it, I will tell you right now.

The Witness: Judge Grosman did make me read every paper, every document he prepared for me.

Mr. Brigadier: Judge, I am going to be here six weeks, if I have to go through this. I am trying to push this thing, as you know. I have been stepping on it and I have been accused of speeding, and not giving anybody a chance. Because if I go through this, frankly, this is going to take weeks.

(1289) The Court: Well, if you are going to do it piecemeal and go over each document, item by item, paragraph by paragraph, line by line, and word by word, you are absolutely right. We are going to be here for weeks. Particularly when you have got a witness who never answers directly.

Q. Let's see if I can get a direct answer on this, Mr Marcus. You complain of this insertion which you have said is proof of fraud, right? This "up to 50 per cent"? A. Yes.

Samuel Marcus—Defendant—Recalled—Cross

Q. Since you made this affidavit you have heard the testimony of Judge Lieberman in the deposition and the testimony here, have you not? A. I did.

Q. You have also heard the testimony of Mr. Schwartz, have you not, in the deposition? A. I recall some of his testimony.

Q. Now, let's get this point blank one way or the other. You know that Mr. Schwartz testified that when he received the telephone call from Judge Lieberman, he called you. A. I believe one of his statement were that he did call me, yes.

Q. And you deny that he did call you, right? A. I do.

(1290) Q. And you deny that you ever gave to Mr. Schwartz any consent to the insertion of this alteration, isn't that right? A. That's correct.

Q. That's what I want to establish. And that if this alteration was made, it was made entirely without your knowledge, approval, consent or ratification, isn't that correct? A. That's correct.

Q. Your position. You say that the contract as it was signed did not contemplate, as far as you were concerned, the insertion of the phrase "up to 50 per cent," right? A. That's correct.

Q. Now, will you look at Paragraph 5 and tell us what you thought it read without that insertion? A. What I thought it read?

Q. Yes. A. My interpretation of the contract when I left the office—

Q. Just the fifth paragraph, which is the one you say you looked at. A. My interpretation of the paragraph, and the contract, when I left that office, and I deposited with Judge Lieberman my 625 shares of stock, that anything else that had transpired prior, any discarded arrangements we had made earlier that (1291) day, this was the deal. My 625 shares were being sold and this covered my contract.

Samuel Marcus—Defendant—Recalled—Cross

Q. Mr. Marcus, please. We are trying to get you down to a very simple thing. I am willing even to tell you what I am doing so that you will see I have no tricks up my sleeve. A. I am sorry.

Mr. Grosman: Well, now, your Honor—

Mr. Brigadier: I am willing to do it, sir. It's as simple as that.

Q. This agreement calls for the sale of 1,250 shares on the face of it, does it not? Look at it. Exhibit DME-5. A. Yes, sir; it does.

Q. And you admit that all—

Mr. Grosman: Where does it do that, Mr. Brigadier?

Q. And you admit—

Mr. Brigadier: What are you interrupting me for?

Mr. Grosman: I am asking you where does this agreement provide for the sale of 1,250 shares of stock?

The Court: In the very first paragraph under "Witnesseth." I remember that by heart.

Mr. Grosman: It merely states that the authorized issued stock consists of 1,250 shares.

Mr. Brigadier: Look at Paragraph one.

Mr. Tepper: Not the contract.

(1202) Q. Now, you concede, Mr. Marcus, there were 1,250 shares issued and outstanding, don't you?

Mr. Tepper: That's different.

A. There were—

Mr. Brigadier: Don't tell me we are going to have to go through that again.

Samuel Marcus—Defendant—Recalled—Cross

Mr. Grosman: I object to these side remarks, your Honor.

The Court: I don't know why a thing that's established as definitely as that is in the nine days we have been here must be constantly asked over and over again. Who has the 1,250 shares?

Mr. Brigadier: Didn't you just hear him say that this agreement did not provide—

The Court: He can't be serious about it. I am the only one—

Mr. Brigadier: These are the objections that are being made that I am called on to meet. Don't you think that should be addressed to them, that they are not making objections in any seriousness, that we have spent nine days establishing the very thing you have said, and then we get this kind of an objection, and then I am asked to explain it. I told you how far I was willing to go. I will tell the witness point blank what it was that I am trying to find out from him.

(1293) The Court: Will you ask him point blank? The direct approach, please.

By Mr. Brigadier:

Q. If only 625 shares were to be put up in escrow, wouldn't the insertion of the phrase "up to 50 per cent" carry out that idea?

Mr. Brigadier: That's the question.

Mr. Grosman: I object to it. It calls for an interpretation of the contract, which this witness is not required to make.

The Court: How many stocks were supposed to be put up in escrow?

The Witness: This agreement—

The Court: How many stocks were supposed to be put up in escrow?

Samuel Marcus—Defendant—Recalled—Cross

The Witness: Six hundred and twenty-five.

The Court: What is 50 per cent of 1,250?

The Witness: This was a discarded arrangement, sir.

The Court: What is 50 per cent of 1,250?

The Witness: Six hundred and twenty-five.

The Court: All right. That's established as a mathematical accuracy that nobody disputes in the entire world. Now, the next question.

Q. Now, Mr. Marcus—

(1294) The Court: Shall we take a five-minute recess so that we can all kind of relax for a minute?

Mr. Brigadier: Thank you, your Honor.

(Short recess.)

Q. Mr. Marcus, I understand that when you signed DME-5 you did not know what was in it, isn't that right? A. That's correct. I didn't know its full contents.

Q. And you were relying on what Mr. Schwartz told you was in it, is that right? A. That's correct.

Q. Now, will you tell us what Mr. Schwartz told you was in this document? A. Mr. Schwartz didn't particularly say anything what was in the document. He merely said to me, when I spoke to him—he spoke to me, he said, "Marcus, I understand the deal is for all the stock."

Q. Now, I am not talking now—please try to listen to me. I am long past that. That's what we spent the morning on. We are now on the point where you have signed this document, right? A. That's correct.

Q And you had not read it, except to the extent you have already testified, is that right? A. That's correct.

Q. So that when you signed it, you did not know what (1295) was in it, is that right? A. That's correct.

Samuel Marcus—Defendant—Recalled—Cross

Q. You had not read it and it had not been read to you. I think I forgot to ask you that. A. That's correct.

Q. So when you signed it you apparently relied on something Schwartz told you, is that right? A. That's correct.

Q. What did he tell you was in the document? A. He didn't tell me anything that was in the document. I thought —should I continue?

The Court: He asked for it. Go ahead. I know just what you are going to say and how long it is going to take. Go ahead.

A. I thought—

Mr. Brigadier: I didn't ask him what he thought. I asked what Schwartz told him.

The Court: Wait a minute. He wants to know if you recall what Schwartz told you.

The Witness: I don't recall any words that Mr. Schwartz said to me at the signing of the contract.

Q. You don't recall him telling you anything as to what was in that document? A. No, sir; he did not.

Q. Whicl. you hadn't read. All right. Now, when you (1296) signed all these papers that have been exhibited to you, dated September 14, will you tell us what you believed, thought, understood, knew, was the transaction that you had executed that day? A. When those papers were signed, I was under the impression that all my stocks were being sold, including Bill Miller's.

Q. You were under the impression that you had sold 1,250 shares less the 125 held by Marcus. A. That's correct—

Mr. Grosman: By whom?

Mr. Brigadier: By Schwartz. I am sorry.

Samuel Marcus—Defendant—Recalled—Cross

A. My understanding when I signed that paper was I was selling Bill Miller's stock and my stock.

Q. For how much? A. For—Bill Miller—I was supposed to get $140,000 for my stock and was supposed to get fifty thousand plus interest on Bill Miller's stock.

Q. You were? A. I was.

Q. Watch your words, then. You say that you were to get from Bill Miller $140,000 for the 625 shares of your own, which you called your stock? A. That was supposed to go to Kevelson, that's right.

Q. Which was to go to Kevelson. And in addition you (1297) were supposed to get $50,000 from Bill Miller, in cash, on that note, is that right? A. That's correct.

Q. Plus interest? A. Plus interest.

Q. And for that he was to receive the remaining shares? A. He was to receive the 500 shares of stock which I held for him, that's correct.

Q. Exclusive of Schwartz'? A. What's that?

Q. Exclusive of Schwartz'? A. That's correct.

Q. So that when you signed this agreement, at the time you had signed it, DME-5, that was your understanding, is that right? A. Yes, it was.

Q. Then what happened, did something happen after that? A. Yes, it did.

Q. At the same meeting? A. Right after the signing, the completion of the signing.

Q. What happened? A. Mr. Schwartz, or myself, asked Miller to produce his money. And Mr. Miller took an envelope from his pocket, (1298) laid down $10,000 cash, and a check for $10,000. And I said to Mr. Miller, "Isn't there something missing here?" And he said to me, "Step outside, Sam, I want to talk to you."

Q. All right. Did you step out? A. I did.

Q. Then what happened? A. Mr. Miller said to me, "Sam, Mr. Bierman promised to send me up a certified check to cover this note, but Al is ill and he said it's com-

ing up in the next few days. Now, please don't hold up this deal. I got Al Kevelson waiting for me. And, you know, Sam, you can't afford to lose this man Kevelson. And I have got a wonderful deal worked out for myself, and please do me a favor and go through with this deal. Let me take the stock. Let me bring it to Kevelson. Let me show him, let me make him happy."

And I kept objecting to Mr. Miller, "Bill, I have told you a half dozen times you can't have that stock unless you give me some cold cash."

And we argued, we fought. He became abusive. And we argued some more. Finally he couldn't wear me down and we went back inside the room, and we went over to the two attorneys and we told them the deal is for 625 shares.

Q. To Lieberman and to Schwartz? (1299) A. We told it to the attorneys sitting there, the deal is for 625 shares.

Q. And for that 625 you were to get $140,000? A. That's correct.

Q. And you told them that that was all that was being sold, right? A. We told them the deal was for 625 shares.

Q. That's all that was being sold? A. That's correct.

Q. And thereupon you handed back to Mr. Miller his note for fifty thousand, isn't that right? A. No, not at that particular moment. There was some discussion there with the attorneys. The attorneys did something with some of the papers. And when that was concluded, Miller said to me, "Say, Sam, but one thing you have got to give me back, you have got to give me back that note. Mr. Kevelson knows about that note. He doesn't want any third partners in here. He is going in the Riviera with me, but he knows me, and he trusts me, and doesn't want any third party in here. And he will not go into business with me knowing any man has got a demand $50,000 note hanging on his head that can clamp down and demand it any time and cause trouble here."

Samuel Marcus—Defendant—Recalled—Cross

Q. Let me see if I can follow you on this. Kevelson was acquiring 625 shares from you, right? (1300) A. That's correct.

Q. And the only stock that Miller ever had was stock that had only been issued in his name, but never had been owned by him, isn't that right? A. That's correct.

Q. So at this point of the transaction Miller had no stock in Milmar, isn't that right? A. That's correct.

Q. And you had the stock and the $50,000 note, right? A. That's correct.

Q. Now, will you tell me how giving back the $50,000 note to Mr. Miller would show Kevelson that Miller had no—what was it?—was still in Milmar? A. No, who's talking about Milmar? Milmar was interested more in the Riviera, he was interested in operating the Riviera. His whole interest in this business was not Milmar, that wasn't making any money for him. The Riviera was making him money. He was interested in operating the Riviera, and his whole argument there was Kevelson was going in partners with him in the Riviera, in the operation, Kevelson was going to put money in. He told me Kevelson had advanced $30,000.

Q. Will you listen to my question? A. I am trying to answer you, Mr. Brigadier.

Q. That has nothing to do with— (1301) A. I am sorry.

Q. Please listen. In your statement before you said that Miller wanted the note for $50,000, to show Kevelson what? A. He said Kevelson knew that I had a demand note of Bill Miller's for $50,000. He didn't want any partner with him in the Riviera that somebody had—what you had, a strangle hold, or something he could clamp down and demand $50,000 off him any time.

Q. So what you understood was that Kevelson was not only going into Milmar with you- if I get your story now, or your testimony—but that he was also going into the Riviera with Miller, isn't that right? A. Definitely. That was always Mr. Miller's assertion to me.

Samuel Marcus—Defendant—Recalled—Cross

Q. And that was why Miller wanted the $50,000 note? A. He told me that Mr. Kevelson insisted that he get back the $50,000 note.

The Court: Don't repeat. Because Kevelson didn't want a partner with a sword hanging over his head.

The Witness: Yes, your Honor.

Q. That was not a note of Bill Miller's Riviera, it was the individual note of William Miller, isn't that right? A. That's correct.

(1302) Q. All right. I just wanted to know. You then handed over the note, is that right, to Bill Miller? A. Miller said to me, "Now, Sam, you have got the stock. Give me the note and we are quits."

Q. That's right. So you understood by that that you were giving up the note and he was wiping out any claim he might have to any option, or privilege, or whatever you called it, with respect to those 500 shares, which became 480 yesterday, is that correct? A. That's correct.

Q. And you gave him the note? A. And I gave him the note.

Q. And as you gave him the note some question arose about that being held in escrow? A. I don't recall the exact question. At first I was hesitant. I didn't know my position and I was hesitant about returning of the note, when Miller said, "Well, Sam, you don't need the note and stock both. Keep the stock, give me the note." And I realized it was good logic, I preferred the stock to the note, I figured the stock was worth more than the note.

I said, "You have got something, Bill. Here is your note."

Q. Yes. Now, let's answer the question. That's the speech. Let's get the question. The question was about the (1303) escrow. A. I think I mentioned it to you. As I recall it now, at the end of the meeting, when I ques-

tioned whether everything was satisfactory, whether anything went wrong, whether Kevelson dropped the deal, whether anything happened in the default, would I be placed back in the original position where I would have everything I am giving out. And everyone assured me it would be. Mr. Schwartz said, "Everything is okay, Sam." Mr. Miller said, "No question, Sam."

Q. Mr. Marcus, will you please get down to the escrow? A. Well, I am trying to tell you. I am leading to tell exactly what happened. Then Mr. Lieberman said, "Marcus, if it will make you feel any happier, I will even give you an escrow receipt for the note." And he sat down and he wrote something in longhand. He didn't give it to me. He gave it to Mr. Schwartz. And I don't even know what he wrote, didn't see it until we found it in our file, in Judge Grosman's file.

Q. And it was at this point that you then obtained DM-25, signed by Judge Lieberman, right? A. I didn't obtain it. This is something we found in Mr. Schwartz' file. I have never even seen this myself.

Q. You don't know how it got there? A. I believe it got there on Mr. Lieberman's advice, that (1304) here, "I will even give you an escrow receipt for the note." And he sat down, wrote out the note, and gave it to Schwartz, I assume.

Q. Did you see it, did you assume; did you see it or didn't you see it? Which is it? A. As I was leaving the door, he sat at a desk and was writing something out on paper, and I assume it was the escrow receipt he was writing.

Q. You got another escrow receipt about the note, didn't you? A. About the note? I don't know that I did.

Mr. Brigadier: I think I am in error. I am in error about that.

The Court: It's not mentioned.

Samuel Marcus—Defendant—Recalled—Cross

Mr. Brigadier: I am in error.

The Court: It looked like an after-thought to me.

Q. I show you DME-15, fourth paragraph. There was another provision about the return of the note, wasn't there? A. Yes, sir; there was.

Q. And that would call for it being in escrow, wouldn't it? A. I don't know whether it would or not.

Q. Will you read it now? A. I believe I read this the other day and testified to it.

(1305) Q. "In the event that the contract of purchase dated September 14, 1948, is fulfilled said note of $50,000 is to be returned—" No, I am in error. I am sorry. I misled you again. I am in error. I guess I am tired.

The Court: That's right.

Mr. Brigadier: That's what it is. This is to be in the event it is fulfilled.

Q. You say the note is to be returned to Miller, is that right? That's not the way I started the question, so I don't want to mislead you. Let me correct it.

In DME-15 the provision is that if the agreement of purchase is fulfilled then the $50,000 note is to be given to Miller, is that right? A. This had nothing to do—

The Court: —with escrow at all.

A. This had nothing to do with our agreement of the 14th. This was an arrangement and discussion I had with Bill Miller some time earlier. I think it mentions here about September 2.

The Court: Yes, referring back to an understanding arrived at on September 2.

Mr. Brigadier: But it is executed on the 14th.

The Court: Yes.

Samuel Marcus—Defendant—Recalled—Cross

The Witness: Yes, I believe it's probably executed that day, yes.

(1306) Q. And it provides for the return of the note to William Miller if this contract of purchase is fulfilled, isn't that right? A. This agreement was drawn pursuant to a completely different understanding we had that day, when Mr. Kevelson was going to buy 50 per cent of the shares of stock, and nothing else, and I agreed to give him the note back on the basis that Mr. Kevelson would buy that stock, and that's all.

Q. Will you look at Paragraph 3 of that Exhibit. What was to happen in the event of a default with that note? A. Oh, frankly, I don't recall.

Q. Look at it. A. I didn't—do you want me to read it?

Q. Yes, I want you to read it. A. Paragraph 3?

Q. Yes. You recall 4, now I want to see if you recall 3.

(Witness examines document.)

A. I think I understand the basis and contents of that paragraph.

Q. So that the $50,000 note would be reinstated in the event of a default, right? A. Yes, in the event of a default the $50,000 note would be reinstated.

(1307) Q. All right. Now, what I want to understand is this. You said that when you came back after this private arrangement with Mr. Marcus, in which you couldn't come to terms—with Mr. Miller, I am sorry—that there took place this conversation between Miller and you, in the presence of both attorneys? A. Pardon me, Mr. Brigadier. When was that? Will you please place the time?

Q. September 14. A. September 14. No, that conversation with Miller took place outside.

The Court: He said he stepped out with Mr. Miller.

Mr. Brigadier: That's right. I am bringing him back. He said he stepped out, he had this conversation with Miller, and he then came back and he reported to the attorneys that the deal was only to be for 625 shares. Right?

The Witness: That's correct.

Mr. Brigadier: Then at that time Miller said to him, "You have the stock. We are quits now. Give me the note. You are going to keep the stock." Isn't that right? That's the way I understood his testimony, sir.

The Witness: I don't recall whether that was said directly in front of the attorneys. As we were coming (1308) in the door, and—we went to the attorneys and told them the deal was for 625. If I am not mistaken, I think we stepped away from the attorneys. I don't know definitely whether we were within the attorneys' hearings, or not.

Q. Did you at any time thereafter say to the attorneys, "I am giving back Miller his note for $50,000 because I am to keep the stock and we are quits"? A. I don't recall whether I made that statement to the attorneys or not. I do definitely recall the statement, that we both made the statement, "The deal is for 625 shares."

Q. And you definitely recall that you and Miller had agreed that the note was to be returned to Miller, and that you were to keep the 480 shares, and that you were to be quits? A. That's correct.

Q. Now, with all of that you then turned around and give Miller the note, but you escrow it, don't you? A. I didn't demand—to my best recollections—

The Court: It was Judge Lieberman's idea. If it would further assure you, it would be held in escrow, right?

Samuel Marcus—Defendant—Recalled—Cross

The Witness: To the best of my recollections—I remember Judge Lieberman's final parting remark to me, "Marcus, if it will make you feel any happier, here is your note in escrow, so that you will get back everything. There (1309) is no question. If the deal don't go through, everything you have signed here, all papers here will be returned to you." That was my definite assertion when I left the room.

Q. That's exactly what I am trying to find out from you, Mr. Marcus. If the deal didn't go through were you still to have the 500—or it became 480—shares of stock? A. Well, I had those 480 shares of stock in my pocket.

Q. You were still to have them, weren't you? A. What's that, sir?

Q. You were still to have them, weren't you? A. Sure, I had them in my pocket. I didn't have to have them over again.

Q. Listen to the question. If the deal fell through— A. Yes.

Q. —you were still going to hold on to your 480 shares, right? A. That's correct.

Q. And you were still quits with Miller anyway, weren't you? A. No, if the deal fell through, according to Judge Lieberman and Schwartz, I would have everything. In other words, I would get back the note, all the stock certificates, anything I—any papers that were signed that day would all come back to me, it would be put back in its original (1310) position as the day we started, before we entered into a contract.

Q. And Miller would still be obligated to you on the $50,000 note. A. That's correct, we would be put back the same as we started.

Q. And what happened to this arrangement you had with Miller whereby it was agreed that you were to be quits on that stock and he was no longer to have any rights as

to that stock? A. I don't follow you, Mr. Brigadier. Will you please repeat that question?

(Question read.)

The Court: Do you mean the 480 shares?
Mr. Brigadier: That's right.

A. Well, frankly, we didn't discuss it. Miller had a perfect—Miller would have had, according to my understanding now, a perfect right to demand his note back. Of course, we did say, "We are quits." We said, "We are quits," so I—if the note was given back to me, in case of default, Miller would have had a perfect right to say, "I want this note back, Marcus. We said we are quits." That's my understanding.

Q. Well, that's exactly what I am trying to find out. Why should there have been any arrangement made to return the note to you for $50,000 in the event of a default, if, (1311) as you have just said, and have said before, that that note was wiped out by this arrangement that you made with Miller? A. Judge Lieberman merely—

Q. Why shouldn't the arrangement have been instead that the note would, in any event, and in all events, belong to Miller and therefore there was no need to escrow it?

Mr. Grosman: Your Honor, it seems to me that the man to ask about that is the man who wrote the escrow receipt, Judge Lieberman. It's in line with practically everything else that's been done in this case.

Mr. Brigadier: But there are papers signed by Mr. Marcus. I showed you one, Paragraph—

The Court: But you are not forgetting his testimony, Mr. Brigadier, that he didn't even look at the escrow agreement, and that he didn't see it again, or never saw what was in it until Mr. Schwartz, his former attorney, turned over to him the papers. Is that right?

The Witness: And I turned it over to Judge Grosman and Judge Grosman found it in his file.

The Court: You didn't see it until then?

The Witness: I didn't see it till Judge Grosman went through the file and found it in the file.

The Court: Let's get another fact straight in here. Are you telling us that from the time that Mr. Schwartz gave you his file, and you delivered it to Judge (1312) Grosman, that you never looked at the contents of that file?

The Witness: Yes, your Honor.

The Court: You did not.

The Witness: I did not; no, sir. I never looked in the file.

The Court: You didn't know what was in the file?

The Witness: I didn't know what was in the file?

The Court: And you made no list of what was in the file?

The Witness: No list whatsoever.

The Court: And you got no receipt from Judge Grosman of what was in the file, either?

The Witness: I got no receipt from Judge Grosman.

Mr. Grosman: And he gave no receipt to Schwartz.

The Court: You gave none to Schwartz, either. I am not criticising you for not giving him one. Are you all getting touchy now that it's 4 o'clock?

Mr. Grosman: No, I am not touchy.

The Court: Didn't Schwartz ask you for a receipt?

The Witness: I don't believe he did. My attorney, Mr. Roth, called me up, as far as I recall—

The Court: When you said you don't believe he did, do you mean he did not ask you for a receipt, or was the file turned over to Mr. Roth?

(1313) The Witness: Well, your Honor, my recollections were that I had gone to get the file, but Mr.

Roth now tells me—just yesterday he told me, which is something different from my recollections—Mr. Roth tells me that his diary shows that he and I went up together to Schwartz' office and picked up the file, and that he and I went together to Judge Grosman and delivered the file. And the file was never in my possession.

My recollections were different, your Honor, on my deposition, but Mr. Roth has just checked his diaries and corrected me on my recollections.

The Court: I want to tell you, Mr. Roth, it's a good thing you do that.

Off the record.

(Discussion off the record.)

The Court: That's enough for today. Gentlemen, we will adjourn until tomorrow at 10:15.

(Whereupon, the hearing was adjourned until Wednesday, February 9, 1955, at 10:15 A. M.)

(1314) Newark, N. J., Wednesday, February 9, 1955.

(Hearing resumed pursuant to adjournment.)

(Appearances as previously noted.)

SAMUEL MARCUS, resumed the stand.

Cross examination by Mr. Brigadier (continued):

Q. Mr. Marcus, I will start off with the daily question. Have you checked with Mrs. Maginn? A. Mrs. Maginn—

Q. About that document. A. I was out to see her last night.

Q. And is it now conceded that that was typed on the typewriter in your office? A. She tells me that—

Samuel Marcus—Defendant—Recalled—Cross

Q. Just answer that question.

Mr. Grosman: He can't answer it that way.

The Court: He has to give you hearsay, what she told him.

Mr. Brigadier: No, I just want to know whether they will concede now.

The Court: Oh. Can you concede after the conversation you had with her?

The Witness: No, your Honor, I cannot.

(1315) The Court: Why not?

The Witness: She told me it looks like her typewriter, but she is not enough of an expert to say that it is hers. And she cannot make me that definite statement.

The Court: You have to rely on what she tells you.

The Witness: She did say, "It looks like my typewriter, Mr. Marcus."

Mr. Briga er: That's all I wanted.

Q. Mr. Marcus, when you left Mr. Schwartz' office on September 14, 1948, what had you thought, and what do you think now, you had done in that office? A. I was definite of the—

The Court: Didn't he tell us that already?

Mr. Grosman: I don't understand that.

Mr. Brigadier: Oh, no. He only told us part of it. All he told us was, "I sold my 625 shares for a hundred and forty thousand." But there are a lot of other things. There were terms, how he was to get paid that money.

The Court: Oh. All right.

Mr. Brigadier: I want to know what he thought he had done.

Mr. Grosman: May I ask, are you referring to Schwartz' office on September 14, 1948?

Mr. Brigadier: Yes.

A. When I left Mr. Schwartz' office I was definite of the (1316) feeling that I had made a sale of my 625 shares of stock for an amount of $140,000.

Q. And that the one hundred and forty was to be paid how? A. At that particular moment I didn't recall the exact terms of it. I knew I was going to get monthly payments, monthly payments for my stock.

Q. When you left Mr. Schwartz' office you say you had sold 625 shares, you knew that you had sold it for a hundred and forty thousand, right? A. That's right.

Q. You knew that you did not walk out with a hundred and forty thousand, is that right? A. That's correct.

Q. You knew that you had walked out with only twenty thousand that you had received that day, ten thousand in cash and a check for ten thousand, right? A. That's right.

Q. And the $10,000 that you had received on the prior occasion when receipt was given, is that right, on August 27? A. That's correct.

Q. So that when you left that office you knew that you had walked out with a total of only thirty thousand, that is, including the other ten, as against the purchase price of a hundred and forty, right?

(1317) Mr. Grosman: Well, now, if your Honor please, his testimony was that the $10,000 check was made out to Milmar, and he deposited it to—

Mr. Brigadier: We all know that is his testimony. I am asking him what he walked out with. He walked out with a check for $10,000, he walked out with ten thousand in cash. Is this an objection?

The Court: He just wants to get it straight.

Mr. Grosman: I didn't want you to mislead the man unintentionally.

The Court: That was the Milmar check that you deposited in the account, then you drew one for yourself, is that right?

The Witness: Yes, your Honor.

The Court: Yes.

Mr. Brigadier: I was going to get to that. I didn't say a word about whose check it was.

The Court: Oh, no, you didn't try to deceive him.

Q. You walked out, I repeat again, with ten thousand cash and a $10,000 check, the check that was made out to Milmar, as I remember your testimony you didn't discover that till three days later, isn't that right? A. I don't recall exactly when I discovered it. When I got to the office I believe I turned the check over to my secretary, as I generally do, for deposits. And at this (1318) moment I don't know whether I noticed it was Milmar, or whether I didn't notice it. I didn't take too much cognizance of it.

The Court: Well, you did testify before, if I can refresh your recollection, that you thought it was about three days later that you noticed that it was made out to Milmar. That's what you said.

The Witness: If I said it—I don't recall exactly what did happen with reference to the check. I believe I turned it over to my secretary, which I normally would have done in a situation of that kind, and tell her to take care of the deposit.

Q. We are still back at September 14. I am trying to find out, Mr. Marcus, you knew that you had walked out with less than the full one hundred and forty thousand, right? A. That's correct.

Q. You knew that there was still a balance coming to you of one hundred and ten thousand? A. That's correct.

Q. What did you know as to how that one hundred and ten thousand was to be paid to you? A. I don't know whether I knew the exact terms at that time, but I know I turned over to my secretary the knowledge of what I was to get. I think she made a record (1319) of same.

Samuel Marcus—Defendant—Recalled—Cross

Q. But I am asking you what you knew. You were selling something for $140,000. That's a large sum of money, isn't it, Mr. Marcus? A. Yes, sir; an extremely large sum of money to me.

Q. You said you know what the transaction was, and the amount of the purchase price. Now I am asking you, what did you know? A. I knew I had made a deal where I was to get a hundred and forty thousand, the balance—

The Court: Don't go through that again. He is particularly interested in if you know what was to happen about the balance, the hundred and ten thousand.

The Witness: I must have known, because I turned that information over to my secretary. So evidently I must have had the knowledge of it at the time, exactly what it was to be.

The Court: You mean you don't have it right now?

The Witness: What was that?

The Court: You don't have that knowledge presently?

The Witness: Yes, I have the knowledge right now.

The Court: Tell him.

The Witness: Yes. I believe the arrangements were for $3,000 per month when the Riviera was open, I believe, and $1,500 per month while the Riviera was closed.

(1320) Q. Until the balance of how much was paid, a hundred and ten thousand? A. No. No, there was two separate things there.

Q. That's what I am trying to find out. A. There was two separate things. The $15,000 was to be paid, I believe, on the basis of $200 a week, when the Riviera was open, if I remember my contract correctly, and—

Mr. Brigadier: Will you show him DME-17?

Samuel Marcus—Defendant—Recalled—Cross

(Document handed to the witness.)

A. Yes, this refreshes my memory. The balance of the $125,000 was to be paid on the basis as I just enumerated, the $3,000 a month, and the $1,500 a month, and the additional $15,000 was to be paid at the rate of $200 a week, commencing May 15, 1949.

Q. So that you knew that the total purchase price of $140,000 was covered in two separate transactions, is that it, one covering a hundred and twenty-five and the other covering fifteen? A. Yes, I knew that.

Q. Now, Mr. Marcus, look at DME-5. Doesn't DME-5 express the agreement as you understood it took place on that day, except in the following respects, according to your contention: One, that you say the seller was you, and not the Milmar Estate, is that right? (1321) A. Yes, I believe that's correct.

Q. Two, the number of shares was not 1,250, but actually only 625? A. No, when this contract was signed the intentions were of—

Q. I don't think you listened to my question, Mr. Marcus. I didn't say when you signed the contract, I say when you ended up the transaction on that day. What I am trying to find out is the difference between the transaction as it ended up on that day and as it purports to be in DME-5. That's all I am trying to find out. A. I got you straight now.

Q. Now, the only difference—and you correct me if I am wrong, and this is what I want to bring out, just what they are—one, that in DME-5 the seller purports to be Milmar Estates, right? A. That's correct.

Q. Whereas, in fact, you were the seller, right? A. That's correct.

Q. That in the paragraph numbered one, "The seller hereby sells to the buyer and the buyer hereby purchases from the seller all of the issued and outstanding shares of

the corporation," the error there is that you say when it ended up it was only 625 and not all, right? A. That's correct.

(1322) Q. Paragraph 2, with respect to the purchase price, is correct as long as—if you make the changes you suggest to 625 shares, is that right? A. Well, that's correct, only with the addition of the other paper here.

Q. But you say there are two separate papers. I am taking each one, just as you say. A. You asked me whether this paragraph is correct, and I say it is not correct unless you put both these together.

Mr. Grosman: Refer to the Exhibit mark.

Q. In other words, you say DME-17—

Mr. Grosman: Will you give him a chance, please, to identify the documents?

Mr. Brigadier: I am helping him.

The Witness: Yes, I have 17 in my hand.

Q. You said at the end of the day when you walked out of the office, and I started to question you about what you knew you had done, you said you knew you had made a transaction in two separate papers, under which, one, you were to get a hundred and twenty-five thousand for 625 shares, right; and a separate paper by which— A. Well, the—

Q. Let me finish. —and a separate paper by which you were to get fifteen thousand; and didn't you ask for the production of that paper, and weren't you presented (1323) with this Exhibit so you could check it and determine what the terms were? A. I wasn't presented with any papers. I merely left the matters in the hands of my attorney. We agreed on a certain thing, the price was $140,000. I felt my attorney was taking care of the legal part of the transaction. I leave everything—I trust people, I trust my ac-

countants, I trust my attorneys, and when I have an attorney I am in his hands; if I have an accountant, I leave it in his hands.

Q. Mr. Marcus, you have now sufficiently, I think, made that statement, don't you think, a number of times?

The Court: At least 50 times.

Mr. Brigadier: Will you try to answer my question now?

The Witness: What is it you wanted to know, Mr. Brigadier?

The Court: Don't start with everything again. Give him that last question that he didn't answer. There is an unanswered question. Will you please give it to him again?

Q. I asked you, Mr. Marcus, a few moments ago, how the price of $140,000 was to be paid, right? A. That's correct.

Q. And you said that you had received that day thirty (1324) thousand, including the deposit, leaving a balance of a hundred and ten, right? A. That's correct.

Q. Then I asked you how the hundred and ten was to be paid; do you recall that? A. I believe I answered that question.

Q. I mean you recall my asking you? A. Yes.

Q. And then you said that in the one transaction you were to be paid $95,000 of that balance of a hundred and ten by the sum of $3,000 a month while the Riviera is open and $1,500 a month while it was closed, right? A. That's correct.

Q. Then I asked you, "Well, what about the other fifteen thousand?" And didn't you answer, "Well, I had a separate paper for that," at which time I asked the clerk to hand you up the paper, and you examined it, and you said, "And under the separate paper I was to receive $200

each and every—commencing May 15, 1949, and each and every week thereafter," is that right? A. That's correct.

Q. Now, I ask you again—I direct your attention to DME-5, and I direct your attention to the second paragraph. Now, except for the fact that you say the number of shares was 625, assuming now that the figure 625 was in the first (1325) paragraph, does the second paragraph express the agreement? A. Only when it is taken together with this other paper.

Q. Was it your understanding that the other paper was to be in this agreement, DME-15—DME-5? A. My understanding was that both these papers were the agreement. It was something which we negotiated, and we arrived at. And how it was done legally, by a separate paper or the inclusion into the first paper, that was up to the lawyers to handle.

Q. Did you know when you left that office that it was done by two separate papers? A. Yes, sir; I did.

Q. That is what I want to find out. A. I knew that.

Q. So that you knew that Exhibit DME-5 covered only the hundred and twenty-five thousand part of the transaction, right? A. Yes, I believe I knew it, because I remembered a separate piece of paper being negotiated that day.

Q. Therefore, I repeat, didn't Paragraph 2 express the terms correctly, as far as the $125,000 was concerned, assuming the agreement said 625 shares instead of 1,250? A. Well, I don't quite understand how to answer you, Mr. Brigadier.

Q. All right.

(1326) The Court: Well, maybe I can help you.

Paragraph 2, part of it says, as to the $95,000, "$3,000 each month on the first day of each and every month that the premises in question, located at Fort Lee, New Jersey, are open for business, $1,500 each month, on the first day of each and every month, if the premises are closed."

Samuel Mar as—Defendant—Recalled—Cross

The Witness: That's correct, your Honor.
The Court: All right. That answers it.

Q. Now, let's turn to Paragraph 3 of this agreement which was stricken out. You knew it was stricken out before you signed it, right? A. Yes, sir; I did.
Q. Don't go through the whole speech again. Just answer my question. A. I did.

The Court: He said, "Yes, sir," that time. Don't look for trouble.

Q. Now, the fourth paragraph, does that express the agreement? A. Frankly, I don't know anything about the balance of the contract.

Mr. Grosman: What happened to the third paragraph?
Mr. Brigadier: He said he knew it was stricken out before he signed it.

(1327) Q. What about the fourth paragraph? A. I don't know, of my own knowledge, anything else pertaining to the balance of this contract, with the exception of Paragraph 5.
Q. Well, will you look at Paragraph 4 now. I am trying to find out now what you know about the transaction. You have got it in front of you. A. I don't know a thing about it. I didn't discuss the matter. It was something evidently the two lawyers discussed with each other.

The Court: You mean nothing was said about the liquor license?
The Witness: I didn't—there was no discussion about the contract at all during my presence.
The Court: About the liquor license, in Paragraph 4.

The Witness: No, your Honor; there was no discussion in front of me.

The Court: The next question. Who was the licensee? Milmar Estate, Inc., or Bill Miller's Riviera?

The Witness: I believe Bill Miller's Riviera was the licensee.

Q. Now, in the fifth paragraph, as you say it was originally drawn, and as it was, in fact, originally drawn, without that insert, "Up to 50 per cent," did the paragraph (1328) express correctly what you understood was the agreement? A. My understanding of the paragraph, when I read it, is I felt that it expressed my understanding, that I was selling my stock, yes.

Q. Listen to me, Mr. Marcus. I don't want you to think I am trying to trick you about this. What I am actually asking you about is what you understood when you left that room, you see what the differences are between what you understood you had done and what this agreement shows, understand? A. Yes.

Q. Now, when you left that room did you have the understanding of the agreement as it read in the fifth paragraph? A. Yes.

Q. Without the insertion? A. Yes, sir; I did.

Q. Because you thought the agreement that you had made was for 625 shares, isn't that right? A. That's correct.

Q. So it didn't require the insertion, isn't that right? A. That's correct.

Q. But if it actually read for 1,250, as it now appears—

(1329) The Witness: Your Honor, there's a bad spot of sun there. It's in my eyes.

Mr. Brigadier: Yes, we had a lot of trouble with that.

(Discussion off the record.)

Samuel Marcus—Defendant—Recalled—Cross

Q. Mr. Marcus, the fifth paragraph, as you now have it in front of you, with the inset in it, would actually express what you understood the transaction was, if only 625 shares were actually put up, is that right?

Mr. Tepper: I must object to that, your Honor.
The Court: Because he said yes to that already?
Mr. Tepper: Yes, sir.
The Court: I know.

Q. Will you look at the sixth paragraph, Mr. Marcus, are there any differences between that paragraph and what you understood was the agreement at the time you left the room? You understand, I am not questioning you of the time you signed it, but of the time you left. A. Well, I think I mentioned it before, Mr. Brigadier. I did not read the balance of this contract—

The Court: You didn't read Paragraph 6?
The Witness: No, sir; i didn't.
The Court: All right. What was your understanding of what would happen in the event of a default when you left that room?
(1330) The Witness: I believe I testified to that. My definite understanding and definite advice by all people present in that room, by Mr. Miller, Judge Lieberman, Mr. Schwartz—that there was no question about my rights, that anything I had signed or delivered that day in that room was to be returned to me in the event of a default.

Q. Suppose there was a default in any particular installment, what was to happen?

Mr. Tepper: I must object to that type of cross examination, asking the witness—the contract speaks for itself. The witness has already testified as to

what he understood the contract to be. Now counsel asks him, suppose something else had happened.

The Court: Now he is particularizing the default.

Mr. Brigadier: That's not what I am doing at all, sir.

The Court: What are you doing?

Mr. Brigadier: Then I haven't made it clear at all. I am asking him what he thought the transaction was when he left. He says that when he signed this paper he had one idea. That idea didn't go through. He thought he was selling all the stock, right? Then he made some other kind of transaction. What I am trying to find out is the differences between—

The Court: I know what you are trying to do.

(1331) Will you please read the last question that Mr. Brigadier asked.

(Question read.)

The Court: Aren't you particularizing there?

Mr. Brigadier: Yes, but I am not asking what was to happen in this agreement, what was to happen, according to his understanding, at the end of the transaction, when he walked out of the room.

The Court: I know, but in the prior answer he told you what was going to happen in the event of default.

Mr. Brigadier: I want to go further and ask him whether or not—what was to happen as to the balance of the installment. In other words, all he said was that everything was to go back to him.

The Court: Yes.

Mr. Brigadier: But now my question is: In the event there was a default as to any one of the installments, what was your understanding as you walked out of that room?

The Court: All right. I know what the answer will be.

Q. (Continuing) —as to what was to happen to the balance? A. Frankly, Mr. Brigadier, nothing was mentioned about that, and I don't know. All I was told—

The Court: What did you think would happen in (1332) the event of a default in any installment?

The Witness: I never gave it a thought. I felt everything would come back to me and I would retain what I would receive.

The Court: That's exactly what I expected him to say.

Q. Did you understand you would have a right to declare all of the balance due to you if any particular—

Mr. Tepper: I must object to that.

Mr. Brigadier: Let me finish the question.

Mr. Tepper: Sorry.

Q. (Continuing) —if any default occurred with respect to any particular installment?

Mr. Tepper: I must object to that as asking this witness to give a legal conclusion, and also to probe the processes of his own mind at that particular time. The contract is here. He has already stated what he understood he was to receive in case of a default. This is improper.

The Court: I respectfully differ with you. We are trying to find out what his notion was when he walked out of what would happen. I think it is a perfectly proper question under the circumstances of this case. Ordinarily I would agree with you, but since there is so much dispute about what was written down, and what he thought he was (1333) doing, I think that Mr. Brigadier has a right to ask the question.

Can you answer that one?

The Witness: Yes, sir; I can.

A. Honestly, Mr. Brigadier, I didn't have any notions about it. I didn't know how the legal technicalities were handled by the lawyers—

The Court: He doesn't care about that.

Mr. Grosman: Will you listen to the Judge, please?

The Court: You know you could save a lot of time for everybody here, including yourself. You are making a long story much longer than it should be.

The Witness: I am sorry, your Honor.

The Court: What did you understand, if there was a default in a particular payment, would happen with reference to the balance?

The Witness: I didn't have any notions on the idea at all. It never particularly—

The Court: What did you think would be the result, as far as you were concerned?

The Witness: As far as I was concerned, my understanding was, in the event of a default, I would retain whatever moneys was paid to me, and I would get back all of the stock; anything I left there in escrow would all be returned to me, I would retain the money I got.

(1334) The Court: Would that apply to any default in the contract at all?

The Witness: That was my understanding; yes, your Honor.

The Court: All right, sir. That's the best answer, I think, that Mr. Marcus can give you, as a layman.

By Mr. Brigadier:

Q. Mr. Marcus, will you look at the seventh paragraph of DME-5, and first read it to yourself.

(Witness examines document.)

Q. When you left that room, Mr. Marcus, on September 14, 1948, what was your understanding as to what the buyer

had agreed to assume and perform? A. I had no understanding whatsoever. I did not know what the balance of the contract contained.

Q. Did you have any understanding as to whether or not the buyer had agreed that he would perform all outstanding contracts and obligations, consisting of first mortgage, taxes and insurance of Milmar Estate, Inc.? A. The only understanding was—

The Court: Did you understand that, yes or no?
The Witness: No, I did not.

Q. Did you have any understanding at that same time when you left the room that the buyer agreed to indemnify and hold the seller and the stockholders of the said corporation, (1335) its officers or directors harmless from and against the said claims—meaning first mortgage, taxes and insurance? A. No, I did not.

Q. Did you know at that time that the provision in the agreement to the effect that they were also to hold the seller harmless of all claims, demands, liabilities, now existing and arising, or that may hereafter arise in connection with such debts, liabilities, contracts and obligations whatsoever had been deleted from the written contract? A. No, I did not.

Q. Now, I direct your attention to Paragraph 8. Would you please read that?

Mr. Marcus, you will notice that there are three deleted lines in Paragraph 8. A. Yes.

Q. Now, did you know that—let me put it this way, first. Did you know what was in those three lines that were deleted before the deletion took place? A. I did not.

Q. It did not take place while you were there? A. It did not.

Q. Now, Mr. Marcus, when you left that room did you have any understanding as to what decision had been ar-

rived at between you and the buyer as to whether the buyer (1336) should furnish the seller with a monthly statement of operations showing the profit and loss until such time as the full amount due to you should be paid? A. I don't recall any conversation pretaining to that.

Q. You don't remember any discussion at all? A. I do not.

Q. You don't recall your demanding that you wanted such a statement of operations? A. Some discussion on that may have taken place early during negotiations, but I don't recall any conversation pertaining to that at that meeting.

Q. And you don't recall having asked for it and having been refused? A. That's correct.

Q. Now, the remaining part of the paragraph that is not stricken out, when you left that room on September 14, 1948, what was your understanding, if there was one, as to whether or not there was any agreement on the part of the buyer not to encumber the property of the corporation with any motrgages, including chattel mortgages, conditional bills of sale, liens or encumbrances of any kind or nature, without the written consent of the seller first obtained, except as provided in a chattel mortgage?

Mr. Tepper: Your Honor will recall, of course—

The Court: I didn't want you to stand up while (1337) he was talking.

Mr. Tepper: I realize that. I wanted to make certain that the witness didn't jump the gun before the objection is registered.

Your Honor will recall that this paragraph, together with a number of other paragraphs, resulted in your Honor saying this whole thing is inexplicable, as it is inexplicable. How can this man be expected to answer that question when, on the face of things, Mr. Miller and Mr. Bierman never could have given anybody a

mortgage on anything, they didn't have title to anything. So how could they possibly have given anybody a mortgage, right on the face of it. It is inexplicable.

Mr. Brigadier: Is that an objection?

Mr. Tepper: How can the witness answer the question, with respect to an understanding or an interpretation of this particular paragraph?

The Court: I don't think that you get the point. I don't think that Mr. Brigadier wants him to interpret this particular paragraph, no matter how inartistically it may be drawn. He wants to know whether he had any understanding that day as to such a provision that the buyer should not encumber. That's all he wants to know, whether he had any understanding.

Mr. Tepper: I withdraw my objection.

(1338) The Court: Yes, I don't think he wants him to interpret that at all. We will have enough trouble interpreting it ourselves.

Was there any discussion, or anything said that day, Mr. Marcus, about the buyer could not encumber the property of the corporation with any mortgages, or liens of any kind, except with the written consent of the seller?

The Witness: I don't recall any conversations pertaining to that paragraph on that day.

The Court: And you didn't know any such provision had been inserted?

The Witness: I did not, your Honor.

By Mr. Brigadier:

Q. Would you read the ninth paragraph first, Mr. Marcus, before I ask you a question about it.

(Witness examines document.)

Samuel Marcus—Defendant—Recalled—Cross

Q. What was your understanding, Mr. Marcus, when you left the room on September 14, 1948, as to whether there was any agreement that no representations had been made by you to the buyer as to the value of or the condition of the property of the corporation, nor as to any other item or thing, except what was set forth in the written papers?

Mr. Grosman: If your Honor please, Mr. Brigadier unwittingly has stated "a representation made by you"—

The Court: He is not the seller in this contract. (1339) I think he realizes that.

Mr. Brigadier: I didn't do it unwittingly.

Mr. Grosman: There is no representation made by this man at all in this contract. He is not a party to it.

Mr. Brigadier: I don't think anybody understands what I am doing. Maybe I don't understand myself. I said, "On the assumption, Mr. Marcus, that we correct this agreement to find out where the differences are," and one of the assumptions under which we are operating is that he was supposed to be the seller of 625 shares, individually. That's all I am doing. With that understanding, that when he left that room on September 14 he had made an agreement whereby he individually—

The Court: You don't have to repeat it for my benefit. I know what you are doing.

Mr. Brigadier: So that is why I said, "You personally," I didn't mean Milmar. I am taking his story of what he did.

Mr. Tepper: The hypothesis there is wrong. Certainly it can't be based on "if you were named in this contract, which you are not," and "if there were 625 shares mentioned here, which are not," and "if this

'less than 50 per cent' were not in this contract, which it is." And I think that we have gotten just about far enough in this type of an examination.

(1340) Now, the hypothesis is wrong. It is based upon a wrong premise. In the four corners of this contract there does not appear this man's name at all. There is no count in this suit for reformation on the part of these people in any wise. And as the matter stands now, this type of cross examination is, in my judgment, my humble judgment, going very far afield—giving him the widest latitude, it is going very far afield.

They have their affirmative witnesses. They have their case. If they are going to show or prove something with respect to what was intended here, or what was said here, they can do it. But I respectfully submit that this is the wrong way to do it.

Mr. Brigadier: All I am asking this witness is, when he left the room on September 14—

The Court: Don't repeat that. He says you are doing it the wrong way. What do you have to say about that?

Mr. Brigadier: I am trying to say that I am not doing it the wrong way. All I am asking this witness, on each specific item, "What was your understanding when you left the room?" I don't care what this paper says. I don't care what all those papers say. I have the right to ask this man what his understanding was as to whether or not he was to wear a green suit as president of this corporation.

Don't I have a right to find out what his understanding (1341) was? One of the things I am picking up is: What was his understanding as to whether or not there was an agreement between him and the buyer that no representations were made?

Colloquy

Mr. Tepper: Then let Mr. Brigadier refer to the paragraph in the contract, without substituting things that are not there. He can't vary or alter the terms of the contract. And if he wants to propound a question with respect to: What did he understand Paragraph 9 to mean? he may do that. But don't say it: Assuming that you were named in the contract—assuming that there were 625 shares. That's all. It's the improper way to do it.

Mr. Brigadier: I haven't asked him a word as to interpreting this contract.

The Court: He says you have no right to assume and then put questions to him.

Mr. Brigadier: I am not assuming anything. I am asking him to tell me whether or not when he walked out of that room on September 14, 1948, he had any understanding as to whether he had made any agreement with respect to the subject matter of representation. Don't I have a right to ask that question?

The Court: Mr. Tepper doesn't think you do.

Mr. Brigadier: But I think I do. I can't conceive of my not having the right to ask the question.

Let me point out another thing, sir. You hear objection (1342) made again and again, the contract speaks for itself. Why, this is the contract which they say is no contract. This is the document which this man says, "I signed, but then it became worthless because when I found I wasn't getting the money from Miller, we made a new deal. This contract is to be disregarded."

So what are they talking about when they get up before you and say this double talk that on the one hand there is no contract and on the other hand there is this contract, and I have no right to ask him any question about what he says was the contract.

The Court: That's enough. We are not going to waste any more time. Answer the question.

The Witness: What was the question, please? I will have to get it.

(Question read.)

A. Frankly, there was no discussion in front of me with reference to that paragraph, and I had no knowledge of that paragraph being in the contract.

By Mr. Brigadier:

Q. Now, I don't think you understand my question.

Mr. Grosman: If your Honor please, I think he has answered it.

Mr. Brigadier: I didn't ask him about a paragraph.

The Court: You want to know if he had anything (1343) in his mind when he left that day about any such representation.

Mr. Brigadier: That's right.

The Court: I know what it is going to be.

A. I had no knowledge of it and I had nothing in my mind about it.

The Court: Because nobody discussed it and nobody said anything to you about it, and you said nothing to anybody.

The Witness: That's right.

The Court: And you made no representation?

The Witness: Yes, your Honor; that's correct.

The Court: So he says nothing about that, he knows nothing.

Q. I direct your attention to the tenth paragraph of the agreement. Will you read that?

Samuel Marcus—Defendant—Recalled—Cross

Mr. Tepper: May I suggest that counsel refer to this as the Exhibit or paper writing, because nowhere in the proceedings is this referred to as an agreement. It is always referred to as a paper writing or an Exhibit.

The Court: Well, you are not prejudiced by that, you know that. It is the document which he has in his hands, and your side has made it abundantly clear that that is not the agreement that he thought he signed.

Go ahead, will you, please. We are not going to argue (1344) about semantics now.

Q. When you left that room on September 14, 1948, did you have any understanding as to whether you had made any agreement with the buyer that he would have a right to assign the agreement he had made with you to a New Jersey corporation without your consent, and that William Miller and Al Bierman—provided, however, that William Miller and Al Bierman should be the principal stockholders of the said corporation? A. I have had no discussion with reference to that, and I didn't have any knowledge of any paragraph of that nature being in the contract. I know nothing about it.

Q. And therefore, I assume, that the same answer holds as to the remaining—that there wa no discussion, and you had no understanding of any kind with respect to the fact that in the event such a new corporation was formed Milmar Estate, Inc., should not be dissolved, but should be continued in existence? A. I don't recall any discussion in front of me with reference to that paragraph, nor did I know that it was contained in the contract.

Q. And when you left on September 14 did you have any knowledge as to whether or not you and the buyer

per cent of the stock, in the new corporation should be immediately (1345) placed in escrow with Abe Lieberman, Esq., pending the fulfillment of the terms of the agreement? A. I didn't have any direct knowledge of any of these paragraphs, nor did I know of them of my own accord when I left that meeting.

The Court: Didn't you know anything about the possible formation of a new corporation?

The Witness: I had heard—some words were said about the possible forming of a new corporation, prior to this agreement.

The Court: Prior to that date.

The Witness: Prior to that date, there was discussions, something was said at one meeting, or something was said—

The Court: I know, but just a minute. Mr. Brigadier directs your attention to the 14th of September. Was anything said that day about it?

The Witness: No, your Honor; nothing was said to me.

The Court: Not a word?

The Witness: Not a word was mentioned to me whatsoever on that day.

Q. Was there anything said on that day—look at Paragraph 12. I don't think 11 is of any particular significance, unless you wish me to cover it. Paragraph 12, (1346) was there anything said that day in your presence about the subject of condemnation? A. Yes, I do recall something said with reference to condemnation.

Q. Now, will you tell us what you recall, and what agreement, if any, was made? A. Well, there again, I am not definite—I am not too definite whether it was said at that meeting, or whether it was said at one of the prior meetings. We did have knowledge of condemnation. We knew

the roadway—I had received a map from the authorities advising me where the roadway was going through the property. And we had knowledge—and we had knowledge that condemnation proceedings may be against part of the property.

We didn't know they were going to take the entire building at that time. And we did discuss—now, whether it was discussed at that meeting, or whether it was discussed prior to that, I cannot definitely make a statement, but I do know there was discussion with reference to condemnation.

Q. This map you speak of, I assume from what you just said, you had to get prior to September 14, 1948? A: Whether that discussion—I assume that discussion must have taken place prior, because when I arrived this contract was completed, so therefore it must have been (1347) inserted, is my assumption.

Q. That is not my question. A. I have no direct knowledge of that.

Q. That is not my question. A. I am sorry, Mr. Brigadier. What was the question?

The Court: Just repeat the question, will you please? Put the question.

(Question read.)

The Court: That is all he asked. Did you have the map prior to that time?

A. Yes, sir; I did.

Mr. Brigadier: That is all I asked.
The Court: That is all he asked you.

Q. Now, was there any understanding and agreement between you and the buyer on September 14, as you walked

out of that room, with respect to what was to happen to moneys received in condemnation? A. There was no discussion. As I can—to the best of my recollections, there was no discussion at that meeting, because everything was prepared, and I don't—

The Court: Don't go through that again.

The Witness: I am sorry.

The Court: Didn't you ask, "What is going to happen to me if the property is condemned?"

The Witness: Frankly, I don't recall. I know (1348) there was discussion of condemnation. Whether we discussed it prior, or at that meeting, my recollections are not too definite. But I do know we had discussion about condemnation.

The Court: All right. Was anything said about what was to happen to the balance due you if the property was condemned?

The Witness: Frankly, I do not have a definite recollection at this time what was said at that meeting, but there was discussion, and I am trying to refresh my memory—

The Court: Don't talk about discussions. I am convinced there was discussion. I suggest to you that you might have said, "Well, if its condemned, and you get a big chunk of money, I think I ought to get my balance right away."

The Witness: Well, frankly, I cannot recall exactly what was said at that meeting.

The Court: Even that you can't recall, that you thought you ought to get all your money right away, if they get their money quickly. Is that possible, Mr. Marcus?

The Witness: Yes, it is possible. I have said that—

The Court: In other words, you would have stood

there and let these buyers get a big chunk of money from the State, or whoever took it over, the Commission, and you were willing to get your balance in regular installments, (1349) is that right?

The Witness: Well, no, I am just trying to— I don't want to make up a story, your Honor.

The Court: Don't make one up. I am trying to see if I can get something out of your mind by asking you—

The Witness: I am trying to think just exactly what was said and what wasn't said. I know several times we discussed the condemnation, between Miller and myself. That's the time I sent to the authorities for a map to see exactly where the roadway was going by. I discussed with Miller, "We ought to get a couple hundred thousand dollars for that condemnation." We had that discussion at various times between Miller and myself. And I believe I had that discussion with Mr. Schwartz prior to this contract and let him know what was in the wind with this.

The Court: Right.

The Witness: So that I cannot pin anything definite down what was said at that meeting.

The Court: Or what you may have said you wanted done.

The Witness: That's right. I must have told Mr. Schwartz to take care of me in the contract, but I do not remember any definite assertion of what I said must be done and should be done.

(1350) The Court: I see.

By Mr. Brigadier:

Q. Mr. Marcus, when you walked into that meeting on September 14, 1948, you were president of Milmar, right? A. Yes, sir; I was.

Samuel Marcus—Defendant—Recalled—Cross

Q. When you walked out of that meeting you still believed yourself to be president, isn't that right? A. That's correct.

Q. As I understand your testimony, you have no recollection of having signed a resignation, is that right? A. That's correct.

Q. Although you admit that that is your signature on it? A. That's correct.

Q. So you walked out of the room as president of Milmar and subsequently acquire from Robert Schwartz 125 shares of stock, right? A. That's correct.

Q. So now you own 125 plus the 480 as to which you and Miller had become quits, right? A. That's correct.

Q. Six hundred and five shares, right? A. Yes, sir.

Q. That you had outright as owner? A. That's right.

(1351) Q. In addition, your 625, as far as you know, which you have sold, but which are in escrow, right? A. That's correct.

Q. And the buyers, as far as you know, have no possession of any stock, right? A. That's correct.

Q. With no right to vote any stock, right? A. That's correct.

Q. You hadn't conferred on anyone the right to vote any stock that belonged to you, had you? A. I did not.

Mr. Brigadier: May I have the checks, please?

Mr. Tepper: Can we have a five-minute break?

The Court : Yes. We will take a five-minute recess.

(Short recess.)

Q. Mr. Marcus, I omitted to ask you one question about September 14, just one that I will go back to.

The sweetening of the deal that we are talking about, the $15,000 sweetening of the deal, did that transaction take place before or after you signed Exhibit DME-5?

A. I believe, to the best of my recollections, that came after I signed.

Q. Do you recall the questions that were asked you just before the recess— (1352) A. No, I don't.

Q. —about your walking out on September 14, you were still president of Milmar, weren't you? A. That's correct.

Q. And about the stock. Now, I show you Exhibit DME-32, consisting of a number of checks—withdraw that. After September 14, you looked at the check that you received for the $10,000 as I remember your direct testimony, it was about three days later you found out it was made out to Milmar, right? A. I don't recall if I looked at it, or my secretary looked at it, and noticed it was made out to Milmar.

> The Court: I asked him that question. Do you remember the answer I got? He doesn't remember whether he did it, or whether his secretary did it, but anyway, he did find out it was to Milmar several days after.
>
> Mr. Brigadier: What I am trying to get is whether he knew that the check was made out to Milmar.
>
> The Court: At the time he got it, you mean?
>
> Mr. Brigadier: No. I understand his testimony is when he received it he did not know.

Q. Isn't that right? A. I didn't particularly notice just what the check was made out to when I received it.

Q. But you found out some time thereafter, right? (1353) A. That's correct.

Q. It's the check which, as I understand it, you deposited in the Milmar account on September 17? A. That's correct.

Q. When you discovered —and you certainly had to discover it by that time to deposit it in that account—did you call Robert Schwartz? A. I did not.

Q. You saw the check was made out to Milmar, not to you? A. Well, I didn't see any particular harm. I was still president of Milmar, stockholder of Milmar. I had a lot of transactions with Milmar, where I loaned Milmar money, and where I took a check back for repayment of money I loaned them. And it was the normal course of events, where the check would be deposited to Milmar and I'd withdraw it. I didn't think of the legal aspects of it at all.

Q. You knew you individually had been the seller, right? A. Yes, sir; I did.

Q. When you left that room? A. That's correct.

Q. And you knew it when you looked at this check? A. I knew it when the check was deposited, that I was the seller, yes, surely.

(1354) Q. And it didn't occur to you, when you saw the check had been made out to Milmar rather than to you individually, to inquire of anyone as to why that check was made out that way? A. I am a careless individual that way. I didn't particularly think it necessary to inquire.

Q. You can answer yes or no, Mr. Marcus. I have stood here for three days— A. The answer is no, I did not inquire.

The Court: So we are all staying here when we get those long answers.

Mr. Brigadier: But I have to also put the questions, sir. You people only have to listen to it.

The Court: Maybe I would rather be putting the questions than listening.

Mr. Brigadier: I think there is something to that.

The Court: I think Mr. Tepper would rather be putting the questions than listening.

Q. At any rate, you did deposit it, and then you drew out the amount, I think you said on the 20th, If I am not mistaken.

Samuel Marcus—Defendant—Recalled—Cross

Mr. Grosman: The 27th I think he said.

A. The 20th is correct.

Q. On the 20th you drew it out by signing a check (1355) drawn on this Milmar account, right? A. That's correct.

Q. With your name as president, I think, on it? A. That's right.

Q. Do you have that check or do we have it? A. I don't know whether I have it or not.

Mr. Grosman: You would have it.

Mr. Brigadier: You don't have it?

Mr. Grosman: I don't have it. It came back to Milmar, I assume.

Q. I show you a check dated September 20, 1948, Milmar Estates, Inc., Sam Marcus, president; is that the check? A. Yes, that is the check which I withdrew from my own order, yes.

Q. What is the endorsement on the back; is that in your handwriting? A. This handwriting here—it says, "In exchange for Bill Miller's check for purchase of Milmar stock, Sam Marcus."

The Court: Is that your handwriting?

The Witness: Yes, that's my handwriting; yes, sir.

Mr. Brigadier: I wish to put this in evidence, if you have no objection, on cross.

Mr. Grosman: I have no objection.

(1356) Q. Now, after that date did you draw any other checks on this account? A. I do not recall whether I did or not.

The Clerk: D. E-43, check dated September 20, 1948.

(Received and marked Exhibit DME-53.)

A. (continuing) I do not recall at this particular moment whether I drew any other checks on Milmar at that time or not.

Q. Do you recall whether or not you drew a check for approximately—$44.43 to close out that account? A. Oh, yes, I recall that now. Mr. Miller—that's the answer. You want a short answer.

The Court: Let him ask you the question.

Q. You did draw such a check? A. I did draw such a check, yes.

Q. And what did you do with that money? A. I think that check was drawn October 1, or something of that nature.

Q. What did you do with it? A. Mr. Miller told me—and Mr. Hoffman—that for convenience sake they wanted to carry the Milmar account together out in Jersey and would I have any objection in closing this New York account, so they could run both companies out there together. So I drew a check, signed it as president, some time about October 1, and gave them (1357) the balance of the money that was in the bank.

Q. I see. Now, from that date down to the present moment have you ever drawn a check on any bank account of Milmar signed by you as president? A. I did not.

Q. Have you ever drawn any check on any bank account of Milmar signed by you in any capacity? A. I did not.

Q. On October 1, 1948, Mr. Marcus, did you receive this check, dated October 1, 1948—that is part of Exhibit DME-32, "Pay to the order of Sam Marcus"—let me finish my question—"$3,000," signed, "Milmar Estate, Inc., Al Kevelson, pres."? A. I don't recall whether I personally received that check or not.

Q. Well, if you didn't personally receive it, who would have received it? A. My secretary.

Q. Do you recognize the handwriting on the back? A. Yes, this is the handwriting of my secretary.

Q. And her name is— A. Her name is Adelaide Maginn today.

Q. The same Mrs. Maginn? A. The same Mrs. Maginn, that's right.

Q. And you can tell from the back that that went in (1358) your account, didn't it? A. Yes.

Q. And that it was paid? A. That is was paid.

Q. Now, did your secretary tell you at that time that you had received such a check? A. She told me that she had received a check from Al Kevelson.

Q. She didn't tell you it was signed Milmar Estate, Inc.? A. She did not.

Q. By Al Kevelson, president, right? A. She did not.

Q. And you had no notion at all at that time that it was signed that way? A. That's correct.

Q. When did you first learn that it had been signed that way? A. I only first learned that there were Milmar checks signed by Kevelson as president when—one of the deposition, I believe, when you supplied me with some checks, or something of that nature, I think is when I first found out that Kevelson had been signing checks as president.

Q. During the taking of your deposition in this case, so that would mean some time from 1951 on, right? (1359) A. Some time from 1951 on, that's correct.

Q. So that between September 14, 1948, and—

Mr. Brigadier: Give me the first date of the taking of his deposition. I think it is February, isn't it?

Mr. Margulies: December 19, 1951.

Q. —and December 19, 1951, you did not know that there were checks coming in to you, to your office, which were being deposited in your account which were being drawn

by Milmar Estate, Inc., signed Al Kevelson, president, is that right? A. To the best of my recollections, I had no knowledge that Al Kevelson—

The Court: All you had to say was "yes," to that.
The Witness: Yes, sir.

Q. Now, I show you another check in the same Exhibit, DME-32, dated November 4, 1948, to the order of Sam Marcus, $2,123.32, signed Milmar Estate, Al Kevelson, president—do you see the line purporting to be drawn through the word "secretary"? A. I do.

Q. Now, will you look at the back of that check and tell me whether or not you received that check? A. I didn't receive that check.

Q. You did not? A. I did not.

(1360) Q. Who received it? A. My secretary must have received it, because I see her signature on the back.

The Court: Her handwriting.
The Witness: Her handwriting, yes.

Q. And she deposited it in your account? A. Yes, sir; she did.

Q. And you can see from the check that it was paid, right? A. Yes, sir; it was paid.

Q. So you don't dispute that you received the proceeds of this check, right? A. We do not.

Q. Did your secretary tell you of any legend that was on this check, the legend that appears in the upper left-hand corner? A. She did not tell me of any legend.

Q. Never told you that she had received a check which had on its face, "October 1 interest, $316.66; November 1 interest, three hundred and sixty-six; principal, fifteen hundred, totaling $2,123.32"? A. She told me nothing of the legend whatsoever.

Samuel Marcus—Defendant—Recalled—Cross

Q. I see. When did you first learn that there was this legend on this check? A. When you produced these checks at my deposition.

(1361) Q. I see. Now, I show you check dated December 1, 1948—

Mr. Tepper: I don't like to interrupt, but can't we shorten this, or expedite this, by showing him a batch of checks rather than—

Mr. Brigadier: No, because there are different situations as to these checks.

The Court: There may be some, Mr. Tepper, where he endorsed them.

Mr. Brigadier: That's right.

Mr. Tepper: Except for those that have a special legend on them, or something—

Mr. Brigadier: I want to find out—I have a right to bring out to the Court how many times this happened, and how it happened, and how many times his secretary put it in the account, and how many times she failed to tell him. That all goes to the question of credibility.

The Court: It sure does.

Mr. Grosman: It takes a lot of time to do it the way it is being done.

The Court: I know that, but I think in view of the peculiar circumstances of this case he is justified in doing it that way. And I am as anxious to save time as you are.

(1362) Mr. Brigadier: And myself, too, Judge.

Q. Incidentally, I direct your attention again to the check dated October 1, 1948. Will you look at it? A. I am.

Q. Mr. Marcus, I show you Exhibit DME-33, which you have identified already as having been signed by you. Will you read it? A. I didn't identify this as signed by me.

Mr. Brigadier: I am in error. I thought you had.

The Court: I can tell from here, without my glasses, thta it is not his signature.

Mr. Brigadier: But I think his testimony was that it was typed by his secretary.

Q. Is that right; isn't that what your testimony was? A. That is my secretary's signature and she would have to recognize her typing. I wouldn't know, sir.

Q. Well, you testified, when I put this in evidence, that's how I got it into evidence, that this was typed by your secretary. It was on that basis that the Judge permitted it in evidence. A. I didn't recall—

Q. This is one of the documents— A. Presented at this session?

Q. Yes. Let me explain this to you. This is one of (1363) the documents I told you I was offering for the purpose of having Mr. Osborn make a comparison. And I asked you whether or not this document was typed on your typewriter by your secretary. And you said yes, didn't you? A. Yes, I still say it's her signature, so she must have typed it. I will concede to that.

Q. Now, when did you first know about this letter? A. Right now, when you showed it to me.

Q. You mean the other day when I showed it to you? A. The other day, that's correct.

Q. You had no knowledge of this letter before? A. I did not.

Q. You notice at the bottom where it shows who dictated the letter and who typed the letter, the initials appear "SM," as the dictator, right? A. Yes.

Q. And "M" as the stenographer who typed it? A. That's correct.

Q. You say you never dictated this letter? A. It could be that I may have dictated it over the telephone to her—

we were in two separate offices, my secretary and I were in two separate offices. She was at the 42nd Street store and I was at the 89th Street store, and she would call me up at times, and ask me certain things, and certain details, and I would tell her. Now, it is (1364) possible that she may have called me at that particular time, asked me, I'd give her the information over the phone and she'd carry through and write the letter.

The Court: And you would dictate the letter over the phone?

The Witness: Over the telephone.

The Court: We all do that once in a while.

Q. Mr. Marcus, do you recognize any of this handwriting on the back of this Exhibit?

Mr. Grosman: The number?

Mr. Brigadier: The same one, Mr. Grosman, DME-33.

A. I do not recognize any of this writing.

Q. It is not yours? A. No, sir; it is not mine.

Q. The figure, ninety-five thousand? A. Is definitely not mine.

Q. And three thousand? A. Is not mine.

Q. And the balance of ninety-two thousand? A. Is not mine.

Q. Okay. I just wanted to make sure. And these figures here, as to the interest? A. They are not mine.

Q. I see. But you do know that the second check that you now have in front of you includes the item called for (1365) in that letter? A. No, I don't know. Let's see what it is all about.

Q. I will let you look at it again.

(Document handed to the witness.)

A. Yes, I believe they coincide.

Q. I show you a check dated December 1, 1948, to the order of Sam Marcus, $1,801.66, drawn by Milmar Estate, Al Kevelson, president, and ask you whether the signature on the back is that of your secretary? A. It is.

Q. And was this deposited in your account? A. It was.

Q. And it was paid? A. Yes, sir.

Q. And again your answer is, as I assume, that the first time you ever knew that this check had been drawn by Al Kevelson as president was when I showed it to you in the taking of the depositions some time after December, 1951? A. That's right.

Q. Is that also the first time that you knew the check had on it the legend, "Principal, $1,500; December interest, $301.66; total, $1,801.66"? A. That's correct.

Q. Did your secretary ever tell you what was on this (1366) check? A. She did not.

Q. Did she keep a record for you of these checks? A. She would call me—I left a memorandum with my secretary—shall I answer it, your Honor?

> The Court: Well, I think you can answer it much more briefly than that. Did she keep a record of these checks or did she not keep a record? A. I don't know. She had a record of what checks she was to receive.

Q. Did you keep a record, Mr. Marcus, of the checks that you received? A. I did not.

Q. And that were deposited in your account? A. I did not.

Q. I see. I show you a check dated January 4— A. May I retract that statement? My secretary did keep a record. I just recalled. When she made a deposit she would make a duplicate deposit slip, and on this slip she would mark down checks received, and from whom. So I believe I may have those duplicate deposit slips. When

I had to correlate together how much money I had, I would merely go through these duplicate deposit slips, pick out any personal slips, and that's what I have got.

Q. That was your bookkeeping system? (1367) A. That was the system my secretary handled for me. She just kept the deposits.

The Court: A lot of people do that.

Q. And could you produce those slips for us? A. I believe I have those slips. I will have to get them together.

Q. Please check them and produce them.

I show you check dated January 4, 1949, to the order of Sam Marcus, $1,796.66, drawn Milmar Estate, Inc., Al Kevelson, president, and I ask you to look at the back and tell me whether the signature, "Sam Marcus," is that of your secretary? A. I believe it is.

Q. That's the same one? A. I believe so.

Q. And this check was deposited in your account? A. Yes, sir.

Q. And the first that you ever knew of the manner in which the check was drawn was when I showed it to you in the deposition some time from December, 1951, on? A. That's correct.

Q. Now, the legend that was on this check you did not know of prior to December, 1951? A. No, I had no direct personal knowledge of it.

Q. I call your attention to check dated February 1, (1368) 1949, and again you will notice that this is drawn Milmar Estate, Inc., Al Kevelson, president, right? A. That's correct.

Q. And it is endorsed again by your secretary? A. That's correct.

Q. And deposited in your account? A. Yes, sir.

Q. And collected? A. Yes, sir.

Q. And paid? A. That's right.

Q. And again your answer will be that you did not know of this manner in which this check was drawn until I showed it to you in the taking of the deposition some time after December, 1951? A. That's correct.

Q. And you didn't know the legend that was on it? A. I did not.

Q. Now, I show you four additional checks dated March 2, April 1, May 5 and May 31. They are all drawn to your order, are they not? A. That's correct.

Q. They are all drawn by Milmar Estate, Inc., Al Kevelson, president? A. That's correct.

(1369) Q. They are all endorsed by your secretary? A. They are.

Q. They are all deposited in your account? A. Yes, sir.

Q. And they have all been paid? A. Yes, sir.

Q. And they all have legends on them? A. That's correct.

Q. But those legends you did not know of— A. That's correct.

Q. —until they were shown to you while the checks were being exhibited to you during the taking of the deposition? A. That's correct.

Q. I would like to direct your attention particularly to the check dated April 1, 1949, and will you note the legend on it, "Interest on $84,500 at 4 per cent, $281.66, principal, $1,500." A. Yes, I see that.

Q. And directing the inquiry to that particular legend, did you know of that legend prior to the taking of the deposition? A. Frankly, this legend here doesn't seem to be written at the same time.

Q. You answer my question. (1370) A. No, I wasn't aware of it.

Q. You are not a handwriting expert. A. No, I wasn't aware of it.

Q. Were you aware of it? A. No, I was not.

Q. You are not going to qualify as an expert on handwriting, are you? A. I don't intend to.

Q. Now, I show you— A. The ink appears different.

Mr. Brigadier: You win. I give up.

(Comments off the record.)

Q. I show you check dated June 30, 1949, to the order of Sam Marcus for $3,251.67, signed William Miller, secretary, endorsed by—the name Sam Marcus, but written by your secretary, right? A. That's correct.

Q. Deposited in your account? A. Yes, sir.

Q. And paid? A. That's right.

Q. Now, let me just get this straight, Mr. Marcus. Did I understand your testimony to be that Mr. Miller originally, when Milmar was organized, did, through some kind of a mistake, receive the right to draw checks? (1371) A. That's correct.

Q. With, I think you said, Hoffman as a co-signer, is that what it was? A. That's correct.

Q. And that shortly after this account was originally opened, and—when I say "this account," I mean your original Milmar account. A. That's right.

Q. You discovered this mistake? A. That's right.

Q. I think you said it was a matter of a few months at most. A. I don't know, six months, one month, two months, I know we discovered the error and it was changed.

Q. But at the most it was six months? A. It was changed when I took the bank account out of the hands of Mr. Hoffman and Mr. Miller and brought the bank account to New York to a bank near my office.

Q. Well, I just wanted to get the approximate time. A. Well, that's the time. I can't place the exact date.

Q. One month, two months, three months, a year later? A. Whatever the change of the bank accounts, that will

be the date of—whatever the date of the change of the bank account, that will be the date of my discovery.

Q. All right. Certainly since 1948—let's take (1372) a date of January 1, 1948—was Miller signing checks for Milmar? A. He was not.

Q. All right. We at least have got a beginning date. So that, as far as you knew, from January 1, 1948—at least from that date—until September 14, 1948, he had no authority to draw any checks on any account of Milmar, right? A. That's correct.

Q. And as far as you knew, when you walked out on September—out of that room on September 14, 1948, you had not conferred or agreed to the conferring of any such authority on William Miller, is that right? A. That's correct.

Q. And as far as you knew from September 14, 1948, down to this present moment William Miller possesses no such authority? A. That's correct.

Q. Only you possessed it? A. That's right.

Q. Now, did your secretary call to your attention the fact that the check which you had received, or she had received for you, and deposited in your account, had been drawn Milmar Estate, William Miller, secretary? A. I don't particularly recall whether she called it to (1373) my attention, but at that time there was a chance—she just didn't particularly call every check to my attention, and I don't recall whether she particularly called that check to my attention. But my deposit slip would definitely show that she received this check from William Miller instead of Al Kevelson.

Q. I don't think you understand my question, Mr. Marcus. You knew that ever since at least January 1, 1948, Mr. Miller had no authority to draw any checks for Milmar? A. That's correct.

Q. And, as you understood, down to this moment he had no such authority? A. That's correct.

Q. Now, you received a number of checks, the first batch of which were all signed by Al Kevelson as president for Milmar, and then you received one, Milmar Estate, by William Miller, secretary. These all come to the attention of your secretary, who deposits the checks? A. That's correct.

Q. But she never told you that these checks are being drawn in the name of Milmar and signed by Al Kevelson as president, and this particular one William Miller as secretary? A. Frankly, she may have called it to my attention. I wasn't worried about it at all. I was getting my money. (1374) I figured—

The Court: He answered, she may have.

A. (continuing) Yes, she may have called it to my attention. To me it wasn't a detail of sufficient importance. I was happy to get my money, which I felt I had gone out of there, and glad to get out of there, and I was getting my money each month. I wasn't worried about who was signing the checks or where they came from.

Q. It was a detail of not sufficient importance to you that, thought you knew you were president of the corporation, and the only one authorized to sign checks of that corporation, though you knew that you had not resigned as president of that corporation, that you had been told by your secretary that checks were being received signed by Al Kevelson as president— A. I was not advised—

Q. —and William Miller as secretary? A. Now, please, Mr. Brigadier, I did not tell you I was advised I was getting checks from Mr. Al Kevelson as president. I said my secretary told me she was receiving checks from Al Kevelson. I had instructed her to look for checks from Mr. Kevelson. I had given her Mr. Kevelson's telephone number that in the event the check didn't come through

she was to call Mr. Kevelson for the check. And on one or two occasions I understand from her she did call (1375) Mr. Kevelson, so that when the checks came through, it was a detail that neither one of us thought about, "Mr. Marcus, I got a check from Mr. Kevelson today," was all her remark would be. And when the checks came through from Mr. Miller, the same thing, she must have said to me, "Mr. Marcus, I received a check from Mr. Miller."

Now, I did understand—after all, when Mr. Miller asked me to close out the account, that him and Hoffman were going to handle the Milmar business over there—I have so many thousands of little details to take care of in a business day—I had six, seven, eight business enterprises which personally I followed through—

The Court: Oh, hold it, please.

A. (continuing) —and I didn't—

The Court: Hold it.

(Discussion off the record.)

Mr. Brigadier: Will you read back the answer before the last one?

(Record read.)

Q. Do I understand, Mr. Marcus, that the fact that you received checks drawn on Milmar, signed by Al Kevelson as president, or William Miller as secretary, was a detail you would regard of no importance? A. Yes, sir.

Q. Yet you made an affidavit in this case in which (1376) that detail you regarded as extremely important, didn't you? A. Show me the affidavit.

Q. In which you stated you were still the president of the corporation.

Mr. Grosman: What is the affidavit? What are you reading from, what paragraph?

Mr. Brigadier: Am I going to go through this again, Judge? It's one affidavit. It's the same affidavit.

The Court: Say it's the same one.

Mr. Grosman: It is simpler to say it is the same one. Give me the paragraph. We are still in this case, Mr. Brigadier.

Q. There isn't any question that you still contend that you are president of the corporation, isn't that right? A. Yes, sir; I do.

Q. Down to this very moment? A. I do.

Q. So that will suffice.

Mr. Marcus, I show you five checks taken from the same Exhibit, DME-32, dated, respectively, July 31, September 1, October 1, November 1, December 1, 1949, for varying amounts. All of these checks, Mr. Marcus—I guess we will have to separate them. A. That is not mine.

(1377) Q. All right, let me separate them. Let me reframe the question.

I show you four checks dated, respectively, December 1, 1949; November 1, 1949; July 31, 1949, and—

Mr. Brigadier: I'm sorry, if your Honor please. In my desire to speed this up I have got myself mixed up. They can't be grouped together. I thought they could. They cannot. They are different.

Let's take them by date.

Q. I show you check dated July 31, 1949, to the order of Sam Marcus, drawn by Milmar Estate, Al Kevelson, president, endorsed "Sam Marcus," and the endorsement is your secretary, right, Mrs. Maginn? A. That's right.

Q. Deposited in your account and paid? A. That's right.

Q. And again the same testimony, that you did not know that this check had been drawn by Al Kevelson as presi-

dent until it was exhibited to you in the deposition? A. That's correct.

Q. And the same testimony about you not knowing about the legend that is on this check, right? A. That's correct.

Q. Until it was shown to you in the deposition? A. That's right.

(1378) Q. Now, the next one would be September. I show you check dated September 1, 1949, drawn to the order of Sam Marcus, drawn Milmar Estate, Al Kevelson, president, and bears an endorsement "Sam Marcus." Can you tell us whose endorsement that is? A. No, I don't recognize that endorsement.

Q. At any rate, it is not yours? A. It is not mine, no.

Q. But it went into your account? A. It passed through my bank. I assume it went into my account.

Q. Well, will you have any record that would show whether or not you received this check? A. Possibly my—I will check my duplicate slips. What is the date?

Mr. Brigadier: September 1, 1949.

Mr. Tepper, will you make a note of it, or Mr. Roth?

Q. You can't tell us at this time whose handwriting that is on the back of this check? A. No, I do not recognize it.

Q. But you know it is not yours? A. It is not mine.

Q. That's the main thing.

I show you a check dated November 1, and October 1—these two I guess we can take together—October 1, 1949, (1379) to the order of Sam Marcus for $3,221.66, and the one for November 1, to the order of Sam Marcus for $1,716.67, both drawn Milmar Estate, Inc., William Miller—well, it says William Miller, but no line drawn through either the word "president" or "secretary," is that right? A. That's correct.

Q. Now, both of these are endorsed Sam Marcus by your secretary, Mrs. Maginn? A. That's right.

Q. And went into your account? A. Yes, sir.

Q. And again you had no knowledge of these checks being drawn by Mr. Miller until they were exhibited by me to you during the taking of the deposition? A. It is possible my secretary may have mentioned that I got a check from Mr. Miller.

Q. The best you can tell us is that it is possible? A. It is possible, that's correct.

Q. And if she had told you that, again your answer is that it would have been a matter of no importance? A. That's correct.

Q. Now, I show you checks dated January 1, 1950; January 31, 1950; March 1, 1950—just these three—and again you will note— A. Same answer.

(1380) Q. —you will note the checks are drawn Milmar Estate, Inc., by William Miller, right? A. That's right.

Q. To Sam Marcus. They all went through your account? A. That's correct.

Q. They were all endorsed by your secretary? A. Yes, sir.

Q. And you knew nothing about the legend on these checks? A. Knew nothing about the legend.

Q. Until they were exhibited to you during the taking of the deposition, right? A. That's correct.

Q. Now, I show you check dated March 30, 1950, pay to the order of Sam Marcus $1,692.50, drawn Milmar Estate, Inc., William Miller, no line drawn through either the word "president" or "secretary." Whose endorsement is that on the back? A. That is my endorsement.

Q. So there can't be any doubt that on this date, March 30, 1950, you knew that William Miller had been drawing checks, or had drawn this check—let's put it this way—on the account of Milmar Estate, Inc.? That's correct.

Q. Now, when you received this check, and when you (1381) endorsed it and deposited it in your account, did

you communicate with anyone about the fact that this check was drawn by Miller on the account of the Milmar Estate? A. I did not.

Q. You didn't call Robert Schwartz? A. I did not.

Q. To ask him, "How come?"

The Court: He didn't call anyone, he said.

The Witness: I didn't call anyone.

Q. Now, I show you checks dated April 29, 1950; June 1, 1950; July 1, 1950—just hold it a minute. We are sort of cooperating here a bit so as to facilitate this. —August 1, 1950, and you will note that these checks which I have just produced, which are all part of Exhibit DME-32, are all drawn to the order of Sam Marcus, by Milmar Estate, William Miller, and I guess in all of them the word "president" is stricken out, right? A. That's correct.

Q. Now, all of these are endorsed by you personally, Mr. Marcus? A. They are.

Q. And deposited in your own account? A. That's correct.

Q. And were paid, right? A. That's right.

(1382) Q. Now, you knew, did you not, when you endorsed the check of April 29, 1950, that it had a legend on it? A. I knew there was a legend. I didn't particularly take too much notice of it. But I knew there was a legend.

Q. And you saw it said 4 per cent interest on $56,000, less interest overpaid, 3-30-50, eighty-three cents, leaving a balance of $185.84, then he says, "Note $3,000," right? A. That's correct.

Q. You knew that was on there? A. Well, I recall seeing a legend on there.

The Court: You said you knew that was on there before.

Samuel Marcus—Defendant—Recalled—Cross

Q. I show you the check dated June 1, 1950, and ask you when you signed that check whether you knew that legend was on it? A. I don't know. This ink on here doesn't seem to be the same as mine. I wouldn't care to make a definite statement on it.

Q. I just asked you whether or not you knew enough to be a handwriting expert. If you don't know, say you don't know. A. I don't want to make any assertions on it.

The Court: He doesn't want you to unless you can answer yes or no on it.

(1383) Q. Your answer is that you don't know? A. I don't recall on this one.

Q. All right, that's all. I am not asking you anything except what you are capable of doing.

In the check dated July 1, 1950, was that legend on it when you endorsed it? A. I recall getting some checks with a legend. I am not prepared to make a definite statement whether these legends were all there or not. I do recall seeing some checks with a legend. Which ones, specifically, I wouldn't know.

Q. So the answer is that you don't know, you don't recall? A. That's right.

Q. That would go as to the legend on this check of August 1, 1950, as well? A. That would go for the legend on all the checks.

Q. Now, I show you two checks, one dated September 1, 1950, to the order of Sam Marcus, for $3,146.67, drawn Milmar Estate, Inc., William Miller, secretary, and the other is to the order of Sam Marcus for $1,621.67, dated December 1, 1950. drawn Milmar Estate, Inc., William Miller—I guess secretary—these bear no endorsements, but did they go through your account? A. They went

through my bank. Now, whether they went through my account, I will have to check my records.

(1384) Q. Will you please do that? A. Yes.

The Court: They certainly didn't go through Judge Grosman's account, I will tell you that.

Q. Now, will you look at the legend—well, I guess I will have to postpone asking him about the legend until he can tell me whether he got them. You don't know whether you got these checks, at this moment? A. At this moment I would have to check my records and see. This is my bank, your Honor, and whether—I assume they did go through. I don't say it did, but I will have to double check before I make a definite statement.

Q. Therefore, at this moment, you can't tell me whether or not you saw these legends that are on these two checks? A. Well, the answers on these legends—

The Court: If it's the same as all the others, don't repeat it.

Q. Now, I show you two checks, one dated October 2, 1950, to the order of Sam Marcus, drawn by Milmar Estates, Inc., William Miller, secretary, and one dated November 1, 1950, to the order of Sam Marcus, $1,626.67, drawn by Milmar Estates, William Miller, secretary, and ask you whether the endorsements on the backs of those checks are your endorsements? (1385) A. They are.

Q. In your own handwriting? A. Yes, sir.

Q. And again I gather your answer will be the same—this one didn't go through your account? A. I think I endorsed it over to my brokerage account.

Q. Well, I didn't want the record to say that I had said you had put it in your— A. That's right.

Q. The check dated October 2, 1950, went through your account, right? A. That's right.

Q. And was paid? A. That's right.

Q. And the other one actually was negotiated by you to somebody else? A. That's right.

Q. Herzfeld & Stern. A. That's my brokerage account.

Q. And was collected and paid? A. Collected and paid; yes, sir.

Q. Again the two legends, your answer is the same? A. That same.

Q. And again, as to whether you had noticed these checks were drawn by William Miller as secretary— (1386) A. Yes.

Q. And your answer would be the same, that it would be a matter of no importance to you? A. That's correct.

Q. Mr. Marcus, I direct your attention to the checks that were received in evidence as Exhibit DME-34, which, if counsel has no objection, we will refer to as—were they $200 payments?

Mr. Tepper: Yes.

Mr. Brigadier: On the $15,000 note, right?

Q. Now, I direct your attention to these checks first, to these 13 checks. They are all to the order of Sam Marcus, are they not? A. They are.

Q. And they are all drawn Milmar Estate, Inc., William Miller, secretary, is that right? A. That's correct.

Q. And they are all endorsed in the name of Samuel Marcus—Sam Marcus, by your secretary, Mrs. Maginn? A. Mrs. Maginn, that's right.

Q. And they are all deposited in your account and paid, right? A. That's right.

Q. And again, with respect to the fact that these are all drawn by William Miller, when was your attention (1387) first drawn to that fact? A. That they were drawn by William Miller?

Q. I mean that the signature under Miimar Estate was that of William Miller. A. Frankly, I don't know. I imagine my secretary may have called my attention to the fact, maybe, that she wasn't getting Kevelson's checks, she was getting Miller's checks, but I don't recall any particular time and place.

Q. These were the checks that were on account of the $15,000 note, weren't they? A. Let me see these again.

(Documents handed to counsel.)

A. (Continuing) They probably were.

The Court: Probably?

The Witness: What's that?

The Court: Probably were? You mean you can't say definitely that they were?

The Witness: Well, I will say definitely they were. There is still a doubt in my—there is a question of doubt, because there was some money owed me by the Riviera, and I just forget what arrangements they were going to make to pay me.

The Court: Let me see these checks.

(Documents handed to the Court.)

The Witness: I will say these checks are part of (1388) that, yes.

Q. Every one has a legend on it. A. All right, they are. I will concede that these checks are.

The Court: Very good. I am glad you do. Never try to deny the obvious, please.

Q. Now, you said you expected Kevelson's checks. You meant Miller's checks? A. You mean on these here?

Q. Yes. A. No, these $200—there again, I didn't know whose checks were going to come in for that, because when Miller came back and told me, he said—

Q. Don't go into a speech. Just answer my question. A. You asked me did I expect Miller's check.

Q. My question was: Whose check did you expect? Didn't you testify a moment ago that you had expected Kevelson's check? A. I told my secretary to expect checks from Mr. Kevelson.

Q. That's right. And these were the checks that you understood you were receiving. A. And when she called me she got checks from Miller, it didn't make any difference to me.

The Court: Wait. Let's get that straight now, too. Did you expect Mr. Kevelson to pay off Mr. Miller's (1389) personal note?

The Witness: I didn't know, your Honor. When Mr.—

The Court: Just yes or no. Did you?

The Witness: I didn't know. There was no mention made who was to pay at that time.

The Court: Ordinarily, would you expect Mr. Kevelson to be paying off Mr. Miller's personal note?

The Witness: Well, we—

The Court: Ordinarily, would you?

The Witness: No, sir; I wouldn't.

The Court: Any more than I would expect you to pay off my notes.

The Witness: That's right, your Honor.

The Court: But you didn't know whose checks you were going to get?

The Witness: No, I didn't know at the time whether Kevelson instructed Mr. Miller to give me the fifteen thousand on his behalf, or whether it was Mr. Miller giving it to me out of his pocket. I didn't know at that meeting.

The Court: Oh.

The Witness: At that time Mr. Miller came over and said, "We agreed to sweeten up the deal."

The Court: But you didn't know who was going to sweeten it?

(1390) The Witness: I didn't know who was going to do the sweetening; yes, your Honor.

The Court: All right. That's clear, too.

Q. You will observe, Mr. Marcus, that this entire batch of checks, produced as Exhibit DME-34, there isn't a single check signed by Kevelson, is there? A. That's correct.

Q. Even though they are drawn—not all, but most of them are drawn on Milmar Estate. I think all but how many? One, is it? Two, was it? A. There are two here drawn from the Riviera, I noticed, Bill Miller's Riviera.

Mr. Grosman: You stand corrected now, do you?

Mr. Brigadier: I said it right away. The clerk heard me. I said one and the clerk said two.

Mr. Grosman: All right.

Q. Except for two checks in this batch of checks that have been produced, all are on Milmar, right? A. That's correct.

Q. And all are drawn by William Miller as secretary of Milmar, right? A. Yes, sir; they are.

Q. And the other two are drawn on Bill Miller's Rivic. Inc., is that right? A. That's correct.

(1391) Q. William Miller, president? A. Yes, sir.

Q. The other one, too. Let's take a look at the other one. Both of them, right? A. That's correct.

Q. Now, in the first batch that I produced for you, which are endorsed in your name by your secretary and went through your account, when did you first learn of the legend which appears on each of these checks?

Mr. Grosman: If your Honor please, we have gone all through that.

Mr. Brigadier: No, I haven't gone through all that. I haven't asked him a thing about the legends on the

four hundred and two hundred dollar checks. I have asked him only on the checks that were paid of the ninety-five thousand, and it is extremely important that the Court should know that there are legends on these checks, and what this witness knows about them.

Mr. Grosman: All right. Withdraw the objection.

The Witness: What is your question?

Q. When did you first learn of the legends that appear in the upper lefthand corner of these checks, in this first batch that you have identified? A. I knew—see, these that Mrs. Maginn received, I don't know what knowledge I had of them, whether I did get the (1392) duplicate receipts and check into them or not, I can't recall at this time.

Q. But you certainly saw them at the time of the taking of the depositions, right? A. You produced them at the taking of a deposition. Just what I saw there, I don't recall.

Q. Wasn't your attention specifically directed to the legend on each of these checks? A. I don't particularly recall whether each individual check was or not.

Q. All right, that's your answer.

Now, I direct your attention to another batch of checks coming out of the same Exhibit, 16 checks, all drawn on the account of Milmar Estate by William Miller, secretary, to your order, right? You better check it, because I am assuming, from your division, that that is so.

Mr. Grosman: Would you name the Exhibit out of which they came?

Mr. Brigadier: I did.

A. Yes, sir; that's correct.

Mr. Grosman: You said "coming out of the same Exhibit."

Samuel Marcus—Defendant—Recalled—Cross

The Court: DME-34.

A. These are all checks received by me.

Q. These are all checks endorsed by you personally, (1393) aren't they? A. Yes, sir.

Q. They contain your personal signature on the back? A. They do.

Mr. Grosman: If your Honor please, he said it, check by check. He has identified his signature.

Mr. Brigadier: Am I not permitted ever to ask a question for another purpose in another way without an objection?

Mr. Grosman: Not seven times.

The Court: He thinks you are asking the same question too many times.

Mr. Brigadier: I remember, I sat back for three days, Judge, and was a gentleman, I think.

Mr. Grosman: You are always a gentleman.

Mr. Brigadier: I am asking you to be one, Judge.

Mr. Grosman: All right.

The Court: Don't get exasperated. Suppose we all get exasperated, we will never finish the trial.

Q. As you endorsed each of these checks did you know that these checks had been drawn Milmar Estate, Inc., by William Miller, secretary? A. I believe I noticed it.

Q. Did you notice the legend that appears in the upper lefthand corner of each of these checks? A. I noticed legends on some of them. I am not prepared (1394) to definitely state whether I noticed the legend on every one of them.

The Court: On which ones, either.

The Witness: That's correct, sir.

Q. You now know that each one contains a legend, right? A. I now know; yes, sir.

Q. Now, out of the same Exhibit, DME-34—

Mr. Brigadier: Judge Grosman, so that you won't ask me again later, I am giving you the number.

Mr. Grosman: All right. Thank you very much.

Mr. Brigadier: I can do that, too.

Mr. Grosman: I just want the number on the record. I am not personally interested.

Q. There are three checks coming out of this same Exhibit, DME-34, Mr. Marcus, which are drawn to your order, which are signed William Miller, secretary—that is, Milmar Estates, signed William Miller, secretary. They contain no endorsements on the back, right? A. That's correct.

Q. But they do contain legends on the face, don't they? A. Yes, they do.

Q. Telling you what they purport to be? A. That's correct.

Q. Can you tell by looking at these checks, or from (1395) your own knowledge, whether these checks were received by you and deposited in your account? A. They seem to be clearing my bank account, and I assume they went through. That is subject to my checking of the records.

Q. Well, we will let you do it all you want, sir.

Now, I show you this check, coming out of the same Exhibit, DME-34, the order of Sam Marcus $200, dated August 15, 1949, signed William Miller, secretary, and ask you whose signature that is on the back? A. I don't recognize that signature. It is not mine, and it is not my secretary's. It could be another one of my employees, bookkeeper, or something or other.

Q. But it went through your account, you are willing to concede that? A. I will concede just the same as the other one. I would like to check my records. And I believe it is so, because it went through my bank.

The Court: During the course of the Pleadings, wasn't the receipt of these moneys admitted by Mr. Marcus?

Mr. Brigadier: They admitted a total of $90,000 as received. The figure on which they admitted on the note is not the same figure as the amount of checks that we have. I think there is a difference.

The Court: All right.

(1396) Mr. Brigadier: I may also observe to your Honor that both in the depositions and in his direct evidence he said, "Now, I am not sure whether I got that ninety thousand on account of the purchase price. Some of it may have been on account of my loans."

The Court: All right.

Mr. Brigadier: Then I think he did correct it, in all fairness to him.

Is that your understanding, Mr. Tepper, that he corrected it and said—

Mr. Tepper: I believe he wasn't certain as to how the money was allocated.

Mr. Brigadier: I thought he had corrected it later. And I wanted to be fair with him. I didn't know what position he finally ended up with.

Mr. Chazin: At some time he stated it was on the stock and at other times he wasn't sure.

Q. Mr. Marcus, the other two checks which you have already spoken of, were they checks drawn on the account of Bill Miller's Riviera, Inc. by William Miller, president —do they both bear your endorsement? A. One is my endorsement. The other is not.

Q. Let's get the one that is. A. This one is my endorsement.

Q. The one dated May 12, 1950, is endorsed by you and (1397) deposited by you, correct? A. That's correct.

Q. Now, what about the other one? A. It appears to be—I would have to—

Q. Did it clear your bank? A. There are two banks on here. There is the Chase National Bank, which is not my bank. And then the Bank of Commerce, which is my bank. It says something on there about Milmar Estate, Inc.

Q. You can't identify the handwriting, is that it, the signature, Sam Marcus, on the back as yours? A. I cannot identify this handwriting.

Q. I am sorry. I didn't mean to put it that way. That wasn't fair. You say definitely it is not yours—that's what I understood you to say—but you can't tell whose it is, isn't that right? A. That's correct.

Q. Will you check your account and see whether or not you give us credit for this? A. Yes.

The Witness: Will somebody take a notation of that?

The Court: Yes, somebody make a note of it.

Mr. Grosman: The date of the check he wants to know.

(1398) Mr. Brigadier: I am through with the checks.

The Court: I want to see all counsel at front bar. We will adjourn for lunch now. Be back at 2 o'clock.

(Noon recess.)

AFTERNOON SESSION

SAMUEL MARCUS, resumed the stand.

Cross examination by Mr. Brigadier (continued):

Q. Mr. Marcus, following September 14, 1948, did you ever go back to the Riviera premises? A. I did not.

Q. From that date down to the date that it closed, is that right? A. That's correct.

Q. From September 14, 1948, to the date of the bringing of the interpleader action against you in December, 1950, did you make any demand upon anyone for an examination of the books of Milmar Estate, Inc.? A. I have no particular recollection of making such a demand.

(1399) Q. Did you make any demand upon anyone in that interval of time for an examination of the books of Bill Miller's Riviera? A. I do not recall making any demand of that nature.

Q. Did you, during that interval—and again, I am referring to between September 14, 1948, and December, 1950—ever make any inquiry orally—either face to face, on the telephone—or by writing, with respect to whether Bill Miller's Riviera was paying the rent to Milmar? A. I didn't make any inquiry direct to Milmar, if that is what you want to know.

Q. Well, did you make it of anyone? A. Yes, I did.

Q. Will you tell us of whom? A. On several occasions I wrote to the Michael Realty Company and wanted to know if mortgage payments were being made according—

Q. Please listen to my question. I haven't reached that yet. I am coming to that. I asked you about the rent. Let's just limit it to what I am asking you. A. I told you I didn't make any inquiry to anyone over at the Riviera, if that is what you have in mind.

The Court: About rent.

Q. Or to anyone else about the rent? A. I do not recall speaking to anyone with reference to (1400) rent.

Q. That's all I was asking you. I am coming then to the others.

During this period of September 14 to December, 1950, again, did you make any inquiry, first, of the Riviera as to

whether the mortgage payments were being made to Michael Realty? A. Yes, I wrote several letters, I believe, to the Michael Realty.

Q. I think you didn't listen to my question. A. Maybe I didn't understand you, Mr. Brigadier. I am sorry.

Q. Did you make any inquiry of Milmar, I asked you. A. Of Milmar, I did not.

Q. Didn't you have your lawyer make inquiry? A. I do not recall. I may have requested my lawyer to make inquiry. I have no particular definite recollections at this time.

Q. I show you DME-38—

Mr. Brigadier: What is the date on that, Mr. Margulies?

Mr. Margulies: March 7, 1949.

Q. —and ask you whether you authorized Mr. Schwartz to send that letter? A. I don't particularly recall authorizing Mr. Schwartz (1401) to send any particular letter. It is possible I may have told Mr. Schwartz to check up and see how the mortgage payments were being taken care of.

Q. Well, now, you are looking at the Exhibit right now, aren't you, that's in front of you? A. Yes, I am.

Q. And you will note that the letter reads, "We have this day received a communication from an attorney by the name of Charles Gadd of 11 West 42nd Street, New York City. In this letter he informs us you are in default under the terms of a certain bond and mortgage of the property occupied by you for the months of February and March, 1949. If this matter is not attended to promptly we shall have no alternative other than to make these payments and to cancel all our agreements with you."

oes that serve to refresh your recollection as to— A. I have no knowledge of the contents of this letter whatsoever.

Samuel Marcus—Defendant—Recalled—Cross

Q. You also notice that it is addressed to Bill Miller's Riviera and not to Milmar? A. It is addressed to both.

Q. I am sorry. You are right, I stand corrected. It is addressed to both. I looked at the top line. You still have no recollection? A. I have no knowledge of the contents of this letter (1402) whatsoever.

Q. Now, did you make inquiry of Michael Realty as to whether the payments on the mortgage were being made? A. I believe I made personal inquiry from Michael Realty.

Q. Who did you speak to in Michael Realty? A. The best of my recollections, I spoke to—I think I asked for Mr. Schimmell. I believe he was the one gentleman that I knew in that office. And I don't recall now whether I spoke to him direct or whether we sent him a letter inquiring about whether mortgage payments were being promptly made.

Q. What did he tell you? A. I don't recall at this time. It was evidently satisfactory because—

Q. The answer is, "I don't recall at this time," period. A. I don't recall. I am sorry.

Q. Let's try to make it short. A. I don't recall his answer to me.

Q. Now, you knew there was a mortgage on the property and you knew that the mortgage was given by Milmar Estate to Michael Realty Company, right? A. Yes, sir; I did.

Q. I think I am slightly inaccurate. It was given, actually, by you and Miller individually at the time you (1403) acquired the title, isn't that right, it was a purchase money mortgage? A. Oh, yes, that's correct.

Q. But when Milmar acquired the title, Milmar began to make the payments on that mortgage, isn't that right? A. Yes, that's right.

Q. And continued so to make them? A. That's correct.

Q. Did you sign any checks from September 15, 1948, down to the present moment, Milmar checks, paying that mortgage? A. I do not believe I did.

Samuel Marcus—Defendant—Recalled—Cross

Q. Have you made any payments on that mortgage yourself, individually, from that date down to the present moment? A. I did not.

Q. Did you inquire whether the payments were being made, of anyone, by checks of Milmar? A. I merely inquired from Michael Realty Company whether mortgage payments were being made.

Q. But not as to who was actually paying them, is that right? A. That's correct.

Q. Now, prior to September 14, 1948, there were two fiscal years for which Milmar filed Federal income tax (1404) returns, were there not, for the fiscal year ending March 31, 1947, and for the fiscal year ending March 31, 1948? A. I would assume so. I have no particular definite recollections of them.

Q. Well, you know, of course, from your experience with your other corporations, that that return must be signed by the president of the corporation, isn't that so? A. If Mr. Hoffman would have presented me with a piece of paper of that kind to sign, I would have signed it.

Q. I say, you know from your experience—you have been in a great many corporations. A. Yes, sir; that's a fact.

Mr. Tepper: I must object. That doesn't happen to be so.

The Court: No, the president doesn't always sign.

Mr. Tepper: That's correct, sir.

Mr. Brigadier: I may be in error. I thought they were always signed by the president, but it may be attested by some other officer.

Mr. Tepper: No. It may be signed by the treasurer.

The Court: That's right.

Mr. Tepper: Or even by a comptroller or by a vice-president.

(1405) Mr. Brigadier: I stand corrected.

Q. Do you recall that you did sign them prior to September 14, 1948? A. I have no recollections. I say, if Mr.

Hoffman had presented such a paper to me for signature, I would have signed it.

Q. Do you have any recollection of whether you signed any since September 14, 1948? A. Since September, '48?

Q. Yes. A. No, I do not believe I have signed any such paper since.

Q. That's all. That's really what I wanted to find out.

Now, Mr. Marcus, prior to September 14, 1948, you maintained an office in Milmar Estate, Inc., in New York City, didn't you? A. I did.

Q. You maintained it at 152 West 42nd Street? A. That's correct.

Q. When did you first open that office at that address? A. That wasn't my office. That was an office that was originally—when I first met Miss Bergler, she was in the audio-visual business. She was making slides, religious slides for churches and so forth. And I used to do her (1406) photographic work for her. And when I met Miss Bergler, and after several years of doing business for her —with her, I might say—I wanted a separate office for Milmar, away from my other business enterprises, and I asked her could we use her business office for Milmar business and receive Milmar mail there, as a business office for Milmar. And I believe she permitted me the use of her office for that business.

Q. Will you now answer my question, Mr. Marcus?

Mr. Brigadier: Would you read him my question, please?

(Question read.)

The Court: That calls for a date.

A. Well, I can't place the date. I tried to tell you just what it was. And I can't place any particular date in my mind.

Samuel Marcus—Defendant—Recalled—Cross

Q. Mr. Marcus, in relation to September 14, 1948, was it a year before that date, two years before that date—I am not trying to nail you down to an exact date. The approximate period. A. It could have been six months, it could have been a year, it may have been one month. I cannot definitely place it. I could possibly by searching some of my records give you a more definite date at some future time. At this particular moment I cannot give you an exact date.

(1407) Q. When you said you opened an office at this address at 152 West 42nd Street, what was in this office; I mean, what was the office there for; what did it have? A. I just explained it to you, Mr. Brigadier.

The Court: Miss Bergler's place of business.

Mr. Brigadier: I am sorry, then my question is misleading, if you understood it to mean that, too.

Q. What I meant was, why did you have the office there? A. Why did I have an office there?

Q. Yes, why did you have an office there? A. I don't know any particular reason. I just wanted—I wanted it kept separate. I wanted a separate mailing office for Milmar business, and I thought Miss Bergler might be able to handle that Milmar business for me, keeping it away, my present secretary had so much work to do for me, in half a dozen other enterprises, and I felt that Miss Bergler maybe could add that onto her other particular work and handle some Milmar correspondence for me.

Q. Up to this time was the office of the Milmar Estate at the Riviera? A. Yes, sir; it was.

Q. Prior to this time? A. That's correct.

Q. That's what I am trying to find out. Now, when (1408) you opened this office of Milmar Estate, Inc., in New York, were the records of Milmar Estate kept there? A. I never had any records of Milmar Estates in my possession.

Q. No records whatsoever were kept there? A. The only thing that I had of Milmar Estates was a checkbook, and a corporate—the corporate outfit, minute book and stock book.

The Court: Was it just a mailing address?

The Witness: Just a mailing address; yes, sir.

Q. Now, to this address was mailed letters received by the corporation, is that it? A. That's correct.

Q. Correspondence that you would carry on for the corporation, as to which you would receive replies, is that it? A. That's correct.

Q. Didn't you also receive at this address the bank statements of the Public National Bank & Trust Company of New York? A. Public National—yes, I believe we did. I am not certain. I believe it was received—whatever the address would be, that is where they would be received.

Q. I am trying to get your knowledge about this, not whatever the address would be. (1409) A. My knowledge on that would be vague. I could refresh my memory very easy, by going back to some records, but at the present moment, I don't have the immediate knowledge for you.

Q. You mean you haven't yet produced all the records here that you have? A. No, I could go back possibly to some correspondence with the bank, or something or other, which I haven't looked forward to, I didn't expect a question of that kind, of when I opened up a bank account, or when I changed an address. And it's possible by going back on some other particular matters I might trace an exact date for you, which is what you are asking me for. If the statement—

Q. I am asking you—

The Court: Hold it a minute, will you? Off the record.

(Discussion off the record.)

Samuel Marcus—Defendant—Recalled—Cross

Q. Mr. Marcus, do you know whether since January, 1947, until September 14, 1948, the Public National Bank & Trust Company sent you the bank statements and the returned canceled checks of Milmar Estate, Inc., to the office of Milmar Estate, Inc., at 152 West 42nd Street, New York 18, New York? A. I do not know of my definite knowledge at this moment.

Q. What do you know, tell us. (1410) A. I do know I had a mailing address at 152 West 42nd Street.

Q. I mean in relation to bank statements and returned checks. This is very important, Mr. Marcus. You produced a batch of checks. A. Now, wait a minute. I do not recall whether or not my office—shall I answer him, Judge, or shouldn't I answer the question? I have something specific to answer there. Should I answer?

The Court: Answer it the best way you can.

A. (Continuing) My 42nd Street office was right around the corner of the bank, and I do not recall whether I had bank statements sent to 152 West 42nd Street or whether the bank statements were sent to my photo shop around the corner. That is something the bank statements would have to show, or the bank records would have to show, and by obtaining the bank records I could probably give you the answer you want, Mr. Brigadier.

Q. Well, you have given me the answer I want, because you say in either event they were returned to you. A. Bank statements were returned to me, definitely.

Q. And the canceled checks. A. I conceded. Yes, sir; they were.

Q. Do you have them? A. Pardon me. What years; will you tell me, please?

(1411) Q. From January, 1947, to September—I will exclude September, because that was returned to us, I think in October, so let's exclude it—through the month of August, 1948. You know, they are returned at the end of the month. That's why I am excluding the month of

September. A. Yes. To the best of my recollections, when Mr. Hoffman was at my office, my secretary tells me, when he picked up the box containing the corporate books, he asked was there anything else here belonging to Milmar. My secretary tells me that she told him to help himself, that everything was lying on the window sill. What he took at that time, I don't know.

Q. Will you tell me the name of this secretary? I want to know which one it is. A. Mrs. Maginn, at my 42nd Street store.

Q. You don't know, therefore, whether he took these canceled checks? A. I do not know what—

Q. Let me put the question another way. Do you have them, Mr. Marcus? That's what I am trying to find out. A. I do not know.

Q. You do not know whether you have them? A. I do not know whether I have them.

Mr. Brigadier: May I ask the Court to direct this (1412) witness to make a search? We need them, we want them. We need them very badly. We have been trying to get them since we started taking the depositions. I think we are at a point where we ought to be able to be told whether he has them, or will produce them.

The Witness: Mr. Brigadier, you produced a canceled check here a few minutes ago.

Mr. Brigadier: I told you that came from the month of September, which was returned to us in October. That I told you we got.

The Witness: I see.

The Court: Now you want it for '47 and '48, up to and including August of '48.

Mr. Brigadier: That's right.

The Court: Will you please make diligent search and see if you can find the same?

The Witness: Yes, your Honor.

The Court: And if you do, will you please bring them here, or give them to Judge Grosman or Mr. Tepper?

The Witness: I will do that, your Honor.

Mr. Grosman: May I suggest, your Honor, that they are available in the bank, if they need them so badly.

Mr. Brigadier: They are not available in the bank.

Mr. Grosman: They have got microfilms of them.

Mr. Brigadier: I wish they did. I would have them. (1413) That's the rub. You might as well know it. They don't have them. I would pay to photostat every one of those, if they had them. That's why I have been trying to get them.

The Court: All right. Mr. Marcus will look for them, see if he has them. If he has them he will produce them, right?

The Witness: Yes, sir. I have nothing to hide about those checks.

Q. Now, Mr. Marcus, you did produce, however, a number of checks that were from the Milmar account, right? A. Whatever I found in my records I produced, I turned over to Judge Grosman.

Q. Do I understand that then you removed from these returned checks certain of these checks for your own records? A. Frankly, I don't recall what I did. All I know is, whatever I had in my possession I turned over to Judge Grosman, pertaining to any records of Milmar, Riviera, or anything else.

Q. In DM-24, Mr. Marcus, produced by you—

Mr. Brigadier: That may not be the Exhibit. Will you hold it a minute. I think I have got the wrong one. That's the wrong Exhibit number. Withdraw the question until I get the correct Exhibit number.

DM-12?

(1414) Mr. Margulies: Yes, sir.

Samuel Marcus—Defendant—Recalled—Cross

Mr. Brigadier: Before I pursue that, I have to ask you another question.

Q. There was also an account of Milmar, was there not, in the First National Bank at Fort Lee in the year 1946? A. That's correct.

Q. And to whom were the canceled checks and bank statements returned in that account? A. Those were returned, I believe, direct to the Riviera offices at Fort Lee, New Jersey.

Q. And they were kept at the offices there? A. They were.

Q. Those are not in your possession, is that right? A. They are not. A few—Oh, no, they were not.

Q. They were not? A. That's right.

Q. Yet you did produce, did you not, in Exhibit DM-12, checks that were drawn by Milmar—this one is to Philbar Agency, Michael Realty, Hackensack Water Company, Lloyds' of London, and sundry other checks—they are the checks of Milmar Estates, Inc., as drawer? A. That's correct.

Q. Will you tell us how you got possession of these, Mr. Marcus? (1415) A. Yes, sir; I will. At the time of the difficulty that I had with Miller in 1947, when I instructed Mr. Hoffman to turn over to me the books of Milmar, and he told me that Miller would not permit the books to leave the premises, he did bring me some ledger sheets.

He said, "I made some copies of the ledger for you, Sam." And then he also brought me the checkbook. It was a large checkbook that they used when the account was over at Fort Lee. And in that checkbook was half a dozen or a dozen loose checks lying in the checkbook.

Q. Now, up until September 14, 1948, who had the bank deposit book of the account of Milmar, or accounts that Milmar may have had? A. Up to what time, sir?

Q. Up until September 14, 1948? A. I did.

Samuel Marcus—Defendant—Recalled—Cross

Q. You had it in the Fort Lee bank? A. Fort Lee? No, I did not. The Public National Bank.

Q. Did you have it for the First National Bank of Fort Lee? A. I did not.

Q. Where was the bank book then? A. The bank book then was in Mr. Hoffman's possession out in the Riviera.

Q. And then when the account was opened up in the (1416) Public National Bank in New York, in January, 1947—well, I don't know whether it was opened up on that date, but from that date on was the bank book in your possession? A. Yes, sir; it was.

Q. And that book would show the various deposits that were made? A. Yes, sir; it would.

Q. And how did the accountant get the information for the entries that were to be made in the books of entry if you had possession of the bank book? A. Mr. Hoffman came to my office approximately every week. Most times I wasn't there. And my secretary would give him the checkbook, where he could take out whatever checks had been issued, she would show him the deposit checks. He would bring the rent—the majority of the times Mr. Hoffman brought the rent. It was very rarely mailed. It was brought—sometimes I was in the office and I would get possession of it, and sometimes my secretary would get it. And when he came to bring the rent, Mrs. Maginn would give him the checkbook. It was only a small little pocket checkbook we used. There was only one or two checks issued per month. And she would give him the checkbook and deposit slips, and he would make a record of whatever checks and deposits were made into Milmar and leave.

(1417) Q. Do you recall whether any other person came to the office to get the information from you for the entries to be made in the books? A. I don't definitely recall. I know Mr. Hoffman also had an assistant.

Q. Do you remember his name? A. No. I don't recall his name.

Samuel Marcus—De'endant—Recalled—Cross

Q. Does the name Steckler mean anything to you? A. No, Steckler—I remember a Steckler, but I do not believe—I believe Steckler died before that time, if I am not mistaken. I know he had an associate by the name of Steckler.

Q. You are going to be surprised if Mr. Steckler walks into the courtroom next week. A. That's perfectly all right. I would not be perturbed about it.

The Court: He just thinks he died.

Mr. Tepper: We may all be dead before this is over.

The Court: Was it Mr. Steckler who came to your place?

The Witness: No, sir; it was some other man's name. I recall—

The Court: You answered the question.

The Witness: That's right; I don't believe it was, (1418) sir.

Mr. Grosman: Who told you Steckler died?

The Witness: I don't know. I had heard some time that Mr. Steckler had died. I don't know what gave me the impression.

Q. Mr. Marcus, I show you what purports to be a book of deposit—or I guess you would call it a record of deposit of the Milmar Estates, Inc., in the Public National Bank and Trust Company of New York. Is this the bank book you were referring to as having been in your possession? A. I believe it is.

Q. Do you recall when you turned it over, and to whom? A. When I turned it over, and to whom?

Q. Yes. A. No, I have no recollections whatsoever as to whom I turned it over to.

Q. Was it prior to September 14 or subsequent to September 14? A. Evidently—possibly Mr. Hoffman may have pi[illegible] this up at the time he picked up the rest of the articles in my office.

Q. That would be prior to September 14? A. No, after September 14.

Q. After September 14. A. Yes, sir.

(1419) Q. That's your best recollection, you say? A. That's the best of my recollections, I would say.

Q. Mr. Marcus, will you look at the first page of this deposit book and will you observe that at various places there appear memoranda or notes in handwriting? Just will you observe it? A. Yes, sir; I do.

Q. Are they your handwriting, Mr. Marcus? A. Yes, sir; they are.

Q. Now, I call your attention to the first item, January 27, 1947—well, the first above it is what, "balance forward," or what? I don't make that out at all. Is that a balance brought forward? A. The first memorandum there is on the checkbook as "loan returned from Riviera to Milmar."

Q. Which one is this? A. That's the $3,000 item.

Q. That isn't the first. I asked you to look at the first. A. $7,868.33 is a loan that I made from the Modern Industrial Bank for the benefit of Bill Miller. Milmar guaranteed the money, Milmar got the money, and, in turn, turned it over to Bill Miller.

Q. Now, this is the first one, then, not the other one you spoke of? (1420) A. That's the first one, the loan from Modern Industrial Bank.

Q. This is a loan that was made by whom? A. By Milmar.

Q. And made from whom? A. Made from the Modern Industrial Bank.

Q. And repaid by whom? A. Mainly repaid by Milmar and myself.

Q. I thought you testified you repaid it in its entirety? A. No, I didn't say so. There were two checks I submitted, which payment I made.

Samuel Marcus—Defendant—Recalled—Cross

Q. Totaling how much? A. I don't recall what the checks are. They are in evidence.

Q. We will come to those checks later.

Now, the next item is the one that you took as the first item, that's that $3,000 item, right? A. That's correct.

Q. And that reads, in your handwriting, what? A. That's a check that I received—

Q. Just read what it says in your handwriting. A. It says, "Loan returned from Riviera to Milmar." This evidently—

Q. Wait a minute.

(1421) The Court: You answered his question.

Q. Does it say "to Milmar"? I have asked you to read what's there. Don't mislead anybody as to things that are not there. A. This is a notation I made. It says, "Loan returned from Riviera."

Q. All right. Then there isn't a word about Milmar there, is there? A. It is in the Milmar deposit book.

The Court: He asked you to read what is there, not to say anything else. Will you please do as you are told?

The Witness: I am sorry.

Q. The next item, $700, has your initials alongside of it? A. That's correct.

Q. "SM"? A. "SM."

Q. And that is in your handwriting? A. That's right.

Q. The same is true of the next item, seventeen twenty-seven twenty-three. It has "SM," your initials, right? A. That's right.

Q. Now, the next item, three thousand, has what alongside of it? (1422) A. Personal.

Q. Actually it is the abbreviation p-e-r-s— A. That's correct.

Q. —which was intended for the word "personal." A. Meaning my personal check.

Q. I didn't ask you that, I asked you what the abbreviation itself meant. It was an abbreviation for the word "personal"? A. Personal, that's correct.

Q. Now, the next item, $1,100, March 5, 1947, also has the abbreviation p-e-r-s alongside of it? A. That is also a personal deposit.

Q. I am asking you whether the abbreviation p-e-r-s appears before it—alongside of it. A. That's correct.

Q. Just answer my questions. A. Yes, sir.

Q. We will find out later what all these mean. A. All right.

Q. Now, I direct your attention to a number of other items appearing thereafter, May 8, 1947, $500, what is that? A. That's April 29, '47.

Q. How does an April entry get in after a May entry? This is a slip that you took back? A. Probably we didn't have the bank book at the time and (1423) we had a deposit made by a slip and we took it back and entered it.

Q. That's all I asked. A. All right, fine.

Q. Next entry, May 15, 1947, $500. Then there follows another entry of—what is that? A. $500.

Q. Then an entry of $2,000? A. That's correct.

Q. Now, Mr. Marcus, all these items were deposited, as I understand, by you in the Milmar account? A. By me personally? No.

Q. You had the book, didn't you? A. Let me understand you correctly. I deposited the money. I want to know do you mean that is my money?

Q. I meant did you have charge of the making of the deposit. A. Whether I—I concede—I concede that we deposited that money.

Q. And then when Hoffman would come to you at the end of each week, he or his man, you would show him this

bank book? A. He would see the bank book and he would see the check books.

Q. So there is no reason why all these entries here (1424) should not have been reflected in the books of account, isn't that right? A. No reason whatsoever.

Q. And if they don't turn up in the books of account, you don't have any explanation? A. I don't have any explanation for it.

Q. All right. Then we will get to the books of account on those later.

Now, the next page, an entry of $2,500. Is that your handwriting, the pencil writing, is it just—answer my question. A. Let me see it, and I will tell you.

Mr. Grosman: Let him look.

Mr. Brigadier: I will let him look.

A. Yes, sir; that's my handwriting.

Q. Now, will you just read what it says? Don't interpret, read. A. It says, "$200 rent, $500 Markowitz."

Q. Now, the next item is one for $2,500, June 11, 1947, right? A. That's correct.

Q. That would represent a deposit you made? A. That's correct.

Q. June 18, 1947, a deposit of $2,500, right? A. That's correct.

(1425) Q. Now, July, 1947, Mr. Marcus, you will see that originally the figure in ink is three thousand, right? A. That's correct.

Q. A line is drawn through it? A. Yes.

Q. Alongside—well, let's start on the left side. Alongside of it on the left is the word "personal" in handwriting? A. That's right.

Q. That's your handwriting? A. That's correct.

Q. Now, above this figure of three thousand, which apparently was written by the teller— A. Yes.

Samuel Marcus—Defendant—Recalled—Cross

Q. —appears a penciled figure of twenty-five hundred, right? A. That's right.

Q. Is that your handwriting? A. I believe it is.

Q. And in the margin is "ng-ck" I suppose, or "ch." A. "Ng" check.

Q. Will you tell us what that represents? A. Well, to the best of my recollections, this was a Riviera check which was "ng" and having short of funds in the bank, I hurriedly made a deposit of my own for $2,500 (1426) to meet some—possibly mortgage payments or something that was due.

Q. And then you made this note in here to that effect, is that it? A. That's right.

Q. Struck out the "3" and put in the figure— A. That's correct.

Q. Now, the next item is a deposit of July 11, 1947, $6,000, which, I take it, you made? A. Yes, sir.

Q. Now, the next is a deposit of July 14, 1947, five hundred, and alongside of it is the abbreviation again, "p-e-r-s." A. Personal, that means it's a personal check.

Q. Now, the remaining items on this page—two thousand, two thousand, two thousand, two thousand, twenty-five hundred and twenty-five hundred—were all deposits made by you, right? A. Yes, sir; it was.

Q. And you know of no reason why any of these should not be reflected in the books of account of the corporation? A. These are not my personal deposits. I mean, these are evidently rents from Milmar.

The Court: He didn't ask you that. Read the question, will you please?

(1427) (Question read.)

Mr. Grosman: Did you hear that question?

A. I see no reason whatsoever that they shouldn't be reflected.

The Court: That's right, because you say Hoffman saw these things.

The Witness: Yes, sir; he did.

The Court: If he made a proper record, they would be in the books of account, is that right?

The Witness: Yes, your Honor.

The Court: You didn't conceal it from him?

The Witness: No, sir; I didn't.

Q. Mr. Marcus, I think you want to make a correction. When I called your attention to the first item, twenty-five hundred, you said the handwriting was "$200 rent." I think you meant two thousand. A. $2,000 rent, $500 Markowitz.

Q. All right. Now, turning to the next page, Mr. Marcus, of this deposit book, the first entry is thirty-five hundred. That looks like September 2—

Mr. Tepper: I don't like to interrupt, but may not that be placed in evidence, if that is what counsel wants. It would speak for itself.

Mr. Brigadier: Oh, it doesn't.

Mr. Tepper: If there is a question of whose (1428) handwriting it is, may not there be one question with respect to that. The witness has admitted that all of these items which appear in this book were deposited by him, or under his authority, by someone, to the account of Milmar. And aren't we wasting a lot of time?

Mr. Brigadier: He may not do it when I am through.

Mr. Tepper: We can go on ad infinitum this way.

Mr. Brigadier: He may not admit them all by the time I am through, for other reasons. I have to get an explanation of these entries. A number of them do not turn up in the books of account. There are a number of other things I haven't yet touched on that have

handwriting explanations that are required. That is all I am doing right now.

I am trying to facilitate it as quickly as possible. You notice when I reach a string of them, I took a string. And that's what i will do.

The Court: Do it as rapidly as you can.

Q. Now, this entry of $3,500, again you have something in your handwriting to the right of it, right? A. Yes, sir.

Q. Will you tell us first what your handwriting says? A. It says, "$1,000 personal."

Q. That would mean that of that thirty-five hundred, (1429) a thousand of it— A. Was personal.

Q. —was what you loaned? A. Loaned to Milmar, that's correct.

Q. Now, let's continue down the intervening ones of twenty-six hundred, twenty-five, forty-two, twenty-three and twenty-five hundred, all deposits, of course, that you say were made? A. That's right.

Q. And should be reflected in the books, right? A. Yes.

Q. Now, we get to the $4,000 item. What appears in the handwriting opposite the entry, September 30, 1947, $4,000? A. "$1,500 personal."

Q. And again that would represent fifteen hundred of that amount which you say you loaned? A. Which I would loan, that's right.

Q. Then comes the entry of twenty-five hundred, followed by another entry of twenty-five hundred, with a line drawn through it, and words alongside of it, or the letters "ng." A. That meant—

Q. That is in your handwriting? A. That is in my handwriting.

(1430) Q. And what would that mean, a check that was returned? A. That would be a check that Miller gave me for rent that bounced.

Q. I see. Now, the next two items, eight thousand—

Samuel Marcus--Defendant—Recalled—Cross

Mr. Grosman: Just a moment. Will you have him explain what it means, "bounced"?

Mr. Brigadier: You can ask him on redirect.

The Court: I will take judicial notice.

Mr. Grosman: All right, as long as your Honor knows what it means.

The Court: I was magistrate for ten years and assistant prosecutor for ten years. I know all about the rubber content of bum checks.

Mr. Brigadier: You know also that it is an improper interruption.

You criticise me, Judge Grosman, for taking so much time, and then break in with obvious nonsense.

Q. I direct your attention to the item, $6,000, with a line drawn through it. Do you know what that item is? A. At this particular moment—that may have been—at about that time I received a note, I think, from Bill Miller for $6,000, which I may have discounted. And I believe the note wasn't paid, so I may have struck a line through the amount in the checkbook to show the six thousand (1431) was to be disregarded. That is what I believe—i recall an incident of that kind just about that time.

Q. Mr. Marcus, on direct examination you were questioned about this note of $6,000 that you put into evidence as part of Exhibit DM-12. A. That's right. This is really—this is a check of $6,000 which Miller gave me.

Mr. Grosman: Now, please.

A. Yes, sir; I did.

Q. Mr. Marcus, this isn't a check, is it? Don't you know the difference between a check and a promissory note? A. This is a note. I thought it was a check. This is a note, yes.

Q. It's a note. A. It's a note; yes, sir.

Q. Let's not have any argument. It is a note made by Bill Miller's Riviera to Milmar, right? A. That's correct.

Samuel Marcus—Defendant—Recalled—Cross

Q. And it was put through for collection? A. I believe we needed money in Milmar and, if I am not mistaken, I discounted the note at the bank, asked them to put it through for collection and discount it for me. That is why the amount is—six thousand is of that date, I believe. That's the best of my recollections.

(1432) Q. You testified, did you not, that payment had been stopped and wasn't made on this? A. So I believe I did, yes.

Q. And in your entry in the book you have alongside of it "ng," I think; doesn't it look like "ng" to you? A. Yes, I think I have an "ng" alongside of there, that's correct, of the six thousand.

Q. That would be the date that the note was put into the bank. Is that what you are trying to tell us. This is December 2. A. Well, frankly, I don't recall exactly. I know sometimes around that figure—this is December 2, this is December 4—whether I got this before and had it—I can't definitely place this transaction.

Q. Let's see if we can't help. Turn to this entry in the back. You see an entry, December 12, 1947. I think that's collection, isn't it? A. Yes, sir; that's right.

Q. $6,000? A. That's correct, yes.

Q. And then it refers to January 3. A. January 3.

Q. Is this the instrument that you think is referred to in that entry? A. Frankly, I don't know. I am not prepared to say what (1433) these things are, something that happened six, seven years ago, I would have to—

The Court: Just give the answer.

A. I don't know, sir.

Q. All right. Now, you testified on direct examination—if you want me to, I can locate the exact part of it—that this was another one of the instruments you got from Miller where you advanced money and you didn't get paid,

is that right? A. I didn't advance any money on this particular instrument that I can recall of.

Q. Did you testify that this was another one of these instruments which Miller gave and never paid? A. I believe, to the best of my recollections, I did testify to such. I believe this was an instrument that wasn't paid.

Q. I see. A. I didn't have the books of Milmar to check definitely whether it was or not.

Q. I want to direct your attention to this testimony, because I am going to confront you with something, and I want you to listen carefully to this.

"I show you a check or note dated December 4, 1947"—this is Judge Grosman to you—

> Mr. Grosman: What are you reading from?
>
> Mr. Brigadier: I am reading from the transcript (1434) of his direct evidence, not deposition, transcript at the trial, CB9, fourth line.

Q. "I show you a check or a note dated December 4, 1947, to the order of Milmar Estates, signed by Bill Miller's Riviera, Inc., Bill Miller, president, in the sum of $6,000, marked 'payment stopped'. What about that?

"Answer: Well, there again, it is a promise to pay some money, and he didn't pay it."

Then he asked you, "Have you in mind that transaction?"

You say, "Frankly, I can't recall just what it is, but the books of Milmar should reflect the transaction.

"Question: I see.

> "Mr. Grosman: I would like to offer these checks in evidence, these checks and notes."

And they went into evidence.

Now, Mr. Marcus, remember the other day I asked you whether this was your signature on DME-51 for identification; signature, Mr. Marcus? A. Yes, that is my signature.

Q. That is your signature? A. That's correct.

Q. Now, look at this, Mr. Marcus, and the Exhibit annexed to it. A. What do you want me to do, read it or something?

Q. I want you to read that letter, which you signed, (1435) in which you say this check was paid—this note was paid by Bill Miller. A. It is quite possible I was in error in this particular check.

Q. I see. Now, let's see if you aren't—withdraw that.

Mr. Tepper: Of course, I presume counsel has in mind what he read on CB-9, "Frankly, I can't recall just what it is, but the books of Milmar should reflect the transaction." In fairness to this witness, it should be so stated now in its proper sequence.

Mr. Brigadier: I read that. Didn't you hear me read that? I read that whole excerpt.

Also in fairness to the witness it should be noted that this was put in evidence with a statement to the effect that this is proof of other moneys that Mr. Marcus put in besides the loans.

The Court: I don't think Mr. Marcus—

The Witness: I never claimed—

The Court: When Judge Grosman offered it he may have said it.

Mr. Brigadier: Well, I have to meet the offer, though, when it is put in.

The Witness: Mr. Brigadier, you are wrong. I never claimed money for this at all.

(1436) Mr. Brigadier: I now want to offer this in evidence, your Honor. And I want your Honor to look at this, because this admits that this was paid, and that he sent along a photostat of this instrument and held on to the other one.

Mr. Grosman: I think the Court should see it. I think we should all see it. If Bill Miller ever paid a note, I would like to see it.

Samuel Marcus—Defendant—Recalled—Cross

The Clerk: DME-51, formerly marked for identification, now marked for evidence.

(Received and marked Exhibit DME-51.)

The Court: I think we shall take a short recess.

(Short recess.)

Q. Mr. Marcus, you were questioned on direct examination as to the total amount of loans to Milmar that you made and that you claimed to be due, and you put into evidence in support of your claim Exhibit DM-24; do you recall that?

The Court: You better tell him what DM-24 is.
The Witness: Yes, what is it?

Q. A batch of checks. A. Yes, sir; I did.
Q. They're right there in front of you. Now, you will recall at that time I stated, when Judge Grosman offered it, that I wasn't going to take the time of the (1437) Court to check it and see if it totaled the amount, I would take the representation that it did.

Mr. Brigadier: Do you recall that, Judge Grosman?
Mr. Grosman: I think you said that.
Mr. Tepper: Yes.

Q. You know that you were asked the specific amount that you claimed to be due from Milmar, and you gave what amount? A. Whatever the amount I gave you, was all predicated upon possible corrections and adjustments, according to the Milmar books.

The Court: He just asked you: What amount did you give?

A. The amount was approximately $46,000.

Samuel Marcus—Defendant—Recalled—Cross

Q. I see. Now, annexed to your counterclaim is a schedule of all of these amounts, is there not, Mr. Marcus? A. I believe—yes, sir; there was.

Mr. Brigadier: Will your counsel let you look at it or do you—

Mr. Grosman: You show it to him. I want to follow your questions.

Q. I show you Schedule B, annexed to your counterclaim, and you will note that it sets forth, first, "Loans advanced," right? A. That's correct.

(1438) Q. Totaling what amount? A. $67,997.23.

Q. And then it shows repayments, right? A. That's correct.

Q. Showing what amount? A. $21,196.

Q. And you are suing for the difference between those two figures, right? A. That's correct.

Q. Which is, roughly, $46,000, in odd dollars, right? A. That's correct.

Q. Now, I direct your attention to the fact that listed herein is an item, December 2, 1947—that is, it is related to '47, so I assume it means '47—$6,000, right? A. Yes, sir.

Q. And you have asserted a claim for that amount, right, as an amount of a loan that was made? A. That's correct.

Q. Now, I call your attention to the fact that in DM-24 you offered in evidence, in substantiation of that item, the following: A check dated December 2, 1947, to the order of Sam Marcus, $3,500, drawn by Peace Light, Inc., signed by E. F. Bergler—I take it that is the same Miss Bergler? A. That is correct.

(1439) Q. —endorsed by you, Sam Marcus, that's your signature. A. That's correct.

Q. —and deposited in the Milmar Estate, right? A. That's correct.

Q. And you also produced a check for $2,500, dated December 2, 1947, to Milmar Estate, Inc., by Sam Marcus, as drawer, right? A. That's correct.

Q. That is your personal signature? A. Yes, sir.

Q. And it is endorsed on the back, "Milmar Estate, Inc.," that's your handwriting? A. It is.

Q. And deposited in that account? A. That's right.

Q. And you also produced, as part of the same Exhibit, a deposit slip, right? A. That's correct.

Q. And the deposit slip shows the date of 12-2-47? A. That's right.

Q. Was there some other date on that that was first stricken out? A. Frankly, I don't recall.

Q. You don't know what that is? (1440) A. No.

Q. Why it was necessary to write the '47 over the figure again? A. No, I don't recall.

Q. And you have on this deposit slip, $3,500, check "NPS." A. I don't particularly know what that means.

Q. Dont' you know what "NPS" stands for? A. Yes, I do. That "NPS" is National Picture Slides.

Q. Not Peace Light? A. No, it is National Picture Slides.

Q. National Picture Slides. That's right.

Q. Did the check for the $3,500 come from National Picture Slides? A. At that time when the deposit was made, Miss Bergler was operating a company by the name of National Picture Slides. She was also associated with the Peace Light Company. And I made a notation, National Picture Slides, forgetting just what particular company the check came from. I don't think it's important.

Q. Well, we will have the Court pass on its importance. A. All right.

Q. But the "NPS" is in your handwriting? A. Yes, it is.

(1441) Q. And, as I recall, you say you made these

notes at the time that you made the deposit? A. That's correct.

Q. And the word "personal" is also in your handwriting, right? A. Yes, sir; it is.

Q. Now, you did not produce a National Picture Slides check, that is conceded, right? A. No, I won't concede it at all. It is possible that there is another National Picture Slides check. However, for the moment—

Q. Besides this? A. I don't know. We might have to look through the National Picture Slides checks.

Q. Mr. Marcus, look at the bank book, the deposit book. How many deposits do you show on that date of December 2? A. I will concede these two checks are part of that deposit.

Q. I see. Now, Mr. Marcus, the only deposit that this book shows on December 2 is a deposit of six thousand, right? A. That's correct.

Q. And that's the deposit through which a line has been drawn and to which you testified that there were in (1442) your handwriting the letters "ng"? A. Well, it appears to be that the letters "ng" have been erased.

Q. I am saying that they were there, weren't they? A. They were there originally—there is something else been erased in here. Let's see what it is. There is another erasure over here which I can't identify. And there is an erasure here, on both sides, and I can't identify just what they are.

Q. But there is no more than the one deposit of six thousand recorded, isn't that right? A. That's correct.

Q. For December 2. Now, is there any doubt in your mind that the two checks which you offered in evidence, totaling six thousand, showing a deposit on that date, were never returned "ng," were they? A. There may have been another check which was returned "ng" and we replaced it with these checks.

Samuel Marcus—Defendant—Recalled—Cross

Q. Just answer what I asked, that these two checks were not returned "ng," were they? A. No, these two checks were paid. They were my checks.

Q. And they are dated December 2, right? A. Yes, sir.

Q. And they show that they went into the bank on December 2, right? (1443) A. That's correct.

Q. So they couldn't replace any other check on December 2, could they, Mr. Marcus? A. I really don't know. We deposited these on December 2.

Q. You don't know whether you deposited two checks on December 2 which you said might have replaced other checks on December 2. don't understand that. A. Just what answer do you wa.., Mr. Brigadier?

The Court: You mean what does he want to know.

The Witness: What does he want to know.

Q. I want to knov since you only made one deposit, according to this book, on December 2, of six thousand, and since, according to your own testimony, these two checks are the checks that were deposited on December 2, as you can see from the back of the checks,— A. Yes, sir.

Q. —are these the checks that were returned "ng"? A. No, sir; they are not.

Q. Could there have been any other checks on December 2 deposited that could have been returned "ng"?

Mr. Tepper: I must object to that question, could there have been any other checks which could have been deposited? The witness has testified to these two checks. They were not returned "ng." Now it is becoming argumentative.

The Court: Who offered that suggestion, that there (1444) might have been some other ones that were returned "ng"? Who suggested that?

Mr. Tepper: I don't know.

Colloquy

The Court: Mr. Marcus did, not Mr. Brigadier. I hear everything he says. Maybe he didn't mean to say that—

Mr. Tepper: I know your memory is much better than mine—

The Court: Unfortunately for many people, it is too good.

Mr. Tepper: I am not going to try and compete with your memory. But the question I objected to is the question I heard, and that was—

The Court: He threw that suggestion out himself. You don't say anything else was deposited that day, do you?

The Witness: No, sir.

The Court: There is the deposit slip—thirty-five hundred, twenty-five hundred, six thousand.

The Witness: That's right.

The Court: National Picture Slides abbreviated and "personal." So I guess there was nothing bounced that day.

Mr. Grosman: May I see the item, please, in the book?

(1445) (Document shown to counsel.)

The Court: Do you want to see it, Judge, I have it here.

Mr. Grosman: I want to see the checks he is talking about.

Mr. Brigadier: I have offered something else. I have the transcript that we got from the bank, and the transcript shows only one deposit of $6,000 on December 2, and it doesn't show anything on any other date anywhere in the vicinity.

Mr. Grosman: You have a photostat, you say?

Mr. Brigadier: I have a transcript. I haven't put this in evidence yet. I will even let you look at it. I am willing to show it to you, but I have to use it now.

Mr. Grosman: When you offer it in evidence, I want to see it.

Q. In DM-12 you produced this note which you now concede has been paid, right, that you were mistaken about? A. Can I read the letter again, please? I didn't read it thoroughly. I would like to see it again, see if I can refresh my memory.

(Document handed to the witness.)

A. (continuing) Frankly, I would like to check the records of my deposits, and as to whom and where this $6,000 was credited to. It is possible this money may have (1446) been credited to Bill Miller, the Riviera account. So I beg leave to have an opportunity to check my records and see exactly where this $6,000 mentioned in here—where it was credited to.

Q. You will have all the opportunity in the world, but we are going to get some answers from you, Mr. Marcus, today; that is, until the Court adjourns. A. I will try to give them.

Q. I direct your attention—

Mr. Grosman: I don't think that remark was necessary, Mr. Brigadier, what you intend to do.

Mr. Brigadier: We will discuss that privately.

Q. Mr. Marcus, you will notice that the photostat attached to this letter is the same note as the one that you have that is in DM-12, right? A. Yes, sir; it is.

Q. I see. Are you disputing whether or not you sent this photostat? A. No, sir; I am not disputing it at all.

Samuel Marcus—Defendant—Recalled—Cross

Q. I see. This letter itself specifically says that this note was paid, doesn't it? A. Yes, sir—I believe it does. Let's see it again.

Q. You better read it again.

The Court: This will be the third time.

(Document handed to the witness.)

(1447) A. That's right. That's correct, this specifies that this note—

Q. That's all I want. This letter admits this note was paid? A. That's correct.

Q. What was this note given for, Mr. Marcus? A. What was it given for? I can't recall at this time.

Q. Well, it was given for the same sum of $6,000 which you claim you loaned on December 2, 1947, to Milmar, right? A. I don't know whether it does, sir. This may have been given for rent money due.

Q. On December 2, Mr. Marcus, you say you deposited $6,000 into the Milmar account, which you loaned to Milmar, right? A. That's correct.

Q. On December 4 you received a note from Bill Miller's Riviera for the same amount, right? A. That's correct.

Q. You now concede that the letter says that that note was paid? A. Yes, sir; the letter says that note was paid.

Q. You now say that the $6,000 which you deposited might be something altogether different than the $6,000 for that note? (1448) A. It is possible. I want to check my records and see what it is myself, and I can give you an intelligent answer.

Q. I direct your attention to the last page of this book, the bank book—I am covering something up, Mr. Marcus. A. Yes, sir.

Mr. Grosman: If your Honor please, I think if he is going to show him the book, show him the book.

Samuel Marcus—Defendant—Recalled—Cross

The Court: He is directing his attention to one entry, a specific item. He may have good reason why he is showing that and covering the rest.

Q. Is that in your handwriting, what I am showing to you now? A. Yes, sir; it is.

Q. Will you read it? A. It says Eli Quain's—

Q. What does it say before it? A. "Repaid by Eli Quain checks $2,500 2-3 and 4-3 $3,500."

Q. Let's read it the way it appears, Mr. Marcus. Don't read it forwards and backwards. Just read what it says. A. "Repaid by Eli Quain check February 3 $2,500, April 3 $3,500."

Q. Now, I show you the entry immediately above that. Do you know whose handwriting that is in? A. I believe it is possibly in the handwriting of my (1449) secretary.

Q. Please identify her each time. You have many secretaries. A. I believe this is Mrs. Maginn.

Q. Can you read it? A. It says on here, "December 12, Bill Miller's note put through for collection, $6,000, due January 6, 1948."

Q. And then immediately below that in your handwriting appears, "Repaid by Eli Quain checks, 2-3"—meaning February 3, right? A. Right.

Q. "$2,500"? A. That's right.

Q. "April 3"—is that a 4? A. "April 3, $3,500."

Q. Is it a 4? A. Four, yes.

Q. It looks like a 6. A. Four.

Mr. Brigadier: I just wanted to make sure I was not misleading him.

Q. "$3,500"? A. That's right.

Mr. Tepper: Shouldn't that book be marked for identification?

Samuel Marcus—Defendant—Recalled—Cross

(1450) Mr. Brigadier: When I come to put it in evidence, it will be put in evidence.

The Court: He is going to put it in evidence.

Mr. Brigadier: Mr. Tepper, I don't tell you how to try your case.

Mr. Tepper: I think we should be entitled to be able to refer back to this testimony with the book, since you want to talk that way.

Mr. Brigadier: I am going to put the book in evidence.

Mr. Tepper: It should be marked for identification so that we can refer to an Exhibit for identification.

The Court: Strictly speaking, he is right, isn't he?

Mr. Brigadier: No, not until I—

The Court: It should be marked for identification.

Mr. Brigadier: Not until I offer it in evidence does he have a right to look at it. I am going to offer it in evidence.

The Court: He didn't say he wants to look at it.

Mr. Brigadier: I am not going to mark it for identification, I am going to mark it in evidence when I have established the balance of what I have to establish with respect to it, sir.

Q. Mr. Marcus, I direct your attention to the entry, (1451) 12-2, thirty-five hundred, cash "PL" in handwriting, is that in your handwriting? A. I believe it is.

Q. And what does that mean? A. Means deposit by Peace Light to Milmar of $3,500.

Q. But it wasn't done in cash, was it? A. I don't think so. I think it was a check. I consider a check cash. I don't always call cash—cash.

Q. I thought you testified on the deposit slips whenever you made a deposit of cash you always wrote the word "cash," didn't you? A. I didn't say so, not necessarily. I didn't make most of the deposits.

Samuel Marcus—Defendant—Recalled—Cross

Q. Well, now, in every deposit slip that you presented here, didn't you indicate which were checks and which were cash? A. I believe so.

Q. Well, we will get to those, too, then, if that is the case. A. All right, fine.

Q. And you now say the "cash PL" is cash Peace Light? A. It wouldn't necessarily be cash. It could be a check from Peace Light.

Q. But you wrote "cash"? A. I wrote "cash," yes.

(1452) Q. Now, the twenty-five hundred underneath that? A. That's personal. It would mean my personal check.

Q. But you didn't write cash? A. I didn't.

Q. Will you tell us what is—no, I will withdraw that.

Mr. Tepper: I respectfully say this, even if this book goes into evidence later on, how are we going to be able to identify, for the record—if this record goes up, or down, or stays here—whether these questions alluded to an Exhibit which later on is put into evidence?

The Court: Except he is giving you the dates he is referring to.

Mr. Tepper: It should be marked for identification. Let's have the record straight.

The Court: Well, he is giving you the dates he is referring to as they are marked in the book.

Mr. Grosman: Now, I think, your Honor—we don't want to see the book, but I think the book ought to be marked some way for identification.

The Court: Well, it generally is.

Mr. Brigadier: Sir, it generally is not, if you are going to offer it in evidence. You mark a book for identification, for example, if I was going to put it in evidence after he got through, because normally I would (1453) have no right to put it in evidence dur-

ing cross. But there is going to be no objection to my putting it in evidence, is there? And I said I am going to put it in evidence. So there is no point in marking it for identification. When I am through with the cross examination, I will offer it in evidence.

The Court: Well, I don't want an academic discussion of whether it should be marked for identification or not. You people start things I never heard of before. Who ever argues about that?

Mr. Grosman: If your Honor please, we will make a formal request that this book that Mr. Brigadier has been questioning the witness about for an hour be marked for identification. We don't want to see it, but we want to be sure that we have access to this particular book at a future time.

Mr. Brigadier: I have no objection to marking it for identification, provided it is understood that until I have completed my cross examination, and put it into evidence, they are not to see this book.

The Court: Well, they can't see it until you put it in evidence.

(Comments off the record.)

The Clerk: DME-54 for identification, bank book, Milmar Estate, Inc.

(1454) (Document marked Exhibit DME-54 for identification.)

Q. Mr. Marcus, on the entry of December 16, 1947, opposite the figure fifteen hundred you also have the abbreviation "prs," which I take it is "personal." A. Personal, that's correct.

Q. What do you have alongside the next entry of six hundred? A. I believe that is also marked "personal."

Samuel Marcus—Defendant—Recalled—Cross

Q. And what do you have alongside the next entry of two thousand? A. The next entry is "BM," meaning Bill Miller.

Q. What does it mean? A. Probably rent, I guess.

Q. That you received rent from Bill Miller? A. Possibly. Just happened to be marked "BM," meaning that it's a $2,000 check from Bill Miller. Rent, I suppose.

Q. How about the next one, two thousand, was that rent? A. I think it was.

Q. There you didn't put "BM"? A. There are ditto marks there.

Q. Those are the dittos? A. That's right.

Q. I see. You are right. The next entry, the same thing? (1455) A. That's the same.

Q. And the next one? A. The same.

Q. The next? A. All the same.

Q. These are all rent? A. Those are all rent payments, yes.

Q. I see. Mr. Marcus, where are the rent payments prior to April 5, 1949; any in there? A. We don't get any rent for—

Q. '48. I am sorry. That date should be '48.

Mr. Grosman: Will you let him answer?

A. We don't get any rent before April.

Q. You only get rent when they are open? A. Only get rent when they are open.

Q. And that's $2,000 a week, right? A. That's right.

The Court: A week?

The Witness: A week, for the season. Four or five months.

The Court: And then there is no rent when they are not open?

The Witness: No rent when they were not operating.

Samuel Marcus—Defendant—Recalled—Cross

Q. Now, let's take the next entry—take you over to July 20, 1948. The figure is $2,500. On the lefthand (1456) side is that your handwriting? A. Yes, sir.

Q. And what does it say? A. It says "cash exchange."

Q. And on the righthand side? A. The other side, it's "personal."

Q. What does that mean? A. Meaning that I deposited—I believe the meaning of that is that I deposited a personal check to meet a hurried requirement, and then I withdrew a check on that, taking out a few days later, when I got some rent money in, and I needed the check, I withdrew that check.

Q. I didn't quite get that. You deposited twenty-five hundred— A. In other words, it means I deposited my personal check. It probably needed it to meet some sudden note.

Q. You mean Milmar needed it? A. Milmar needed it. I deposited my personal check of $2,500, and possibly a few days later when I got the rent money, and there was money in there, I withdrew a check and repaid that loan.

Q. And called it "cash exchanged"? A. Cash exchange, yes, that's what you call it.

Q. All right. I just want to know. Anything I see "cash," I like to know. (1457) A. That's right. That's what they count in the books, cash exchange.

Q. I call your attention, Mr. Marcus, to the transcript of the bank of July 20. You will notice that it went in the same day and out the same day, didn't it?

Mr. Grösman: If your Honor please, may I register an objection? I don't know what he is showing this witness. He refers to it as a transcript from a bank. Now, I think it ought to be identified properly before he uses it.

Mr. Marcus, will you please listen to me.

The Witness: I am sorry.

Colloquy

Mr. Grosman: I don't know what that document is that he is showing him.

Mr. Brigadier: Maybe Mr. Marcus knows.

The Court: I can see what it is. Public National Bank & Trust Company.

Mr. Brigadier: It says, "Transcript." Does it say Milmar Estates on it, Mr. Marcus?

Mr. Grosman: Well, now, if your Honor please, I want this thing to be formally offered in evidence so we know what he is showing the witness. And to have it properly marked.

The Court: I don't know if he intends to put it in evidence.

Mr. Grosman: I know, but he is asking the witness (1458) to look at it and compare it with the bank book. So now before he does that, I would like to know what he is showing him.

Mr. Brigadier: I am asking him to look at it to compare it with his testimony where he says he put in a check on one date and then I think he said a few days later, when they got the money from Bill Miller, he drew it out. I am showing him what purports to be the transcript issued by the bank, same date in and same date out.

Mr. Grosman: I don't know where he got this thing from. It may be accurate, it may not be accurate. Now, we are entitled to have it identified. If they are ledger sheets from a bank, we want them properly proved, shown in the record. Merely because it has the name on top, and a lot of figures, doesn't mean necessarily that they are accurate.

The Court: Do you really mean that, Judge?

Mr. Grosman: Yes, your Honor.

The Court: Do we have to go through the Business Record Rule again, and the cases decided thereunder? There is a presumption of regularity.

Colloquy

Mr. Grosman: I don't know where this thing comes from. He says it to the witness out of a clear sky and says, "Compare it with your bank book."

Mr. Brigadier: That isn't what I said to the (1459) witness at all. I said, "Will you look at what purports to be a transcript?"

Mr. Grosman: Will you represent to the Court—

Mr. Brigadier: Judge, I let you finish. Let me finish.

Mr. Grosman: Will you let me make my objection. I am not through with my objection. Will you represent to the Court that these papers that you are now showing this witness and asking him to compare with the bank book are, in fact, a true copy of the ledger sheets of the account of Milmar Estates, Inc., with the Public National Bank & Trust Company of New York for the period indicated on these six sheets?

Mr. Brigadier: I will represent to the Court that the Public National Bank represented that to me. Judge, I haven't sat down at the Public National Bank and asked them to open their ledgers.

The Court: That is all you can represent.

Mr. Brigadier: I asked them for a transcript and this is what they furnished.

Otherwise, I will have to suggest to your Honor that I interrupt the cross and bring in somebody from the bank on Tuesday.

The Court: Nobody expects you to.

Mr. Brigadier: All right, Judge.

(1460) Mr. Grosman: All right. The Judge says it's all right.

The Court: It is, under the Business Record Rule.

Mr. Tepper: He has to identify it.

The Court: Sure. You don't know what he is reading from. I can see it here.

Samuel Marcus—Defendant—Recalled—Cross

Mr. Brigadier: I have even forgotten the date.
Mr. Margulies: July 20, 1948.

By Mr. Brigadier:

Q. July 20. You will notice that the entry is "deposited $2,500," right? A. Yes.

Q. Check drawn out, twenty-five hundred? A. That doesn't necessarily mean that that check was drawn out the same day.

Q. What day does it mean? A. The deposits are generally on that day. Withdrawal checks can differ by two or three days.

Q. You mean when they set up on a deposit statement—on a transcript opposite the date, July 20, "deposit twenty-five hundred," and on the same line "debit twenty-five hundred," that that could be some other day? A. I believe it could be.

Q. Have you ever experienced that before in your life? A. Yes, sir.

(1461) Mr. Brigadier: May I ask for an adjournment at this time? I am exhausted.

The Court: Yes, we will adjourn. I think everybody is tired by this time.

You all understand, gentlemen, we adjourn today to meet Tuesday morning at 10:15 a.m.

Mr. Brigadier: If your Honor please, Mr. Miller has to leave and I just want your Honor to know that he is leaving. Mr. Bierman has to leave and Kevelson has to leave. But I don't require their presence until later on in the trial. I may have to recall him for rebuttal. But I just wanted your Honor to know that they have been here and they do all have to go off on different business engagements at this point.

The Court: Well, when needed they will be back, won't they?

Mr. Brigadier: Yes. I wanted you to know that they were here and I am going to bring them back. But they are not going to be here from today on until they get their work completed.

The Court: Go ahead and tend to your work. We are going to tend to some work, too.

(Whereupon, the hearing was adjourned until Tuesday, February 15, 1955.)

(1462) Newark, N. J., Tues., Feb. 15, 1955

(The hearing resumed pursuant to adjournment.)

(Appearances as before noted.)

The Court: All right, gentlemen.

SAMUEL MARCUS, resumed the stand.

Cross examination by Mr. Brigadier (Continued):

Mr. Brigadier: Will you hand the witness DM-24.

(Documents handed to the witness.)

Mr. Brigadier: Mr. Marcus, would you like the stenographer to read back to you the last question and answer, if it would be helpful?

The Witness: Yes.

(Record read.)

Q. Now, Mr. Marcus, that entry on the book, DME-54 for identification, of July 20, 1948, $2,500, you recall that you testified that the word "personal" alongside of it indicates that that was a personal loan by you to Milmar, isn't that

right? A. It would indicate—it would indicate it's a personal transaction.

Q. No, no, no. Now listen to my question. Didn't you testify at the last session that the word "personal" alongside of this entry indicated that this constituted (1463) a personal loan to Milmar? A. I believe I did tell you it constituted a personal loan and it could mean a personal transaction.

The Court: You can't ever say yes, can you? You must repeat the question put to you and then answer it in full. When it's yes, please say yes. It's getting kind of tiresome.

Q. In other words, do you want to now change your testimony from last week? If you do, let's hear it. A. Mr. Brigadier, I can give you an intelligent answer to that question right now if you want to know it.

Q. Oh, yes. A. I have traced that transaction. That transaction was a party by the name of Lenny Geffner—there was some business transaction wherein he wanted to cash a $2,500 check. I didn't have any money in my account, so I took his $2,500 check, deposited it to Milmar, and withdrew a check from Milmar for that same amount and we called it a cash exchange transaction, both done at the same day.

Q. So therefore when the word "personal" appeared in this bank book it meant a personal transaction of your own. A. In that particular—

Q. Just answer yes or no. (1464) A. Yes, sir: it did.

Q. And it did not mean a personal loan by you to Milmar. A. That's correct.

Q. And you are now correcting the testimony that you gave last week, is that right? A. Yes, sir: I am.

Q. When you said that the word "personal" that appears in this book always means a personal loan by you

to Milmar. A. If I said every transaction. I am correcting it.

The Court: You were mistaken.
The Witness: Yes, sir.

Q. All right. Now, if you will turn to the exhibit which I asked the Clerk to hand up to you, DM-24, you recall this is the exhibit that you offered into evidence, or your counsel on your testimony, to support the loans made to Milmar, right? A. That's correct.

Q. Will you turn to that exhibit and see whether you have included in it a deposit slip for $2,500 showing Leonard Geffner's cashier's check. A. I didn't say it was a cashier's check, Counsel.

Q. Just look at the exhibit, sir, will you?

The Court: Is that the bank deposit slip (1465) dated July 20, 1948?

A. Yes, here it is, right here, Leonard Geffner, cashier's check, $2,500.

Q. And you offered this as evidence of a loan of $2,500 made by you to Milmar, right? A. I don't believe this is in the schedule of loans, Counsellor.

Q. Now, wait a minute, didn't you just testify that this is part of Exhibit DM-24? Look at it. You have the exhibit in front of you. A. This slip is not in our schedule of loans.

Q. Mr. Marcus, please answer my question. Is this part of Exhibit DM-24? A. It is.

Q. And is DM-24 the exhibit which you just testified to that you offered to prove the loans of Milmar? A. I believe these were—yes.

Q. Then I ask you again. Didn't you include in this exhibit to prove loans made to Milmar this deposit slip? A. This was included through error.

Samuel Marcus—Defendant—Recalled—Cross

Q. I see. This is an error. All righ' let's see about some others.

Mr. Brigadier: Will you hand the witness Exhibit DM-31?

(1466) (Documents handed to the witness.)

Q. Do you have DM-31 in front of you, Mr. Marcus? A. I do.

Q. This is the exhibit that was offered on your behalf to substantiate the loans made by you to Bill Miller's Riviera? A. That's correct.

Q. Will you look in that exhibit and find check dated May 17, 1946, Photo Shop? A. I see it.

Q. Have you got that check in front of you, Mr. Marcus? A. I do.

Q. This was offered in evidence by you to establish, as you testified, that you paid the Imperial Sign Corporation the sum of $1,000 on behalf of Bill Miller's Riviera, right? A. That's correct.

Q. And that you paid it by the check of Fotoshop, right? A. That's correct.

Q. And that it constituted a loan that you had made to Bill Miller's Riviera? A. It constituted a check, I believe, I paid to Imperial Sign Company for the signs up there.

(1467) Q. Yes, but aren't you seeking to recover this money— A. Yes, sir; I am.

Q. —as part of your loan schedule against Bill Miller's Riviera? A. That's correct.

Q. Now, I direct your attention to the legend on the check and ask you what that means. A. Frankly, I didn't write that. I don't know what it means.

Q. Can you read it? It is your check. A. Well, it isn't my writing, so I don't know what it means. It says something—"Account exchange check." I don't know what it means.

Samuel Marcus—Defendant—Recalled—Cross

Q. "Account exchange check," and you don't know what it means. A. No, I am not thoroughly familiar with what it means. I don't know who wrote it.

Q. I show you a check dated the same day, May 17, 1946, to the order of Fotoshop, Bil Miller's Riviera, for $1,000. Does that help refresh your recollection as to this transaction? A. Well, it's a check that I received and possibly be an exchange check for this, which, through error, we have included. It's all possible. It's all subject to (1468) checking. Our claims are subject to checking on the Riviera books.

Q. You see the check right now, don't you, Mr. Marcus? A. I do. And from the appearance of your check, I am ready to admit that this is possibly in payment of this check. I had no records of that.

Q. And that you are possibly in error. A. I'm possibly in error on this check.

Q. About having listed this $1,000. A. It is possible, yes.

Q. Now, will you look, Mr. Marcus, at the check that I have shown to you and will you tell us who signed that check, the check that I produced?

Mr. Grosman: Will you refer to it by number, please?

Mr. Brigadier: I will mark it for identification.

The Clerk: DME55 for identification check dated May 17, 1946.

(Document marked Exhibit DME-55 for identification.)

Q. Will you tell us whose signatures are on that check? A. This is my signature.

Q. Bill Miller's Riviera drawn by Samuel Marcus? (1469) A. Yes, Samuel Marcus—

Samuel Marcus—Defendant—Recalled—Cross

Q. As what? A. —Treasurer on here.

Q. You were an officer of Bill Miller's Riviera? A. Frankly, I had completely forgotten about it, but at the very inception of the Riviera when I had intentions of going in with Bill Miller and operating the Riviera, why, I believe I must have been an officer and possibly did sign checks. I had completely forgotten about this fact.

Q. You recall having testified that you were not an officer of Bill Miller's Riviera at any time? A. I resigned as an officer practically immediately.

Q. Listen to my question. A. I did testify to that.

Q. Did you testify here—

The Court: He said he did.

A. I did.

Mr. Brigadier: I'd like to mark this check into evidence, if your Honor please. It's been marked for identification. Since he has identified it.

Mr. Grosman: For what purpose, Mr. Brigadier?

Mr. Brigadier: For the purpose of showing that there is a loan listed in the Riviera loans that was not a loan. The check itself that he produced has on it (1470) "on account of exchange" and this shows that on the very same day he himself drew a check on the Bill Miller's Riviera account for the same amount.

Mr. Grosman: Now, do I understand that the Riviera suit is in issue in this case?

Mr. Brigadier: You put the checks of Rivera in evidence. You had him testify on direct examination that he made loans to Riviera. I am taking your exhibit.

The Court: Are loans that are made to Riviera mixed up with the loans that are made to Milmar?

Mr. Brigadier: No, he put in two separate batches of checks, one which he said totals the amount he is

suing for, for the loans to Milmar. This batch are the total that he is suing for for the loans to Riviera. He put that in evidence.

Mr. Grosman: We put it in evidence because you have been screaming for days that we haven't produced all of the records that we have in our possession pertaining to any transaction had by Marcus with Miller in connection with these two companies.

Now, we didn't put those checks in for the purpose of proving the loans to the Riviera, because that suit is not being tried.

Mr. Brigadier: May I read the transcript to show that they were put in?

(1471) The Court: Isn't what Judge Grosman says true? We are not trying the Riviera suit.

Mr. Brigadier: Sir, he put into evidence—and I will read you—

The Court: Suppose he did, by mistake?

Mr. Brigadier: I don't know of any mistake. I have to try the case that is being presented. If he says he put these in because I—

Please, let me address the Court.

The Court: Go ahead.

Mr. Brigadier: He said he put these in because I asked him to produce all the instruments. When you ask a party to produce papers, does that mean you must put them into evidence? You ask him to produce them so you can see them. He didn't show them to me, he put them into evidence. That's No. 1.

He has put in and has had him testify to both his loans to Milmar and his loans to Riviera. He put in two separate exhibits, each to total the amount of the loans.

I am on cross examination, sir. For me to sit back and not cross examine on this would be, I think, malpractice for my clients.

Samuel Marcus—Defendant—Recalled—Cross

The Court: I don't intend to determine anything in connection with Milmar as a result of what we (1472) are presently—Riviera as a result of what we are doing now.

Mr. Grosman: Now, may I state for the record, so there won't be any misunderstanding about it: My understanding coincides with that of your Honor. You are not trying the Riviera suit, I put these things in because we tried to put in everything that we could find pertaining to the transaction between Mr. Marcus, Mr. Miller and these two companies.

Mr. Brigadier: He put into evidence, and he had the man testify, as you have already heard.

The Court: No doubt he has testified.

Mr. Brigadier: If for no other reason, I have a right to attack his credibility on his story. I have a perfect right to put in the countering check. And that is what I am doing.

The Court: If that is the purpose, you may do so.

The Clerk: DME-55, formerly marked for identification now marked into evidence.

(Received and marked Exhibit DME-55.)

By Mr. Brigadier:

Q. Mr. Marcus, will you return to Exhibit DM-24—

(Comments off the record.)

Q. Now, again I call your attention to the fact (1473) that you have in front of you the exhibit that was put into evidence on your behalf to support the loans against Milmar, right? A. Yes, sir.

Q. All right. Now, will you show me where in that exhibit you have anything to support the first item on your list? The first item is July 16.

Mr. Brigadier: Your Honor will find these annexed to his counter claim. That's what I am referring to, the schedule.

The Court: I see.

A. I don't have it in this exhibit. I have something else that will show it.

Q. Wait till I finish the question, till the Court can follow it. Do you have anything in that exhibit to support the item of July 16, 1946, $2,000? Just answer my question. A. I want to look these over. I have got to get these checks in position here.

Mr. Brigadier: If your Honor please, while he is doing that, may I call to your attention what I did in the record when this exhibit was offered.

"Mr. Brigadier: We will do this later, with the Court's permission, subject to our being able to check them against the items that appear in the counterclaim (1474) that he filed, so that we won't delay this examination."

You will recall, at that time I did not check into the items.

The Court: I know you didn't.

The Witness: Judge Lieberman, can I have your schedule, please?

Mr. Grosman: Grosman.

The Witness: I can answer it quickly from your schedule.

Mr. Brigadier: You can answer me from that exhibit.

Mr. Grosman: He is entitled to look at his pleadings, if he wants to.

The Witness: These papers are so mixed up, it's going to take me time. I can answer it quickly from the schedule.

The Court: It sure will take time.

The Witness: I can tell you exactly what we have records of and what we don't have records of, right from the schedule. I have it marked on the schedule.

The Court: Let him have the schedule.

Mr. Brigadier: Are there any notes on that?

Mr. Tepper: No, that's only the typewritten schedule.

Mr. Grosman: Some check marks I have on this.

(1475) The Witness: What is your question, Mr. Brigadier?

Mr. Brigadier: Will you read the question to him, Mr. Bremer?

(Question read as follows: "Do you have anything in that exhibit to support the item of July 16, 1946, $2,000?")

A. I was not able to locate my check. It's not in this exhibit.

By Mr. Brigadier:

Q. Just answer my question. A. It is not in this exhibit.

Q. Now, the next item you have is September 30, $3,500. Is there any item in that exhibit to support that item on your loan list? A. There is not.

Q. Is there anything in that exhibit to support the item of November 13, 1946, $700? A. There is not—

Q. In that exhibit. A. I may have the $700—I don't think we have. I haven't got this marked off on here. No.

Q. I want you to tell me, Mr. Marcus. This is very serious. A. No, we do not have that one of November 13.

(1476) Q. November 27, $3,500, do you have anything in that exhibit to support that item? A. No, sir; we do not.

Q. December 4th, $3,500, do you have anything in the exhibit to support that item? A. Yes, I have.

Samuel Marcus—Defendant—Recalled—Cross

Q. Will you produce it? A. There must be a check missing. I have a check here for $2,000 on that date, but I believe there is another check that's evidently missing somewheres. It may be mislaid in Mr. Grosman's file or so. I have a check here of $2,000 of that date. I don't see the other check here.

Q. On December 4th? A. On December 3rd, 1946.

Q. I am asking you for this entry of December 4th. A. That was up—

Q. Just a moment. Don't argue with me. You are going to answer questions. On December 4th, do you have anything to support the entry of December 4th, $3,500? And your answer is what? A. My answer is, I have a check of $2,000 here.

Q. Dated what date? A. December 3rd.

Q. 1946. A. ?

(1477) Q. What about the other fifteen hundred? A. I think that that check should be available. It may have been mislaid somewhere in Judge Grosman's file or so. I will have to look around for it.

Q. So as of this moment you have nothing else to support this item except this check that you have produced, is that right? I would like to have it identified in the record. A. Yes, I believe I have something else to prove that item.

Q. From that file, from the exhibit. A. From this exhibit?

Q. Yes. A. No.

Q. I am talking about from the exhibit. A. From the exhibit, no.

Mr. Tepper: I believe the witness should be able to answer the question irrespective of this exhibit; from any source can he prove that item? I think that's what the Court wants to know. I think that's what the record should show.

Samuel Marcus—Defendant—Recalled—Cross

The Court: I know, but if you proffered certain exhibits as proof of the evidence of loans, and it turns out that it is not—

Mr. Tepper: It was introduced as a step in (1478) the direction of proving these items.

The Court: Well, nobody said it was done that way. I am sorry these things weren't properly prepared for presentation and separated. We have been losing an awful lot of time.

Mr. Brigadier: Shall I proceed, sir?

The Court: Well, I think they are trying to find the check to establish that loan. Is that right?

The Witness: Yes, that check should be here.

Mr. Brigadier: I am referring to the exhibit. I can only prepare my case as it is given to me.

The Court: All right. Proceed.

By Mr. Brigadier:

Q. I direct your attention to the item, February 6, 1946, $700. Is there anything in the exhibit, DM-24, to support that item? A. Yes, there is.

Q. Will you produce it? A. That's right here, a deposit slip.

(Document handed to Counsel.)

Q. Now, Mr. Marcus, the deposit slip which you have produced is in whose handwriting? A. That's my secretary's handwriting. That is, not my—

Q. Please give us the name of your secretary. (1479) A. I don't know. This is not Mrs. Maginn's, this is someone else's. This is somebody else who may have been pinch-hitting for her a day or so.

Q. I see. Now, I direct your attention to the items on this deposit slip—

Samuel Marcus—Defendant—Recalled—Cross

The Court: What is the date of it?
Mr. Brigadier: February 6, 1947.

Q. There is the figure— A. Is this the one you asked me about?

Q. This is the one you produced. A. What date are you asking me about?

Mr. Tepper: You asked for '46, Mr. Brigadier.

A. (Continuing) I don't have anything for '46. I'm sorry. I do not have the item for '46 in this exhibit here.

Q. I didn't say '46. A. I'm sorry. I thought you said '47

Q. You are right, it is '47. Your counsel is in error. February 6, 47, $700, is the item. A. Yes, this would be correct.

Q. I said you were right. Your counsel is in error. What are the entries that appear on this deposit slip, Mr. Marcus? A. It shows, "Bills, $400."

Q. Does that mean cash? (1480) A. That would mean cash. "Checks, $200, $100." And there is an item on here says, "Personal checks, SM."

Q. Now, in whose handwriting are the words, "Personal checks"? A. Mine.

Q. And "SM"? A. Is mine.

Q. And when was that placed thereon? A. That was placed on about the time that the rest of these were placed on, when I got back with these slips, or so, and I was checking up my records I would find out what these were and make my notations.

Q. You can answer me very simply, Mr. Marcus. We are trying to expedite this. Was it placed on it when you made the deposit, after you made the deposit, or before? A. After the deposit was made.

Samuel Marcus—Defendant—Recalled—Cross

Q. Now, whose check was it for $200 that you deposited into Milmar? A. I can't recall at this time.

Q. And you can't produce the check? A. Possibly could. I have never been asked to. I will try to locate it.

Q. I am asking you to produce— A. I will try to locate it. It was a check given to (1481) me. It wasn't a personal check I drew.

Q. Mr. Marcus, you didn't know that you ought to bring here the checks showing the loans you made? A. I haven't found those checks. If I did, I'd produce them.

Q. And what about the hundred dollar check, whose is that? A. It was some check, either my personal check or a check given to me, which I, in turn—that we needed some money in a hurry there and I deposited it.

Q. So that actually the only reason you know that these constitute personal loans is because you have written in your handwriting on the deposit slip the words, "Personal checks," right? A. That's correct.

Q. And you have no evidence of what check the two hundred or the one hundred dollars was from? A. At this moment I do not; no, sir.

Q. Now, where did the four hundred dollars come from? A. My own cash.

Q. Did you take it from any source? A. Took it from the cash register in my store.

Q. Would there be some record in your store to show that you took that cash? (1482) A. There would have been at that time. I put an I.O.U in the cash register and later on, why, I replaced the money or it's charged up to my personal account.

Q. Well, can't you bring any record into this court to show that you took four hundred dollars from one of your businesses and loaned it to Milmar? A. The records wouldn't show whatsoever. I mean, the records would simply show that that very same day—

Samuel Marcus—Defendant—Recalled—Cross

The Court: Is the answer no, that you can't?
The Witness: No, I could not, sir.
The Court: Then why don't you say so?
The Witness: I'm sorry.

Q. Will you look at Exhibit DM-24 and see what you can find to support the item of March 5th, $1,100?

The Court: Better give him the year.

A. That's right here. I have it right here. There is a cash—it's a cash deposit slip—

Mr. Grosman: Wait a minute. The Judge has spoken.
The Court: What year is it?
The Witness: 1947.
The Court: Do you have the deposit slip for that?
The Witness: Yes, sir; right here.
The Court: He has it, Mr. Brigadier.

(1133) *By Mr. Brigadier:*

Q. Now, again that deposit slip shows what sum to have been deposited? A. Cash, $1,100.

Q. And alongside of it appears what? A. "SM, personal."

Q. Will you look at that closely. Is that what it says, "SM, personal," are you sure? A. I believe that's what it means, "SM, personal."

Q. And this time the "SM, personal" means what, personal loan? A. My personal cash that I deposited in this bank for Milmar.

Q. It doesn't mean that you conducted some personal transaction— A. No, it does not.

Q. —through the Milmar account? A. It does not.

Q. Where did the $1,100 cash come from, Mr. Marcus? A. From my personal funds.

Q. Well, where, from a safe deposit box? A. No, I always carry at least a minimum of five thousand dollars cash in my safe. I often went to auction sales and needed fast money to go to these auction sales. (1484) It was always a cash proposition.

The Court: Don't tell us why. You said you often carried five thousand dollars in your safe.

The Witness: That's right.

Q. Mr. Marcus, outside of this deposit slip, do you have any kind of record, account book, or anything else that shows a record that you kept of cash loans that you made to Milmar? A. I do not believe I have. I have looked for such a record, but I haven't been able to find such a record.

The Court: Did you ever keep one? That's important.

The Witness: No, sir; I did not.

The Court: How are you going to find it if you never kept one.

The Witness: Not to my recollection. I may have kept memorandums sometimes.

Q. Didn't you testify at one time in the depositions that your secretary kept such a list? A. No, not of my cash—not of my cash loans or anything of that kind. This would be my record right here, my duplicate deposit slip.

Q. I see. Will you look at exhibit DM-24, Mr. Marcus, and produce from this exhibit anything that you have there to support the item, April 11, 1947, $500? (1485) A. At this moment I can't see anything in the record here for that five hundred dollars. I may locate it a little later.

Q. All right. I direct your attention next to the item, June 20, $2,000, to Modern Industrial Bank. Will you

produce out of DM-24 whatever there is to support this item as a loan of Milmar? A. It's not here.

Q. The next item, Mr. Marcus, July 7, 1947, $3,000. A. It is not here.

Q. Next item, August 15, $3,500. A. It is not here.

Q. The next, September 2nd, $1,000. A. Here it is. This is a deposit slip.

Q. Dated September 2, 1947? A. That's correct.

Q. And you are relying on the first item that appears on that slip? A. That's correct.

Q. Now, the total of that slip is thirty-five hundred, right? A. That's correct.

Q. Consisting of a thousand cash— A. That's right.

(1486) Q. —and two checks, one of five hundred and the other of two thousand, right? A. That's correct.

Q. And your proof in support of this item are the initials "SM" in your handwriting along the figure, $1,000, right? A. That's correct.

Q. Outside of that initial on—withdraw the question. The "SM" was written on this deposit slip before or after the deposit was made? A. I made this deposit slip myself.

Q. Yes. A. This is my handwriting. The entire deposit slip is my handwriting.

The Court: When did you put "SM" in there, before or—

The Witness: On the date—on the day of making this deposit slip.

The Court: The same day.

The Witness: The same day; yes, sir.

The Court: Before you deposited it in the bank.

The Witness: Before I deposited it in the bank; yes, sir.

The Court: That's what he asked you.

(1487) *By Mr. Brigadier:*

Q. But it does not appear on the deposit slip which you gave to the bank, does it, it only appears on your copy? A. I wouldn't make these markings on the deposit slip you give to a bank. This is only for my own records.

Q. That's what I wanted to show. A. I don't think it would show on the deposit in the bank; of course not.

Q. This is only on your record. A. That's correct.

Q. Now, again, outside of this item, or this paper, do you have any record whatsoever anywhere of where the thousand dollars came from? A. I might have a record in my—I said before I looked as much as I could. This could be a part of my cash reserve, which I held, or it could be a check which I hurriedly cashed at the bank. I am trying to locate the check, but this could be part of my cash reserve.

Q. All right. The item of September 8, $100—I can facilitate this by telling you to look for a deposit slip dated September 8th. A. Yes, I see it.

Q. Is that the only evidence you have in that exhibit to support this one hundred dollars? (1488) A. That's correct.

Q. And again that's a hundred dollars in cash? A. That's right.

Q. And you were relying on the penciled or handwritten entry alongside of it as your proof, is that it? A. This is my—I made this deposit myself. This deposit slip is written in my handwriting.

Q. Will you tell us what the penciled handwriting says alongside the figure $100? A. "SM loan"—and that's in ink, "Loan, SM. Rent, two thousand and five hundred dollars," meaning the $2,500 is rent, the hundred dollars is loan from SM.

Q. Is the rent twenty-five or two? A. It's two thousand dollars rent and the five hundred dollars was some of the payments he made against the Markowitz notes, which he

was supposed to pay. He did make some payments against it.

Q. He did make some payments? A. Oh, yes; he made some payments against it.

Q. When you offered all those notes in evidence the other day, didn't you testify that you yourself had paid all those notes? A. Milmar paid all those notes. Miller repaid some of them to Milmar.

Q. I see. And again you have no other record (1489) except your own penciled note on this deposit slip to support that hundred dollar item, right? A. That's correct.

Q. Mr. Marcus, I direct your attention to the item, September 30, $1,500. You will find that your exhibit contains a check dated that date for a thousand dollars and a deposit slip. A. I have it.

Q. Is that right? A. That's correct.

Q. Now, will you tell us what you have to support the fifteen hundred in that exhibit. A. Yes, I should have—there is $2,500 there received from the Riviera, and it's a personal check of mine on the bank, Industrial Bank of Commerce, and five hundred dollars in cash.

Q. Now, again for the five hundred dollars cash you are relying on the entry in your handwriting on the deposit slip to support it; is that right? A. It's bracketed there, the check—

Q. You can answer my question. A. —and the five hundred dollars is bracketed—

Q. I didn't ask you about that. I am asking whether you are relying on this deposit slip as your evidence of the five hundred dollar cash loan? (1490) A. Yes, sir; I am.

Q. That's all I asked you. A. I'm sorry.

Q. The other question: Do you have any other record to establish that loan? A. I do not believe I have.

Q. That's your best answer. Mr. Marcus, I direct your attention to the item, November 5th, 1947, $5,820. Will you

produce from this exhibit whatever evidence there is in that exhibit that you rely on to support this item? A. Yes, sir. I had a deposit slip for that item, which broke up the item. Yes, I have it right here.

Q. All right. Now, what have you produced? A. There is a check for $5,500 from the Peace Light Company to Milmar Estates, Incorporated, and—

Q. That was certified, right? A. That's a certified check; yes, sir. —and $320 in cash, SM. That makes $5,820.

Q. Let's take this check first. The check is from Peace Light. A. That's correct.

Q. Wasn't the loan made by Peace Light? A. This loan was made by Peace Light and charged to me by the Peace Light Company.

(1491) Q. Have you any records of Peace Light, or of your own records, in any way to establish that this is a charge that is made against you personally? A. I do not have any records of Peace Light right now, no.

Q. So outside of just your testimony here, that is all we have to rely on. A. I believe that is the only record I would have; yes, sir.

Q. Mr. Marcus, were loans ever made by Peace Light to Milmar directly? A. Direct by Peace Light to Milmar?

Q. Yes. A. I don't recall whether there were or not. It is possible.

Q. Was there another company known as Peace Products, Inc., Mr. Marcus? A. There was; yes, sir.

Q. Was that connected in any way with Peace Light? A. That was—that company took over the Peace Light,—Peace Light, Incorporated, discontinued and Peace Products took over the operations of Peace Light, Incorporated.

Q. I show you a note dated March 15, 1948, for $1,000, and ask you whether that represented a note given (1492) by Milmar, signed by you as president, to Peace Products for a loan of a thousand dollars? A. This is evidently a return of a loan of a thousand dollars, yes.

Samuel Marcus—Defendant—Recalled—Cross

Q. This is a note that was given for the loan, isn't it? A. Frankly, I don't just know what this is at this particular moment.

Q. Look at it. A. For deposit in Peace Light, Inc., Peace Products, Inc. At this particular moment I can't tell you exactly what this is for. I might be able to refresh my memory at a later date.

Q. Just listen to my question. Is this note signed Milmar Estate, Inc., Sam Marcus, president? A. Yes, sir; it is.

Q. Is it for a thousand dollars? A. It is.

Q. Is it to the order of Peace Products? A. It is.

Q. Was it deposited by Peace Light? A. It was.

Q. And Peace Products? A. Yes, sir.

Q. And is it paid? (1431) A. Yes, sir.

Mr. Brigadier: That is all I wanted to know. Mark this for identification.

The Clerk: DME-56, note dated March 15, 1948, for identification.

(Marked Exhibit DME-56 for identification.)

Q. Now, turning to that deposit slip which you refer to as supporting this item of $5,820, your total deposit slip is for $8,320, is that right? A. That's correct.

Q. And you are claiming, of this total, that $5,820 of it represents personal loans by you? A. That's correct.

Q. Now, will you tell us how that is made up? A. It is made up of one check here of—it is made up of the check of Peace Light, Inc., for $5,500 and $320 in cash, deposited by me with the deposit.

Q. I see. And you have no other evidence of these two items except this slip and this check, is that it? A. That's about the only records I have of that, yes.

Q. No other record? A. That's right.

Q. Will you tell us what the handwriting is that appears on the slip to the left of the figure $5,500? A. Yes, it

reads on here, "Loan from Peace Light." (1494) And then there is some additional writing on here, "$3,000 Bill Miller, $2,500 Bill Miller."

Q. Well, now, Mr. Marcus, it doesn't say "loan from Sam Marcus," does it, it says, "loan from Peace Light"? A. That's correct.

Q. So actually it was Peace Light that was lending this money to Milmar Estates? A. That's correct.

Q. Didn't you testify a few moments ago that it was you who loaned it? A. I did loan it. This money was charged to me on Peace Light, so therefore I loaned it.

Q. Have you any record of any kind from Peace Light? They had books, didn't they? A. They had books, yes.

Q. Where are they? A. I don't know where they are at this time. We had quite a litigation at Peace Light.

Q. You can't bring us the books to show this loan? A. That's right.

Mr. Grosman: Maybe they are destroyed at the end of a year.

Mr. Brigadier: Well, I think you can wait, Judge.

Q. Mr. Marcus, the item of December 16, $1,500, (1495) you can look for a check which you have in the file there. A. Did you say December 16?

Q. Yes, sir. A. Oh. $1,500.

Q. You will find a check and deposit slip that you have offered. The deposit slip is December 16. A. I have it.

Q. You have it? A. That's right.

Q. Now, on that deposit slip the figure of 500 is cash again? A. That's right.

Q. And you have no other record for that cash except this deposit slip with your personal note— A. That's right.

Q. —of the word "personal"? A. That's right.

Q. Now, Mr. Marcus, this next item is December 2, six thousand, which we have already, I think, covered with you

once before. This is the one I think you are now ready to concede has been paid, is that right? A. We have credited that amount.

Q. You credited the payment? A. Yes, sir; we did.

Q. The December 2 item of $6,000? (1496) A. Yes, sir; we did.

Q. Where did you credit it, Mr. Marcus? A. We credited it to Bill Miller's Riviera.

Q. Wait a minute. Let me see if I can get this. I directed your attention to Schedule B, which is your loans to Milmar, right, and you have listed the item of December 2, $6,000, right? A. That's correct.

Q. Now, you tell me that you showed the receipt of the payment of that item in where?

The Court: In the other suit it is. In the complaint in the other suit. Against the Riviera, Exhibit A, Payments on Account.

Q. But you didn't set it up in the repayment of loans to Milmar? A. Frankly, there was probably some mixup in the items.

Q. Mr. Marcus, all I wanted to know— A. I am sorry; we did not, sir. Okay.

Q. So this is in error, is that it? A. It is an error, in compilation, yes.

Q. That is all we want to find out, what is correct and what is wrong. This is an error, as far as Milmar is concerned; the item of six thousand shouldn't be in there? A. I don't know whether it should be or not. I don't know whether that money was repaid—that six thousand was (1497) a repayment on Riviera or Milmar. That has to be straightened out first.

Q. Well, Mr. Marcus, didn't you concede the other day, when I produced the letter with the—the photostatic copy of a note, that that was paid? A. May I see that note again, please?

Q. Do we have to go over this again, Mr. Marcus? Did you get this Eli Quain check— A. Yes, that's correct.

Q. —totaling $6,000? A. Yes, sir; I did.

Q. And this is your handwriting, "Repaid"? A. Those checks were not given to Milmar, they were given to Sam Marcus, and therefore Sam Marcus credited Bill Miller's Riviera as part payment on the loans due me from the Riviera.

Q. But you have set it up in your handwriting in the Milmar deposit book, didn't you? A. I just set up a lot of entries in the Milmar deposit books to refresh my memory, certain transactions that were going on.

Q. That have nothing to do with Milmar? A. I don't know whether it did not not. I would have to refresh my memory.

The Court: That is very interesting. That is (1498) going to make it very interesting.

Q. Mr. Marcus, the next item, January 3, 1948, $808.33, you will find in Exhibit DM-24. A. I have it right here.

Q. A check? A. I have it right here.

The Court: Wait till he finishes the question, because your lawyer has to look it up and I have got to look it up.

The Witness: I see.

The Court: What Exhibit is it?

Mr. Brigadier: It is a check dated January 3, 1948, in this same Exhibit, the one I am questioning about.

The Court: DM-24.

Mr. Brigadier: DM-24.

Q. Would you produce that check? A. I have it right here, sir.

Q. Then let's fix this first. This is a check to the order of Michael Realty Corporation— A. That's correct.

Q. —for $808.30? A. That's correct.

Q. And drawn by Sam Marcus, individually? A. That's correct.

Q. And deposit by Michael Realty? (1499) A. That's correct.

Q. And this represents interest that was paid to Michael Realty on the mortgage? A. That's correct.

Q. And you say you loaned this money to Milmar? A. Yes, sir.

Q. And never got it back? A. I show what I got back here.

Q. Well, look and see whether you show whether you got this back. A. No, it doesn't show on here that I got this back.

Q. So that you are now asserting that this is a loan that you made to Milmar that has not been paid back? A. According to my records; yes, sir.

Q. What record are you going by, Mr. Marcus; anything other than this check? A. Yes, sir; I am going by a record of all the checks that Milmar issued from the day that I started signing checks for Milmar to the very last check, and these items will bear out your bank statement, will show every item on the bank statement—every item on the bank statement will be represented on this list and I merely go from this list to what items I drew as checks to me, and I have credited myself with those items. And you will find, Mr. Brigadier, that this list here will match your bank statements, (1500) check for check, in spite of the fact you say you don't have the canceled checks.

Q. That is the record that you are relying on? A. Yes, sir; I do.

Q. And that's the record you said that you got from whom, Mr. Hoffman? A. Oh, no. No, this is a record I made after the closing on September 14, a week or ten days after I sat down and started reconciling all my

records, my various checks, to see how much was coming to me from Milmar, so I would have some figure.

Frankly, I hadn't done anything on it in two years. And I gathered together all various checks which I had given out. I had five or six different corporations. I had issued checks sometimes in various corporations, people sometimes loaned me their personal check, which I deposited. And I gathered all loose ends together and tried to compile an exact amount of what Milmar owed me. And then I got together what I thought—between the deposit slips and the checks I had, I made a record of that—

The Court: A compilation.

A. (continuing) —compilation of that. And then I went ahead and made this record from the canceled checks which I had in my possession at that time.

The Court: That's enough.

(1501) A. (continuing) I made this record of all canceled checks in my possession—

Mr. Brigadier: Do you think we could stop at some point?

The Court: I started to smile. I wondered how long he would go on.

The Witness: Should I stop?

The Court: Mr. Tepper started to smile, too, and everybody else, so perhaps we had better stop him now.

Let me ask you one question. This is all very interesting. Was Mr. Hoffman the accountant here?

The Witness: Yes, sir; he was.

The Court: Did you and Miller ever sit down at any stated periods of time and have reckonings between you with the accountant present?

The Witness: Never did.

The Court: Did the accountant ever submit reports to you, or Miller, or both of you, a statement of account between you?

The Witness: The accountant—at the time—

The Court: Yes or no, please.

The Witness: Yes.

The Court: All right, that's enough.

The Witness: Just that one time.

By Mr. Brigadier:

(1502) Q. Mr. Marcus, this list of checks which you say contains a list of all the checks ever drawn by you up until September—what is the last date? A. This is up—

Q. Just answer the date. A. Let me tell you right here. This shows up to September 3.

Q. When did you prepare this list? A. A couple of—I prepared this list a week or ten days after the closing.

Q. After September 14? A. That's correct.

Q. Therefore, at that time there was in your possession every one of these canceled checks? A. Yes, sir; there were.

Q. Where are they? A. I ask you where are they.

Q. Mr. Marcus, you said that you would look last week to see if you could find them and produce them when I asked for the production of the canceled checks. A. Mr. Brigadier, you showed me several canceled checks. Therefore, they must be in your possession.

Q. The only checks I showed you—and you recall when I asked you to produce them—were the last month, when I said that we got the bank statement for the month of (1503) September, 1948, and I asked you to produce the checks up to August, and you said you would. A. Mr. Brigadier, you are incorrect. You did not get that statement of September. I got that September statement.

Samuel Marcus—Defendant—Recalled—Cross

Q. Where are the checks up to and including August, 1948, Mr. Marcus? A. You ask Mr. Hoffman where are they.

The Court: That's enough. He explained that once before, what he thought happened to them.

Mr. Brigadier: No, I never heard the explanation.

The Court: Yes, he claimed that Mr. Hoffman came up there some time when he wasn't even there, is that right?

The Witness: That's correct.

The Court: And he swept out all of the records of Milmar. That's what he said.

Mr. Tepper: I wish I had your Honor's memory, really.

The Court: I recall him saying it. He said he wasn't there. That's why I remember it.

Q. And that included all the checks, is that it, that you had up to the time? A. Mr. Hoffman took whatever record he wanted to take at that time. And from then on I never saw the canceled checks of Milmar.

(1504) Q. That's what I am asking you. So that prior to that time you had the checks, then when Hoffman came in, you never saw the checks again? A. That's correct.

Q. Now, will you place the date of that, as best you can? A. When Hoffman came in?

Q. Yes. A. Well, I would say the date should be some time after October 1.

Q. But Hoffman did not remove the checks that you produced, obviously, right? A. I didn't produce any checks of Milmar.

Q. You produced no Milmar checks at all? A. I don't believe I did.

Q. Are we going to have to go through that again? A. Oh, yes, I produced some '46 checks which—I think, Judge, you have that book there on the table that Hoffman—

Samuel Marcus—Defendant—Recalled—Cross

Mr. Brigadier: We will go through the record again later.

The Court: He did produce some.

The Witness: I produced them at the deposition, your Honor. Hoffman gave me a big book in '47, of the old checkbook they had in Fort Lee, and those checks were inserted in the book there, and I just produced everything I had. Your Honor has them right on the table.

(1505) Mr. Brigadier: And I have a question pending. I don't know what is going on.

The Court: He is explaining to you about the checks that he had, and how he had them. Would you like to hear it from Mr. Bremer?

Mr. Brigadier: I didn't hear that part.

The Witness: At the deposition—

The Court: Wait a minute. Will you let him hear what you said?

(Record read.)

The Court: All right. Now, by "those checks" you mean the Milmar checks?

The Witness: Milmar checks of 1946.

The Court: In that book?

The Witness: In that book. The book is right there

The Court: All right. That's all.

The Witness: They were just lying loose in the book.

Mr. Tepper: And it must also be remembered that the witness testified that he had the last statement—

Mr. Brigadier: What is this, a summing up in the middle of the case?

Mr. Tepper: No, but I wanted to call it to the Court's attention, that is all. Nobody is summing up, Mr. (1506) Brigadier, but you.

The Court: Suppose we take a five minute recess, And line them all up, will you, that you are going to ask him about.

(Short recess.)

By Mr. Brigadier:

Q. Mr. Marcus, the list of checks which you have produced for the first time today, out of your pocket, has been in your possession since the week following September 14, 1948, when you prepared it? A. Yes, sir; they were in my possession.

Q. Why wasn't it produced by you at the deposition, when we required you to produce all your records and papers? A. I just found these in the last few days. I spent three days in the warehouse going through tons of records there. I had overalls on, and I spent three days there—Friday, Saturday and Sunday—picking up every little scrap I could find. And I found these scraps in some other old papers and I picked them up and brought them with me.

Mr. Brigadier: If your Honor please, in view of the fact that we have been afforded no opportunity, as you see now, for discovery on this, may I request that we be furnished with a copy of this Exhibit? We have exchanged photostats on each side of every paper. I would suggest that Judge Grosman let me have a photostat of it. If not, I will (1507) have it photostated.

The Court: I am sure he will, if you have done it that way before.

Mr. Grosman: Now, your Honor, I make the same request with respect to the books of Milmar and the Riviera, and particularly this bank deposit book that he has been acting so very cagey about

Colloquy

Mr. Brigadier: I would be very glad to furnish you with a photostat of the bank deposit book. What else did you say? The Milmar books you have a photostat of. We have been through this four or five times.

Mr. Grosman: We want the Milmar books right down to date, so that Mr. Marcus can show exactly what is due to him to date.

Mr. Brigadier: We have furnished them and he has photostats up to September 14, 1948. Are we going to argue this again? I thought your Honor had ruled.

The Court: I thought I did, too.

Mr. Grosman: Well, now, your Honor has made a number of rulings. You remember when they came in here and obtained, on their application to have the bank loans paid, we were to have an opportunity to check those. We were never given that opportunity, because we never got the books.

The Court: Were they prevented from checking the (1508) bank loans?

Mr. Brigadier: No. You remember, your Honor ruled that until you decide the main part of the case—in other words, as to whether they have any rights after September 14, 1948, that they were to have no inspection or examination as to what occurred after September 14, 1948, because if your Honor should determine that he has no right of rescission, and that he isn't a stockholder, then he has no interest, no matter what our books may show of any transaction after September 15.

And I understood that after we get through this part of the case, your Honor will probably make some determination and at that time we will know whether or not he has any right to entitle him to go beyond that time.

But this has nothing to do with the cross examination of Samuel Marcus. He has suddenly produced a sheet of paper—

The Court: You made a simple request and I don't want to attach conditions to the compliance with it. Do you want to give them the photostats requested by Mr. Brigadier, or don't you want to give them to them?

Mr. Grosman: We have produced these—whatever records we have had all along. Now, whenever we ask them for records, they have no—

The Court: But these should have been produced (1509) before. I am willing to believe Mr. Marcus, that he just found them over this recess. Aren't they entitled to them? Because if he had found them before, they should have had them a long time ago.

Mr. Grosman: I suppose that is so.

The Court: Certainly. And I can understand, with these old records, what a job it is to dig them up sometimes.

He says he will produce them. You will produce a copy of that bank book for him, please?

Mr. Brigadier: Yes.

The Court: Well, the photostat people are going to do a good business out of this case, anyway.

Mr. Tepper: Doesn't it now become apparent that it is very important and material to all issues that the books of the Riviera and Milmar be produced down to date? It is no longer a case of trying to prove your right to see these books. This man has shown more than a right to these books. He has shown a proprietary right in these books. He has shown that he is entitled to—by these very books—and he has said time and time again, "Show me the books and I will prove to you, from your own records, that you owe me so much money, Riveria and Milmar."

Colloquy

And what is this protestation on their part not to show us these books? There isn't anything mysterious in those (1510) book, is there? There can't be.

The Court: I thought I had ruled that if I find that the contract was rescinded, and there was no contract, he can look at everything. And if I find that there was a contract, he will look at nothing, after he sold his entire interest in the corporation.

Mr. Tepper: How is he going to, with respect to the $46,000—

The Court: If you can demonstrate to me afterward that they are necessary, of course, I will give you permission to look at them.

Mr. Tepper: That's what I thought your Honor ruled. That's why I renewed the application.

The Court: You don't think, in the interest of justice, that I would prevent you from looking at anything you should see. But please don't renew the motion every three hours.

Mr. Tepper: But it becomes more apparent now with the—

The Court: You may need it, I don't know. I have learned, as a Judge, to hear all the evidence before I make up my mind. I never pre-judge anything.

Mr. Tepper: I am sure of that, your Honor.

The Court: I know Judge Grosman learned it the hard way, just the way I did.

(1511) Mr. Brigadier: If your Honor please, I can't possibly examine him on that list at this point, since I have never seen it before. It may be there will be no need to examine him, but I want the photostat so that I have the choice.

The Court: You heard what Judge Grosman said. He said you will have it.

Mr. Tepper: Would counsel like to look at them during recess, as they are? He can look at the original records, if he would like, during recess.

Mr. Brigadier: I have prepared my examination. I don't want to delay the case.

The Court: With what you have on hand, all right. We will proceed accordingly.

By Mr. Brigadier:

Q. Now, let's finish this list, Mr. Marcus. I am still on your schedule. The next item is February 3, 1948. Is there anything in Exhibit DM-24 to support that item, February 3, 1948, $600? A. I don't see anything here.

Q. The next item is February 5, $2,500. I think you produced a note. We might as well take the next one, because there are two notes. February 5, $2,500 and March 5, $2,500; is that right? A. Yes, sir. I have them right here.

(1512) Q. Those are notes made by you to Michael Realty? A. That's correct.

Q. Each in the sum of $2,500? A. That's correct.

Q. Both made on January 5, 1948, one due one month after date and the other one due two months after date, right? A. That's correct.

Q. Mr. Marcus, who paid these notes? A. I did.

Q. How did you pay them? A. They went through my bank.

Q. They were paid by your bank? A. Paid by my bank.

Q. The Industrial Bank of Commerce? A. That's correct.

Q. And you were relying on the "paid" stamp that appears on these two notes, right? A. That's correct.

Q. Do you have any other record to show that you actually paid these notes out of your account? A. I don't think I have.

Q. And that you hadn't received the money for these notes? A. I have no record of receiving any money.

(1513) Q. Now, the next item is March 8, $791. Is there anything in Exhibit DM-24 to support that item? A. No, there is not.

Q. The last one is the item of September 15, 1948, $50. Is there anything in that Exhibit to support that item? A. I believe there was. I believe there was a deposit slip that I made on September 15 for $50.

Q. Will you look and see? A. I thought it was shown in evidence. It isn't with this Exhibit, if that's what you mean.

The Court: He says it is not in this Exhibit, Mr. Brigadier but he thinks it is evidence.

The Witness: I believe it is, a deposit slip for $50 cash. We had to cover this check coming through.

Q. Mr. Marcus, I want to take you back to the item, January 3, 1948, $808.33, for which you produced a check to Michael Realty for the interest. A. That's correct.

Q. Do you remember my questioning you whether this was an individual loan by you and you said yes? A. Yes.

Q. And you said that you hadn't received it back? A. To the best of my recollections, because my records don't show its return.

(1514) Q. You have a list of all the Milmar checks, haven't you? A. Yes.

Q. Haven't you got a check in your list, July 16, 1948, to the order of Sam Marcus? A. No—July 16, I don't, no. I don't see anything on here to my order on July 16. From Milmar to me?

Q. Yes. A. I don't see anything from Milmar to me on July 16.

Q. Mr. Marcus— A. Excuse me. Is that '47 or '48?

Q. '48. A. Oh, '48. Excuse me.

Samuel Marcus—Defendant—Recalled—Cross

Q. July 16, 1948, is there a check drawn to the order of Sam Marcus on that date? A. I don't see anything on the 16th.

Q. Do you have a check indicated there at all for around that time for $1,696? A. Yes, I do. It's on--

Q. What is the date of it? A. I have it here July 12, $1,696.

Q. Mr. Marcus, is this your handwriting, the name Sam Marcus? A. Yes, sir; it is.

Q. And is this the handwriting—your handwriting, (1515) underneath it? A. That's right.

Q. Now, notice what it says. A. Return loan—

Q. Please, just take it easy. January 6, $808.33 interest, right? A. That's correct.

Q. $791.67, right? A. That's correct.

Q. Alongside of that I guess that's 33? A. That's right.

Q. Then comes interest, sixteen hundred? A. That's right.

Q. And it totals sixteen ninety-six? A. That's correct.

Q. So you got the money back, didn't you? A. Yes, we have got it marked here right on the schedule, repaid.

Q. Then do I understand that when you offered this batch of Exhibits in DM-24 that not all of them were intended by you as open loans, is that it? A. That's correct. The schedule so states.

Q. I am not talking about the schedule, I am talking about the Exhibit. When you offered this Exhibit, this Exhibit did not constitute the—only of the items that (1516) remain unpaid, is that right? A. No, I turned over all my checks that I had given to Milmar.

Q. So this contains all loans before crediting payments received, this Exhibit? A. That's correct.

Q. I didn't understand that, because the record doesn't say that.

Mr. Grosman: Now, before we do anything else—

Samuel Marcus—Defendant—Recalled—Cross

Mr. Brigadier Do I understand that is what you are doing, Judge Grosman?

Mr. Grosman: I don't know what you are referring to.

Mr. Brigadier: When you offered this Exhibit, DM-24, you said this is the Exhibit to support the loans that were made. I now understand that in that Exhibit it is conceded there are items that were paid, that against that—

Mr. Grosman: We give you credit on the statement.

Mr. Brigadier: I want that to be understood in the record, because the record didn't show that.

Mr. Grosman: I think the Judge understands that.

Mr. Brigadier: I mark this book for identification.

The Court: I certainly do now.

(1517) Mr. Brigadier: Mark that for identification.

The Clerk: DME-57 for identification, checkbook, Public National Bank & Trust Company.

(Marked Exhibit DME-57 for identification.)

Mr. Grosman: Whose checkbook is that?

Mr. Brigadier: Milmar. Well, I will have to represent that it is. It says so at the top.

Q. That is Milmar, isn't it, Mr. Marcus? A. Yes, I believe that is the last checkbook that Milmar had, that's right.

Mr. Brigadier: Do you want a photostat, Judge?

Mr. Grosman: I would like to know why that book wasn't produced when we asked them to produce — when your Honor ordered them to produce —

Mr. Brigadier: Wait a minute. That's not true.

Mr. Grosman: — the books prior — would you let me finish?

Colloquy

The Court: You don't even know what he is going to say. I don't, I'm sure.

Mr Grosman: —when they were requested to produce the books of Milmar prior to September 14, 1948, why that book wasn't produced.

Mr. Brigadier: I would like to reply. Number one, we were required to produce the account (1518) books. We produced the account books. That's number one. The reason this never came to be produced, if you look at the depositions, you will see that the depositions were interrupted just as I began cross examination on the papers that I had, and that examination was never resumed.

So it is not only this, there are several things, and as they came along I gave them to you. Now, this is the only thing that you haven't perhaps had, but your client has a list of everything in here. So he hasn't been injured in any way if he hasn't had it. And I am perfectly willing to supply you with a photostat of it.

Mr. Grosman: No, we would like to see the books.

Mr. Brigadier: What do you mean, the books. This is it.

Mr. Grosman: Well, maybe you will discover more books as you go along.

Mr. Brigadier: Why don't you wait and see if we do.

Mr. Grosman: Apparently there are books that they haven't told us anything about, and I think we are entitled to an explanation as to why they weren't produced. He says that is not an account book. It seems to me that a checkbook is an account book.

Mr. Brigadier: Sure we have other records, Judge Grosman. They are all in Marcus' warehouse, when and (1519) if he discovers them.

Mr. Grosman: That wasn't in his warehouse.

Mr. Brigadier: This is all we were left with. All our canceled checks are gone. Even the checks for this period are gone.

The Court: This is all interesting. Are you going to give him a photostatic copy of that?

Mr. Brigadier: Yes.

The Court: All right. If you produce any more, you give him a photostatic copy.

Mr. Brigadier: All right.

I will have to do this, we will have to go through the repayments, if your Honor please, because I didn't know up till now that these are credits against these vouchers.

By Mr. Brigadier:

Q. Mr. Marcus, could you give us a quick rundown of this schedule so that it won't delay it any longer; will you take your repayment schedule and tell me how you made each of these repayments, just very quickly, if you can? Take the first item, January, 1947, $3,500. A. Now, on here I see, "January, SM returned loan, $3,500."

Q. How did you return it?

Mr. Grosman: What are you looking at?

(1520) The Witness: I am looking at my schedule, and checking it with yours.

Q. You mean your schedule— A. Of the checks issued.

Mr. Brigadier: Let's mark that for identification so we will know what you are referring to.

Mr. Tepper: I take it that only the face of that document is marked for identification. There is something else on the back of it.

The Court: He just said he did calculating on the back.

Samuel Marcus—Defendant—Recalled—Cross

The Witness: The back has some other figures, some accountant's figures. It is nothing pertinent to this.

The Clerk: DM-34 for identification—how would you identify it?

The Witness: I say it is a schedule of all the checks issued by Milmar during '47 and '48 up to September—up to October 1, 1948.

The Clerk: DM-34 for identification, schedule of checks issued.

(Marked DM-34 for identification.)

A. Now, we have in January, I think I mentioned, $3,500.

Q. That you got a check from Milmar to you, is (1521) that it? A. Yes, sir; that's correct.

Q. All right. Next, sir. A. We have here in March, $1,500.

Q. Check from Milmar to you? A. $1,500. And I have in July, $3,000.

Q. Would you fill in these dates? The dates are going to become important. Will you give us the January date? A. January, I don't have the date—I didn't have the date on here in January. In March it's the 12th.

Q. March 12, $1,500? A. $1,500. And then I have July—it looks like July 21, $3,000.

Q. That is also a check drawn Milmar to you? A. Milmar check drawn to me. Then we have, on August 12, $3,500.

Q. Again a Milmar check to you? A. Milmar check drawn to me. Then on September 30 we have check of $3,000, drawn to the 42nd Street Photoshop, Inc. That was a cash exchange check that 42nd Street Photoshop had given to Milmar. It is on the books of the 42nd Street Photoshop.

Q. I don't get that. Just hold it a minute. Will you read that.

(1522) (Answer read.)

Q. And you have a check drawn— A. I have a check drawn by the 42nd Street Photoshop to Milmar for $3,000.

Q. Wait a minute. A. It's a repayment. This would represent one of the loans.

Q. Just take it easy. We are taking checks of Milmar to people, right; so it is not a check of 42nd Street to Milmar, it must be Milmar to 42nd Street, right? A. This is a check to 42nd Street Photoshop.

Q. That's all I want. A. I am accepting it as my payment, repaid to me. It is right on here, Mr. Brigadier, September, $3,000.

Q. Next. A. Next is July 6, I think it is, $5,000. And then we have July 12, $1,696.

Then we have that memorandum here of that Geffner exchange check, which is $2,500. There is no entry in here, because it was merely a cash exchange—

Q. It has nothing to do with this list of payments, so let's stick to what I am questioning you about A. All right.

Q. Mr. Marcus, when you prepared this schedule which is annexed to your coun[illegible]relaim, you had not discovered (1523) this sheet tha[illegible] is in front of you, DM-34 for identification, right? A. No, sir; I did not.

Q. Where did you get the items of the repayments from for this schedule? A. I got them from my deposit slips, my personal deposit slips, bank deposit slips.

Q. You went through all your personal bank deposit slips? A. Yes, sir; I did.

Q. And figured out from those the repayments? A. And I checked each deposit slip to see where I would have a repayment from the Riviera, or payment from Milmar, and calculated these figures, and gave them to Mr. Grosman.

Q. And you also had to go through the deposit slips of the Photoshop? A. Photoshop had a record. One of the bookkeepers—I don't remember just what it was—gave me a memorandum one time of certain charges that were charged to me, and there were some checks that were chargd to me, and one of those checks was the item of $3,000 to Milmar, chargd to my personal account. And the repayment was credited to my personal account. He just gave me a record of that sheet.

Q. And that is in answer to the question I just put to you? (1524) A. Isn't it, sir?

Q. All right. A. If I haven't answered—I thought I did.

Q. Oh, you did more than answer it. A. I'm sorry.

Mr. Brigadier: I am trying to discourage these speeches and to get answers to the questions.

The Witness: I don't want to be evasive, Mr. Brigadier; I am trying to give you an honest answer without being avasive.

The Court: You are very fulsome.

Q. Mr. Marcus, where are these deposit slips? A. I believe I have them with me.

Q. In court? A. I believe they are in court. If I am not mistaken, we showed them in our deposition.

Q. During the luncheon recess will you get them together and produce them when you get back to the stand? A. Surely, I will.

Q. Now, within a week after September 14, 1948, as I understand your testimony now, you prepared DM-34, right? A. What is DM-34?

Q. That's your list, DM-34 for identification. A. This here. I would say within about a week.

(1525) Q. Just yes or no. A. Within about a week or ten days; yes, sir.

Samuel Marcus—Defendant—Recalled—Cross

Q. Then I understood your testimony before that at that time you computed, when you prepared this list, all the moneys that were due you from Milmar, is that right? A. I couldn't—at that time I didn't have complete compilations.

Q. Did you make any compilation? A. I made some work sheets on it, if that's what you mean.

Q. Did you testify, Mr. Marcus, when you first produced this Exhibit, that after it had been prepared that you then made compilations of the loans that were due you from Milmar? A. That's right.

Q. All right. Will you tell me why when your deposition was taken, beginning December, 1951, and continuing through March of the following year, when you were asked, at least on a dozen occasions, to state whether you had any claims whatsoever against Milmar you stated that you were unable to do so, or you didn't know, or you were unprepared to do so?

Mr. Tepper: He stated in the answer, and the record will show, without the production of the books, that Mr. Marcus persisted right along, "Before I can give you (1526) a full and complete answer, show me the books." That was his answer, not what counsel says.

The Court: Was that your answer, Mr. Marcus?

The Witness: I answered two separate times, your Honor. One time I told them—

The Court: Was that the answer that you made, substantially, what Mr. Tepper said?

The Witness: Yes, sir; I did.

The Court: That is all I want to know.

Mr. Brigadier: Let me pass this by and later read—as I offered to do originally, when I got to the end—I will read from the depositions the portions, because this runs over page, after page, after page.

Samuel Marcus—Defendant—Recalled—Cross

The Court: Yes, sir.

Mr. Brigadier: I will reserve, with your Honor's permission, the right to do that.

Q. When did you first call upon Mr. Schwartz subsequent to September 14, 1948, to turn over the file to you? A. That would be some time—some time after I was served with some legal papers.

Q. Was it after the suit was brought in New Jersey? A. I believe that would be correct. My New York attorney would have his records on that—it would serve better than my memory.

(1527) Q. I have you on the witness stand right now, Mr. Marcus. Just try to answer these questions as best you can.

Mr. Schwartz retained the possession of whatever documents were executed on September 14, 1948, as I understood your direct testimony, until after the action was brought in New Jersey, the present action of interpleader against you, right? A. I believe that's correct.

Q. And that was brought in December, 1950? A. I wouldn't know the exact date. If that's the date.

Q. If I tell you that is the date, would that— A. If that's the date, I suppose it's so.

Q. Now, prior to December, 1950, had you ever communicated with Mr. Schwartz about this transaction, between September 14, 1948, and December, 1950, when this suit was brought? A. I don't recall any particular conversations with Mr. Schwartz, unless I may have said to him, "Are you checking up whether they are making payments on the mortgage," is probably the only conversation that I recall having with him.

Q. Now, you made reference in your direct examination to the fact that you monitored certain conversations that you had with Robert Schwartz. I assume (1528) that

these are all subsequent to December, 1950, is that right? A. I believe that is so.

Q. Now, I still want to deal with the interval between September 14, 1948, and December, 1950. You say that during that interval you at no time spoke to Mr. Schwartz about this transaction, except possibly to find out whether the mortgage installments or interest were paid? A. I don't recall any particular conversation—

The Court: Don't repeat it again, you don't recall the conversation, except about the mortgage payments?

The Witness: That's correct.

Q. When was it, Mr. Marcus, that you first decided that you had been defrauded on September 14, 1948? A. Oh, I think I mentioned before it was possibly a year or a year and a half afterwards, when I heard stories through the grapevine; the fact when I spoke to people in my—

Q. Don't let's go over that. A. About a year—

Q. I asked you when. A. About a year or a year and a half after the consummation of this transaction.

(1529) Q. All right. So that would bring that approximately between September, 1949—is that right, that would be a year? A. That's right.

Q. —and within a range of six months thereafter into 1950, right? A. I believe that would be a fair assumption.

Q. Now, when you became convinced, or came to the conclusion that you had been defrauded, did you go to see Mr. Schwartz? A. I don't—at that time I think I discontinued doing business with Mr. Schwartz. I had a new attorney then, if I am not mistaken.

Q. Now let's see. A. I believe—I had had a lot of differences with Mr. Schwartz, with his method of handling a lot of my cases, and I took all of my business out of his office.

Q. Just try to answer my questions directly. Did you go to see Mr. Schwartz? A. With reference to the fraud?

Q. That's right. A. I do not believe I spoke to him with reference to this at all.

Q. Now, up to this point, the early part of 1950, you haven't yet seen what is in the papers in the file, (1530) isn't that right? A. That's correct.

Q. Those papers are in Mr. Schwartz' office? A. That's correct.

Q. So up to this point you have on reason to suspect that you have been imposed upon with respect to the documents that were signed on September 14, is that right? A. That's correct.

Q. Because actually you don't discover that you are imposed upon until after you get to see what is in that file, isn't that right?

Mr. Grosman: I object to that question as argumentative.

Mr. Brigadier: I don't think it is argumentative.

Mr. Grosman: He wants to conclude this hearing some time in the foreseeable future, and he is not doing it by asking questions of this sort.

Mr. Brigadier I think it is a perfectly valid question, sir. What I am trying to establish—and I think it is perfectly obvious what I am trying to establish—is that prior to this time he couldn't possibly have blamed Schwartz for anything that was in those papers, because he didn't know what was in those papers. And certainly that is a very crucial issue in the case.

(1531) Mr. Tepper: I think the facts should be produced, and it is for your Honor to determine whether or not he has been imposed upon, or if there has been fraud committed. That is the heart of this case. It is not for this witness on cross examination to respond—

Samuel Marcus—Defendant—Recalled—Cross

The Court: He wanted to know when he suspected or when he first became conscious of the fact that he might have been defrauded. That is what he is trying to find out. You all know why.

Mr. Grosman: He has asked him that two or three times and he has answered.

The Court: Some time between September, 1949, and six months thereafter.

Mr. Brigadier: And six months thereafter.

The Court: And by that time you had already changed your lawyer, is that right?

The Witness: That's right. Yes, your Honor.

Q. That was when you retained Mr. Roth, right? A. That's correct.

Q. And did you go to see Mr. Schwartz then after you retained Mr. Roth? A. I called up Mr. Schwartz—

Mr. Grosman: Did you, Mr. Marcus?

The Witness: I called Mr. Schwartz.

Q. Yes. What did you tell him? (1532) A. (continuing) —and told him I had received—

Mr. Grosman: I suppose I should object.

The Court: Don't bother. We will get through sooner.

A. (continuing) —had received some papers with reference to the Riviera, I would like to meet with him and go over the transaction, because I have completely forgotten anything that happened that day.

Q. Wait a minute, Mr. Marcus. We are getting all bolixed up here. The papers in the Riviera suit weren't served on you until December, 1950. We are now talking about from September, 1949—with the six-month period following September, 1949, you said you retained Roth? A. That's correct.

Samuel Marcus—Defendant—Recalled—Cross

Q. So don't tell me about December, 1950. I am asking you whether at the time—

Mr. Tepper: I don't think counsel should argue with the witness. "Don't tell me"—that's argumentative. And I think it is unfair to approach a witness in that fashion.

(Discussion off the record.)

Q. Mr. Marcus, you said you became conscious of the fraud within a year to a year and a half after September 14, right? (1533) A. Mr. Brigadier, don't hold me down too closely.

The Court: Roughly.

A. (continuing) Roughly, I'd say about a year and a half, maybe longer, sooner or later, but I'd say it's in a year and a half period, yes.

Q. All right. You fix it as best you can. A. Mr. Roth was my—

Q. The suit was brought against you in December, 1950. Now, certainly in relation to that date when you were served with the summons and complaint in the present suit, you can tell us how long prior to that date you had consulted with Mr. Roth. A. Frankly, I can't place the exact date at all. This is something—

Q. Six months prior? A. Prior to the suit?

Q. Yes. A. It may have been a few months prior. I don't recall the exact time, but it was somewhere during that year, early or later, I can't place the exact date. Maybe Mr. Roth can help you.

Q. All right. Let's see now. When you got served with the summons and complaint in the interpleader action, to whom did you take the summons and complaint to represent you in this matter? (1534) A. I believe I took it to Mr. Roth.

Samuel Marcus—Defendant—Recalled—Cross

Q. Didn't you take it first to Robert Schwartz? A. I do not think so.

Q. Well, now, let's see if we can refresh your recollection.

Mr. Brigadier: I have to use your Honor's file.

The Court: You may. Take whatever you want.

Mr. Brigadier: Get me the appearance of Hannoch and Lasser in this case on behalf of Mr. Marcus.

(Document handed to counsel.)

Q. I show you, Mr. Marcus, an order entered in this cause on the 15th day of January, 1951. Do you see that? A. Yes.

Q. And you will notice that there appears for Hannoch and Lasser—Hannoch and Lasser appear as the attorneys for Samuel Marcus by Aaron Lasser, is that right? A. Yes.

Q. All right. Now, does that serve to refresh your recollection as to whether, when you were served with the summons and complaint in this matter, you took it to Robert Schwartz? A. I do not believe I did.

Q. Robert Schwartz did not engage Hannoch and (1535) Lasser for you? A. I do not believe he did.

Q. I do not believe he did.

Q. Who did? A. I don't know. I believe, to the best of my recollections, I had Mr. Roth handle the matter for me.

Q. To the best of your recollection it was Mr. Roth who retained, on your behalf, Hannoch and Lasser? A. To the best of my recollections, I turned this matter over to Mr. Roth.

The Court: Well, do you know who retained Hannoch and Lasser for you?

The Witness: Frankly, I can't place them right now.

The Court: The names don't mean anything to you?

The Witness: The names don't mean anything to me; no, sir. Your Honor, I can't think of it. Maybe Mr. Roth might know something about it. I don't.

Q. Let me ask you, is it at all possible that Mr. Schwartz retained Hannoch and Lasser?

Mr. Grosman: I object to what Schwartz—

Q. According to your recollection.

The Court: If he never spoke to Mr. Schwartz about this suit—

Mr. Brigadier: That's what I am trying to find (1536) out.

The Court: —and he never turned the papers over to Mr. Schwartz, as he says, how could Mr. Schwartz retain Hannoch and Lasser?

Mr. Brigadier: If I have contrary information, I have to question him about it.

The Court: Yes. You heard what he said.

The Witness: To the best of my recollections—

Mr. Tepper: To assist the Court—

The Court: You don't have to recall that. You certainly would know if Mr. Schwartz retained Hannoch and Lasser for you, or whether Mr. Roth did. Don't you know that?

The Witness: My firm belief is that I turned the matter over to Mr. Roth. That is all I can think about, sir. I can't remember getting Mr. Schwartz to handle this, because I had taken all my business away from him at that time.

The Court: Prior to that time?

The Witness: Prior to that time; yes, your Honor.

Samuel Marcus—Defendant—Recalled—Cross

Mr. Tepper: To assist the Court in expediting this matter, if Mr. Brigadier would like to have Mr. Roth state to him that it was he—he tells me how—who went over to Mr. Lasser's office to retain him, he will state (1537) so for the record, under oath or otherwise, if he wants it. I didn't know it until just now, but here it is.

Mr. Roth: Mr. Schwartz suggested the name of Aaron Lasser to me. And I went to consult, Mr. Lasser. If I may state, sir—

Mr. Brigadier: Yes, I would like to know.

The Court: He would like to know how it came about.

Mr. Brigadier: Yes.

Mr. Roth: I went to consult with Mr. Lasser. Actually, they were never retained. They were considering the matter and they put in an appearance to get an extension of time. They and I did not see eye to eye with respect to fees, with the result that the file thereafter was turned over to Judge Grosman.

Mr. Brigadier: May I just ask you one question—if we can make this part of your question—why you spoke to Mr. Schwartz about it? You say it was at his suggestion.

Mr. Roth: Because Mr. Marcus and I went together to Mr. Schwartz' office, and we got the file on that occasion. And I can give you the exact date by referring to my diary, sir.

Mr. Brigadier: I see.

Q. So that the names of Hannoch and Lasser were originally suggested by Mr. Schwartz, as I understand it? (1538) A. I don't recall it at all.

The Court: To Mr. Roth.

Mr. Brigadier: To Mr. Roth with Mr. Marcus present. Is that right?

Mr. Roth: Well, yes, he was there on that occasion.

Q. Now, Mr. Marcus, did you ever go to see Mr. Schwartz after this suit was started to discuss your claim with respect to this transaction? A. I called Mr. Schwartz on the telephone.

Q. Yes. A. I asked Mr. Schwartz—

Mr. Grosman: Well, now, if your Honor please, I think we ought to call a halt to this. This is what he told Mr. Schwartz, who was then his attorney, and what he told him.

Mr. Brigadier: On what theory?

Mr. Grosman: On the theory that the relationship between attorney and client is privileged.

Mr. Brigadier: In the first place, he has already testified that the relationship between the attorney and client had already terminated. When he got Mr. Roth into the case, he said Mr. Schwartz was no longer his lawyer. So I am asking him about conversations that took place after Mr Schwartz was no longer his attorney.

(1539) In the second place, we have been all over this. Your Honor has ruled already on it.

The Court: Oh, both of you have broken the privilege so many times, it is ridiculous to raise it any more. I don't know why you keep doing it. Each one has told what has happened innumberable times, and they give contrary versions of what's happened, too, very contrary versions.

Mr. Grosman: And, furthermore, your Honor, that is not proper cross examination. If he wants to produce Schwartz, let him produce him. Mr. Marcus only touched upon the Schwartz incident very briefly. And I don't think we ought to go into that at this time.

Samuel Marcus—Defendant—Recalled—Cross

Mr. Brigadier: He even referred to the fact that he took monitored conversations. I have a perfect right to question him because he is a party to the suit.

The Court: The objection is overruled. Proceed. What is the question?

(Record read.)

The Court: Go ahead, Mr. Marcus.

A. (continuing) I asked Mr. Schwartz could he arrange a meeting with me, that I am completely blank of what happened on this September 14, could he please arrange a meeting with me and discuss with me exactly what occurred on September 14. He told me that he didn't have time to see (1540) me this week and I should call him again next week.

I called him again—

Q. Now, before you get to the next call, all I want to know is, was this first call monitored? A. It was not.

Q. All right. Now, go on. A. I called him a second time, asked him would he please meet with me and go over these things that happened—show me—go over the things that happened, and so forth.

Again he told me that he was busy and didn't have time, and he will let me know when he can see me.

Q. And this call was, likewise, not monitored? A. That was not monitored.

And I called him a third time, and again he was completely evasive, wouldn't—just told me, "Don't come up; busy today; see you tomorrow. I will call you when I got time." That was his general answers to two or three of my telephone conversations.

Q. Now, as best you can, will you fix the time, in relation to the commencement of the suit against you, as to when these conversations took place, a month, two months, three

months, whatever the period was? A. Practically immediately afterwards my attorneys asked me—Mr. Roth, Mr. Grosman, and all—they asked me what (1541) happened that day. And I said, "Frankly, I am trying to get hold of Schwartz and find out what happened myself. I am completely in a fog here."

Q. And what did you do next? A. And I became fairly convinced that Mr. Schwartz was giving me a run-around. So, therefore, I had one of my switchboard operators try to get Mr. Schwartz for me, and I told my secretary to listen in on the conversation.

Q. Which secretary, please? A. Miss Bergler.

Q. And to take down notes? A. What's that?

Q. Did you tell her to take down shorthand notes? A. I did.

The Court: Was this after it appeared to you that he didn't want to see you, or tell you about it, is that it?

The Witness: That's correct, your Honor.

The Court: All right. Go ahead.

A. (continuing) I told Miss Bergler, "I have a suspicion Mr. Schwartz here is trying to avoid me," and that, "frankly, what we ought to do from now on is to monitor any telephone conversation that we have between him and me."

Then we finally got him on the phone again.

Q. What was the date, since you have it monitored? (1542) A. Frankly, I don't recall the date. I have memorandums of the date. I don't have it with me now, and I can't place the date for you.

Q. No memorandum here in court? A. I don't know whether Judge Grosman has them or not. I gave Judge

Grosman memorandums of the dates. And I don't know whether he has them with him or not.

Q. Why don't you ask Judge Grosman? I would like to get the dates. I think they are very important.

Mr. Grosman: It will take me a half hour to go through my files.

Mr. Brigadier: Will you do it during the luncheon recess?

Mr. Grosman: I will not. During the luncheon recess I expect to eat my lunch.

Mr. Brigadier: If your Honor please, I think I am entitled to have the benefit of something they have in their possession. The dates here are of very crucial importance.

The Court: I know, but I don't think that I can order Judge Grosman to give up his lunch hour to go digging through records.

Mr. Brigadier: All I know is that I have gone through my records during his entire direct examination—you know I did—and furnished him again and again with (1543) documents.

The Court: I know you did, but I wouldn't compel you to do it, either, during the lunch hour.

Mr. Grosman: You didn't during lunch hour.

Mr. Brigadier: It will only delay the finish.

Mr. Grosman: I will go through my records, but he wants it on the spur of the moment, and I can't give it to him.

Mr. Brigadier: I didn't say the spur of the moment. I am willing to wait until after lunch.

The Court: Will you try to get them for him?

Mr. Grosman: I will get them for you.

By Mr. Brigadier:

Q. Will you tell us what is your best recollection at this time as to when the monitored conversations took place,

remembering that the suit was brought in December, 1950? A. It took—one of those conversations took place over a period of a year or a year and a half, I would say.

Q. What was the date of this one? A. Frankly, I can't recall it at all, the exact date.

Q. Whether it was six months, nine months, you don't remember? A. No, I don't. The dates would show on the memorandums I gave to Judge Grosman. I can't place the dates at all, (1544) at this particular moment.

Q. Will you tell us what occurred in this monitored conversation? A. Well, I can't recall—I can't tell you exactly what occurred. There were four or five conversations that we had.

Q. Tell me about this first one. A. One mixes with another.

Q. Just listen to my question, Mr. Marcus, will you please? A. Yes.

Q. Will you please tell me, to the best of your recollection, the contents of the first monitored conversation. A. If I am not mistaken, the first conversation that we had with reference to that is when I accused Mr. Schwartz of being evasive, and not wanting to meet with me, and he claimed it wasn't so, "you can always see me," and things of that kind. And then I said something to him, "I want to see you and talk to you about this Riviera deal." And there was some—he made some remark to me, "I can't see you till I see Bill Biller first."

I says, "What the devil do you mean, you got to see Bill Miller first before you talk to me? Who was your client, me or Bill Miller?"

(1545) I don't recall his answer at that particular time, but I do definitely remember that particular remark, which got me as high as a kite.

Q. Well, did you— A. That's I believe, was one of our first conversations.

Samuel Marcus—Defendant—Recalled—Cross

Q. Did you arrange for a meeting with Mr. Schwartz in this conversation? A. No, I do not believe we had a meeting after that conversation.

Q. Did you ask him for a meeting? A. We asked him for it. I don't think—I don't recall what came of it. I believe he was just as evasive about a meeting as he was before.

The Court: Did he give you any reason why he had to see Bill Miller first.

The Witness: Well, it was just a slip of his tongue, or whatever—he said, "I can't see you till I see Bill Miller first." And I said, "What do you mean, you got to see Bill Miller first?" I said, "Who was your client, me or Bill Miller?"

"I don't know Sam. I am busy right now. I will get together with you." Whatever the telephone—we had this conversation—

The Court: In other words, he didn't give you a reason.

(1546) The Witness: He didn't give me a reason; no, sir.

The Court: All right.

By Mr. Brigadier:

Q. Now, Mr. Marcus, you were endeavoring to have a meeting with Mr. Schwartz to find out what you could about your claim, right? A. I tried to find out—to get him to tell me what happened at that meeting.

Q. That's right. And you were trying to arrange a face to face meeting with him? A. That's correct.

Q. What about your lawyer, was he coming along with you? A. I don't remember what I told Mr. Roth. I believe I told Mr. Roth that Mr. Schwartz was evasive. I don't recall his answer to me at the time.

Q. Was there ever any meeting arranged by you with Mr. Roth in meeting Mr. Schwartz? A. Yes, sir; there was.

Samuel Marcus—Defendant—Recalled—Cross

Q. When did that meeting take place? A. That meeting took place when I—after Mr. Schwartz sent me that letter of May, 1948, and I ran down to his office and demanded to know, "What is the reason of this date on this letter?"

(1547) Q. You are now talking of 1953-'54, aren't you? A. That's the first meeting we had with Mr. Roth.

Q. That's what I am trying to find out. So that from September—

The Court: Let him answer.

Mr. Brigadier: I know what he is referring to.

Mr. Grosman: I want the record to show.

The Court: That May, 1949, letter which was misstated to be '48.

The Witness: That's the first time I was in Mr. Schwartz' office with reference to that letter.

Q. And that would have been some time in 1953, right? Or '54, rather, last year? A. No, that wasn't '54. That would be back in '52 or '53.

Q. When you went with Mr. Roth? A. No, I am talking about the first time I met Mr. Schwartz was the time I went down to see him about the letter he mailed to me. Then—

Q. Please listen to my question again.

The Court: He wants to know when you went down with Mr. Roth the first time.

Q. That's right. A. The first time I went down with Mr. Roth was the time I demanded—over the telephone, which is also (1548) monitored—I demanded that he give Mr. Roth any documents which he has shown the opposing side.

Q. And that was in 1954, was it not, last year? A. I don't know whether it was '54 or '53. I am not too definite about that.

Samuel Marcus—Defendant—Recalled—Cross

Q. Between December, 1950, and 1953—let's take your notes—did you ever go to Mr. Schwartz' office with Mr. Roth to get a statement from Mr. Schwartz as to what had occurred on September 14, or an explanation? A. Mr. Roth was not my attorney in these transactions, in this Milmar thing. Judge Grosman was my attorney in the handling of Milmar matters.

Q. Now, you heard Mr. Roth make the statement that in December, 1950, he went and retained Hannoch and Lasser as attorneys for you, right? A. Yes, sir; I did.

Q. So you had conferred with Mr. Roth already, hadn't you? A. Yes, sir; that's right, I did.

Q. In New York? A. That's right.

Q. And you testified on direct examination that Mr. Roth was the lawyer you went to when you became suspicious about the fraud, isn't that right? A. That's correct.

(1549) Q. Now listen to my question. You got served with this suit in December, 1950. The first time you go to see Mr. Schwartz with Mr. Roth is in 1953, is that right? A. Mr. Roth would have the date, I suppose. That would be correct, some time around there.

Q. In that interval of three years did you ever go with Mr. Schwartz—with Mr. Roth, or go alone and demand from Mr. Schwartz an explanation of the meaning of these documents that had in the meanwhile been delivered to you? A. We did not.

Q. You did not. After this first monitored conversation, did other monitored conversations take place? A. Yes, sir; they did.

Q. And when were those? A. Well, one was with him weeks or months of the first one, and another one was approximately a year later, I believe.

Q. Will you tell us the substance of the second monitored conversation? A. Frankly, I cannot recall the substance at all right at this moment. There was intermin-

gling of three or four telephone conversations, and I can't recall any other substance at this moment.

(1550) Yes, there was one remark when I spoke to him about something. He said, "You know, you gave me an awful dirty deal on that 32nd Street proposition." I said, "What are you talking about, Bob?" He says, "You know, that deal where you were supposed to"—Oh, I don't know what he said—"hold the money for a couple of years. And you paid me off too soon, and made me go to a lot of trouble drawing up a lot of papers, and I didn't get enough—"

Q. Mr. Marcus, what I want to know is, was there anything in this monitored conversation that pertains to Milmar, Riviera—you know what I am trying to ask you, Mr. Marcus. A. Frankly, the conversations—the memorandums that I have, which I can't particularly think what was what—we spoke—at one time I asked him for—does he have the canceled check that he gave me; who was it made out to, Milmar, or what is made out to me? He told me he couldn't find the check.

Another time I asked him—

Q. This is another monitored conversation you are giving us? A. I believe it is. I believe every conversation I had with Mr. Schwartz after a certain day, when I became suspicious of him, I tried to—if someone was around—(1551) to have it monitored.

Q. Mr. Marcus, when did you last look at the memorandum that you have of the monitored conversations? A. I hadn't looked at it since I gave it to Judge Grosman—whenever it was—a year or two years ago.

Q. And you haven't looked at it for this trial? A. I haven't looked at it since; no, sir.

Q. Now, when Judge Grosman and Mr. Tepper were substituted for Hannoch and Lesser, did you then go to see Mr. Schwartz again, or speak to him? A. I did.

Q. And was that in person or by telephone? A. I called Mr.—

Mr. Grosman: Answer the question, please.

A. By telephone.

Q. And was that call monitored? A. I don't recall whether it is or not. It may be.

Q. I see. What did you say to him and what did he say to you? A. I said to him that my attorneys in Jersey would very much like to have a word with him with reference to the transaction of September 14, could he possibly find the time? I will be happy to pay him whatever his fees are for his day's time that would be involved to go over and see my attorney.

(1552) Q. Now, Mr. Marcus, I want to try and fix the date of this. Let's see if we can fix it. Wasn't this after you had started testifying at depositions? A. Yes, I believe it was after; that's right.

Q. You had testified on several different occasions on depositions? A. I believe that's true.

Q. When you talked to Mr. Schwartz and invited him to come over, is that right? A. That's right.

Q. Now, it was at the taking of these depositions that you were certainly confronted with all of these various documents of September 14, right? A. That's correct.

Q. So at that time you already knew there were documents as to which you had a number of questions to raise, right? A. That's correct.

Q. That you didn't understand them, and that was your testimony in the depositions, isn't that right? A. That's correct.

Q. Did you tell that to Mr. Schwartz on the telephone when you asked him to come over? A. I merely asked him to come over and speak to Judge Grosman.

(1553) Q. You didn't tell him anything about the depositions that had been taken or the documents that you had

been confronted with that you didn't understand? A. I didn't say anything at all to him at that time other than would he come over and talk to Judge Grosman.

Q. And did he come over? A. He did.

Q. And who was present? A. Judge Grosman and myself.

Q. And who else? A. No one else.

Q. Mr. Schwartz? A. And Mr. Schwartz.

Q. No one else was in the room? A. I don't recall anyone else in the room.

Q. Mr. Tepper was not there? A. Mr. Tepper was not there.

Q. Mr. Verney of Mr. Tepper's office? A. He was not there.

Q. He was not there? A. That's right.

Q. Now, will you tell us what occurred in that room? A. I don't recall the conversation other than that Judge Grosman asked Mr. Schwartz several questions. And, frankly, I didn't mix into their conversation whatsoever.

(1554) Q. Do you know whether any portion of your deposition was read to Mr. Schwartz while you were there? A. It was not.

Q. No portion of it? A. No portion whatsoever.

Q. Did Judge Grosman make any statements to Mr. Schwartz about the transaction of September 14, 1948? A. To the best of my recollections, Judge Grosman merely asked questions, made no statements whatsoever.

Q. Do you remember what the questions were? A. I do not.

Q. And you don't know Mr. Schwartz' answers, if you can't recall the questions. A. I do not recall his answers, or the questions.

Q. Did Mr. Schwartz leave that room in a friendly manner? A. It is hard for me to say.

Q. Let's put it this way. Was there any argument—was there any anger on the part of Mr. Schwartz while you were there? A. I don't believe so.

Q. Did Mr. Schwartz accuse you of lying while he was there? A. He did not.

Q. You are positive of that? (1555) A. Positive.

Q. When Mr. Schwartz left that room was it on a friendly basis? A. Mr. Schwartz, I believe, left—I believe I left with him, on the train together.

Q. I see. A. I believe we left together on the train.

Q. You left together? A. That's correct.

Q. And where did you go? A. I went to my office and he went to his office.

Q. You didn't go to his office? A. I did not.

Q. And he didn't go to your office? A. He did not.

Q. And you didn't sign any paper on that day? A. I signed a paper before we went to Judge Grosman's.

Q. Before you went to Judge Grosman's? A. That's correct.

Q. What kind of a paper did you sign? A. Before we went to—I believe—he asked me to stop in and pick him up. We both went out together. And before we went out he says—the first thing he said was, "Sam, you know, you never gave me anything in writing with reference to our deal that we had about the additional (1556) money I was to get over the 70 per cent."

I said, "Didn't we?" I said, "Bob, you most always take things in writing."

He says, "No, you never did give me anything in writing about that. How about giving me a paper now?"

I said, "Listen, Bob. This is the wrong time for me to give anybody papers. This litigation is going on now and I am not too happy about your attitude and I am not going to give you any papers now on something I promised you four years ago." I said, "But whatever I promised you, I will keep my promise."

He sort of upbraided me, "Well, I don't think I can take you at your word. This 32nd Street deal didn't work out

so good." And I still refused to give him anything in writing.

I said, "This is not the time to give you anything in writing." Well, he said, "I won't go out to see Judge Grosman unless you sign a release for me."

And if I am not mistaken, I called up Judge Grosman, and I am not sure, but I know—or whether—I wouldn't say definite, but it seems to me I have a recollection of asking Judge Grosman, "Is it all right for me to sign papers of this kind?" And Judge Grosman said, "Give him anything he wants. I want to ask him a few questions. Let him have anything he wants."

(1557) And Mr. Schwartz prepared a couple of papers for me—in other words, waiving any claims I might have against him for any kind—anything he may have done. I don't recall the exact contents of them, but he made me sign two papers, one releasing him of any claims to him personally and one releasing Alfange and Friedman, his firm.

And after I signed those papers he agreed to come out with me to Judge Grosman's office.

Q. That, as you say, was signed before he came to Judge Grosman's office? A. Yes, sir; it was.

Q. Do you have a copy of either of those papers? A. I don't know whether I had a copy or not. I am not sure whether I had a copy, or I gave Judge Grosman a copy, or not. I thought I had a copy at one time, but I am not sure.

The Court: That is all very interesting. The net result is that you don't know if you ever had a copy.

The Witness: I thought I had a copy. I saw it somewhere.

Mr. Grosman: I think I have a copy of one of them in a file.

The Witness: I knew I saw a copy somewhere. I wasn't sure just where it was.

(1558) Mr. Brigadier: I would like to see it.

Mr. Grosman: I will get it for you. It is the most unusual document I have ever seen.

Mr. Brigadier: I haven't seen it yet. That's why I would like to see it.

The Court: Was it all typewritten?

The Witness: Yes, sir.

The Court: In his own language?

The Witness: In his own language; yes, sir.

The Court: Shall we recess, Mr. Brigadier?

Mr. Brigadier: Yes.

The Court: Two o'clock.

(Noon recess.)

AFTERNOON SESSION

(1559) SAMUEL MARCUS, resumed the stand.

Cross examination by Mr. Brigadier (continued):

Q. Mr. Marcus, will you produce document P-53 for identification and P-54 for identification, which you produced in the taking of the depositions? Those are the two agreements with Michael Realty on the modification of the mortgage.

(Document handed to counsel.)

Q. I will question you briefly about this one in front of you, Mr. Marcus. The document you have in front of you is signed by you, is it not? A. Yes, sir.

Q. Both individually and as president of Milmar Estate, Inc.? A. Yes, sir; it is.

Q. Whose signature is that under yours—no, above yours is William Miller, is that correct? A. That's correct.

Samuel Marcus—Defendant—Recalled—Cross

Q. And Michael Realty, by Herman Bloom, president? A. That's right.

Q. Now, Mr. Marcus, under the original mortgage that was made with Michael Realty, the purchase money mortgage, you were obligated to pay $5,000 a month, is that right? A. That's correct.

(1560) Q. Besides interest at the rate of 4 per cent, isn't that right? A. That's right.

Q. So that would have totaled $60,000 a year, exclusive of interest, isn't that right? A. That's correct.

Q. Now, I show you Exhibit P-54 for identification. Does that constitute a modification agreement that was entered into between yourself and Marcus as parties of the first part and Michael Realty, second party, Milmar Estates, third party, on the 29th day of August, 1946, for the modification thereof?

The Court: Did you get the question, Mr. Marcus?

A. That's correct, yes.

Q. And I direct your attention particularly to Paragraph No. 1, on the bottom of page 3. That sets forth the modification, doesn't it? A. I believe it does, yes.

Q. And it changes it to read as follows, "The principal secured by said bond and mortgage now is the unpaid sum of $295,000, with interest on the unpaid balance thereof to be computed from August 1, 1946, at the rate of 4 per cent per annum. The parties of the first part"—that's you and Miller—"and the party (1561) of the third part"—that would be Milmar—"do hereby covenant and agree to pay to the parties of the second part a payment of $2,500" —instead of five thousand, isn't that right, twenty-five hundred? A. That's correct.

Q. —"on the first day of September, 1946, and thereafter in payments of $2,500, each on the first day of each subsequent month until and including April 1, 1947, and $5,000 beginning with May 1, 1947, and thereafter in pay-

ments of $5,000 on the first of each month until the first day of July, 1951, when the balance will become payable," is that right? A. That's correct.

Q. So the modification really only operated until September 1, 1946—no, I am wrong—until April 1, 1947, isn't that right? A. You are correct. Yes, May 1.

Q. Beginning with May 1 it would go back to the five thousand.

Mr. Tepper: That's the danger of propounding questions in that fashion. The document is in evidence. It is there.

The Court: Is it? I haven't seen it yet.

Mr. Brigadier: It isn't in evidence.

Mr. Grosman: No, it was put in on the (1562) deposition.

Mr. Brigadier: I am putting it in evidence right this minute. Instead of having to read the whole thing to the Court, I just thought—

Mr. Tepper: Let's put it in evidence. Don't read the whole document.

The Court: He didn't say you misled him.

Mr. Brigadier: I am not reading the whole document. I am only reading the portion that I want you to note.

I offer that in evidence. Have you found the other Exhibit, P-53 for identification?

Mr. Grosman: I am looking for it, but I can't seem to locate it.

The Clerk: DME-58, agreement dated 29th day of August, 1946.

(Received and marked Exhibit DME-58.)

The Court: Let me see that.

(Document handed to the Court.)

Samuel Marcus—Defendant—Recalled—Cross

Mr. Brigadier: In order that we may save time, while the Judge is looking for it, will he stipulate with me that this is a photostat that he furnished me?

Mr. Grosman: If you say so, I will.

Mr. Brigadier: This is a photostat of the Exhibit as it was produced at the deposition by you, P-53 (1563) for identification.

Mr. Grosman: All right.

Mr. Brigadier: The only difficulty is I will have to stand alongside the witness. Do we have another photostat over there?

Mr. Margulies: No.

By Mr. Brigadier:

Q. Now, Mr. Marcus, I direct your attention to Exhibit P-53 for identification, produced by you at the taking of the depositions. You will note that it is an agreement dated July 30, 1947, right? A. That's correct.

Q. Between William Miller and Samuel Marcus as parties of the first part, Michael Realty, party of the second part, Milmar, party of the third part, right? A. That's correct.

Q. Now, apparently this one appears only to be signed by Michael Realty Company, Herman Bloom, president, but I assume that there was a copy executed by all the parties, is that right? A. I believe there was. I am not definite, but I believe there was a paper of that kind executed by us that particular day.

Q. And this is for the modification—a second modification, or another modification of the same mortgage, (1564) isn't that right? A. I believe that is so.

Q. All right. Will you turn to Paragraph 1 on page 4.

Mr. Brigadier: Again I would like to read the paragraph instead of having to read the whole document, since that is the only modification, Mr. Tepper.

Samuel Marcus—Defendant—Recalled—Cross

Mr. Tepper: All right.

Mr. Brigadier: I will read it together with you.

Q. "The principal secured by said bond and mortgage now in the unpaid sum of $267,500, with interest on the unpaid balance thereof to be computed from July 1, 1947, at the rate of 4 per cent per annum, the parties of the first part and the party of the third part do hereby covenant and agree to pay to the party of the second part by payment of $5,000 on the first day of August, 1947, and thereafter in payments of $5,000 each on the first day of each subsequent month until and including January 1, 1948; and $5,000 per month on the first day of August, 1948, and thereafter in payments of $5,000 on the first day of each subsequent month until the first day of July, 1951, when the balance of the principal remaining unpaid shall be due and payable, together with interest at the rate of 4 per cent per annum (1565) on the unpaid balance on the first day of each and every month." And that was the agreement that was made, isn't that right? A. Yes, I believe this was signed. I think a paper of that kind was signed that day.

Q. This one here is signed by Michael Realty and was produced by you from your files. A. That's the only thing I had, so it—probably this was—

Mr. Brigadier: Judge, should I mark this? You haven't found the other?

Mr. Grosman: I haven't found it.

Mr. Brigadier: I offer that in evidence.

The Clerk: DME-59 in evidence, agreement dated 30th day of July, 1947, photostat.

(Received and marked Exhibit DME-59.)

Q. Now, Mr. Marcus, as I understood your testimony, Mr. Miller used to pay rent, whenever he did pay it, at

$2,000 a week during the time that they were open, is that right? A. Yes, that's the arrangement.

Mr. Tepper: You don't mean Mr. Miller, do you?

Mr. Brigadier: I meant Bill Miller's Riviera. He used to say Miller, so that I am using his word. That's (1566) the way he put it.

Q. Now, when would the place normally open? A. The arrangement was, also, he was to pay $4,000 before the place opened. He was supposed to pay $4,000 about February of the year prior to when he opened.

Q. Yes. A. And then I believe the room generally used to open some time in May, I believe.

Q. And then he would start paying you $2,000 a week? A. That's correct. That was the arrangement.

Q. That was the arrangement, at any rate? A. Yes.

Q. And that was to continue during the time that it was open, right? A. Well, we had a certain amount he was supposed to pay, whether he was open or not, and the arrangement was for $2,000 a week for the amount of the lease.

Q. Yes. But when I asked you how the rental was paid, and the Judge asked you that at one point, wasn't your answer, "I was being paid $2,000 a week while it was open"? A. We had no definite arrangement. The arrangement was, he was supposed to pay me a fixed rental rate—

Q. I know that. (1567) A. —and I don't believe—I never bothered him for money when the place was closed, other than the advance payment, and when the place was open he was supposed to pay me two thousand a week.

Q. That is all I am trying to find out. A. That's correct.

Q. So that when the place was closed in October—isn't that when normally it would close? A. About the middle or near the end of October. That's right.

Q. Did it often close the first week in October? A. To my recollection it generally closed somewhere about the middle or third week in October.

Q. From then on you would receive no payments till the following February, is that what you said? A. That's right, till the following February.

Q. When you were supposed to get a $4,000 payment? A. That's correct.

Q. Now, I call your attention, Mr. Marcus, that Exhibit P-53 for identification—I am sorry, let's now call it the correct number.

What is that last Exhibit I put in?

The Clerk: The photostat?

Mr. Brigadier: Yes.

The Clerk: DME-59.

(1568) Q. —DME-59 provided for payments to be resumed on August 1, 1948, at $5,000 a month, isn't that right? A. That's correct.

Q. And that it required you to continue to make such payments from August 1, 1948, and thereafter, of $5,000 on the first of each month until the first day of July, 1951, isn't that correct? A. No, I don't think so. (Witness looks at document.) That's a clause in every one of those. They just gave us the yearly renewal on those, from year to year.

Q. I am asking you about this one. A. Frankly—

Q. Just look at it. A. I am reading it. I guess that's what it says in there.

Q. So that beginning August 1, 1948, you were obligated, again under this modification, to pay $5,000 a month, right? A. That's correct.

Q. And those $5,000 payments would have to be paid not only during August, September and October, when Bill Miller's Riviera would be open, but you would have to make them during November, December, January, February, March and April, when it would be closed? A. Yes, sir; that's true.

Samuel Marcus—Defendant—Recalled—Cross

(1569) Q. Do you know whether subsequent to September 14, 1948, Michael Realty demanded and received the $5,000 payments for the period that the Riviera was closed? A. I don't know of my own—I don't know.

Q. Well, you were asked this question by Judge Grosman, "Did Mr. Miller make certain representations to you about their not being able to get any reductions," do you remember Mr. Grosman asking you that? A. I do.

Q. And you said yes. A. Yes.

Q. Then he asked you, "Did you rely on those representations," and didn't you say yes? A. That's correct.

Q. Then he said, "Well, are those representations—were they true," and you said no. A. That's correct.

Q. And yet you don't know whether or not Michael Realty demanded and received $5,000 a month, not only for August and September, but thereafter for October, November, December, January, February and March? A. I do not know of my own knowledge what they received.

Q. That's all I wanted to know.

Incidentally, do you know who Mr. Michael Schimmel is? (1570) A. Yes, sir; I do.

Q. He is associated with Mr. Marden in Michael Realty? A. That's correct.

Q. He is the person you would contact with respect to the modifications? A. I forget whether we contacted Ben Marden direct or we contacted him. He was one of Mr. Marden's associates.

Q. Do you know where his office is? A. Yes, I believe it's 11 West 42nd Street.

Q. Very close to your own office, is it not? A. Well, close to my office where it used to be on 42nd Street.

Q. Yes. About a block away. A. About a block away, that's correct.

Q. Now, Mr. Marcus, when did you learn that a suit had been instituted in the Superior Court of New Jersey,

Chancery Division, by Milmar Estate, Inc., against your wife for the quieting of the title to the real estate because of an alleged assertion of an outstanding claim of inchoate dower by your wife? A. Frankly, I have no recollection of when I acquired knowledge of the suit.

Mr. Brigadier: Will you stipulate for the record, Mr. Tepper, that the suit was instituted in January, (1571) 1951; that you appeared as the attorney for Mrs. Marcus, and that Mr. Roth appeared at the pretrial conference as the New York counsel?

Mr. Tepper: As to the date, if you say that is the date, I will stipulate to that date.

Mr. Brigadier: Summons issued January 5, 1951.

Mr. Tepper: It is so stipulated.

Q. Do I understand, Mr. Marcus, that you didn't know anything about this suit pending? A. I knew nothing about the suit, or action, being started, when it was started, if that's what you mean.

Q. I asked you whether you knew about it pending. A. Pending, I don't know what you mean by its pending.

Q. Did you know after it was started that there was such an action pending at the time? A. Yes, I was told by someone that there was such a suit started, or an action.

Q. At that time you had already consulted Mr. Roth as your counsel, had you not? A. I just simply can't place the correct time at that time. Mr. Roth's records would show that. And I can't correlate them together at all right now, the exact particular time.

Q. Mr. Marcus, this morning you testified that when we brought the interpleader suit in December, 1950—(1572) when I say "we" I am now speaking of this side of the table; it was brought for us by Chazin & Chazin—that that was when Roth went over to see Hannoch & Lasser to represent you. A. Mr. Roth has those dates.

Samuel Marcus—Defendant—Recalled—Cross

Q. So that you now know definitely a date—that it is prior to the bringing of this dower action? A. I assume that is so, yes.

Q. All right. Now, I want to know this. When you learned of the dower action, did you in any way intervene in that suit? A. I did not.

Q. Did you retain counsel to appear before the Court and state that the plaintiff has no authority to bring this action? A. I did not.

Q. When did you learn that there had been a settlement made by Milmar and a payment made to your wife of $7,500? A. Long after the settlement had been made did I first find out about it.

Q. Were you living under the same roof at the time, you and your wife? A. I was.

Q. But she didn't tell you anything about it? (1573) A. She did not.

Q. You weren't on talking terms with each other. A. We spoke to each other, but we kept our own—kept to our own business matters.

Q. And Mr. Roth didn't tell you anything about it? A. Mr. Roth didn't tell me a thing of what happened with reference to the dower suit.

Q. Did you know, Mr. Marcus, that your wife, Sara Marcus, in the dower action, in answer to Interrogatory No. 12, stated, "On two or three occasions I had conversations with William Miller in which I stated I would like to see my husband have no interest in night clubs," and in answer to Interrogatory No. 13, "About the end of the summer of 1948 I was advised by Samuel Marcus that he had severed all connections with the Riviera. Just what interest he had or the nature, I did not know. Shortly thereafter I was introduced to a Mr. Kevelson at the Riviera. Said Mr. Kevelson was introduced to me as the new owner of the Riviera by Mr. Marcus," did you know that she had made these answers under oath? A. I did not.

Samuel Marcus—Defendant—Recalled—Cross

Q. When was the first you learned—or when did you learn? A. When you were just reading it to me right now.

Mr. Grosman: That's one you missed.

(1574) Mr. Brigadier: I did. I thought I had asked him in the depositions. You are absolutely right.

Q. This is the first that you know she made these statements? A. Yes, sir; this is the first time I heard that remark made.

Mr. Brigadier: I would like to make a statement to your Honor for the record.

Mr. Grosman: Sum up?

Mr. Brigadier: No. Why don't you wait till I say it, Judge?

For me to cross examine this man on everything he has testified to on direct examination would take, frankly, another three days. I have reached the point where I think something has to be done by way of restricting the areas to be covered. And I am going to endeavor simply to cover what I consider the main issues which you are trying.

In other words, I am not going to go into Mocambo, except for one document. But we have got so much in that area alone that we would have to cover. And I will try to confine it to the issues of: What the transaction was on September 14 and the fraud charges.

I want to make this statement on the record because, since my clients are not in court, as your Honor knows, I had to reach that conclusion as a result of conference with counsel. I know, of course, that my clients are bound (1575) by my decision. There isn't any doubt about it. But I want you to know that it had to be my decision and the basis on which I make it.

Mr. Grosman: Now, if your Honor please, may I ask that the record show that neither the Court nor coun-

sel for Mr. Marcus, by objection, have stopped in any way to circumscribe Mr. Brigadier's cross examination. He is doing this of his own accord.

Mr. Brigadier: The statement I made, of course, I am doing of my own accord.

There is one document I do want to call your attention to.

By Mr. Brigadier:

Q. I show you a writing, a typewriting, dated June 14, 1946. Is that your signature? A. Yes, sir.

Q. Who typed that, Mr. Marcus? A. I believe my secretary must have typed it.

Q. Did you know what was in it when you signed it? A. I believe so.

Q. Before I show it to the Court, will you tell me whether the paper attached sets up the certificates of stock that are referred to in this Exhibit? A. I believe it does.

Q. That's Hoffman's handwriting, I think, isn't it? (1576) A. It looks something like it. I wouldn't recognize it for sure, but it looks like Hoffman's signature.

Mr. Brigadier: May I mark it first. Then I would like you to look at it.

The Court: Yes, it is best that you mark it.

Mr. Grosman: May I see it, please?

(Document handed to counsel.)

Mr. Abraham Chazin: They have a photostat of it.

Mr. Brigadier: Did you get a photostat?

Mr. Grosman: No.

Mr. Abraham Chazin: They have a photostat of it attached to the affidavit of William Miller.

The Clerk: DME-60, writing dated June 14, 1946, on the stationery of Photoshop, Inc., and signed by Samuel Marcus.

(Received and marked Exhibit DME-60.)

Samuel Marcus—Defendant—Recalled—Cross

By Mr. Brigadier:

Q. Mr. Marcus, do you remember being cross examined by me in your deposition as to the meaning of the word "collateral" as you understood it? A. That's correct.

Q. And do you remember your testimony that you understood the word "collateral" to mean that you owned the stock, right? (1577) A. Well, I told you at the time that I wasn't too sure what—of the word "collateral." In my layman's way of taking it, I can call—I call collateral in a number of different fashions, and I use it loosely. I wouldn't attempt to try to say that I used the word "collateral" in the legal term it is meant to be used.

Q. Will you tell us in what sense you used it in this Exhibit, DME-60? I will show you the photostat. The Court is looking at the Exhibit itself. You see the word "collateral" there? A. Yes, I do.

Q. All right. A. I dictated that and I used the word there. And it's a word that sounds good. It seemed to fit the bill at the time, and I used the word. I can't explain how I used the word. I just simply used it.

Q. Well, now, isn't it your testimony that you remained the owner of this stock throughout? A. Yes, it is.

Q. And isn't it your testimony that William Miller never became the owner of any of this stock? A. Yes, sir; it is.

Q. And isn't it your testimony that at best what you gave William Miller was an option to purchase it, which you sometimes describe as a privilege? (1578) A. That's correct, yes.

Q. So when you used the word "collateral" in this writing, you did not intend or understand, that that meant that he owned the stock, but that you merely held it as security? A. Yes, I did not understand the word meant that.

Q. Well, now, in your direct testimony, on direct examination on February 1, 1955, in this courtroom, tem-

porary page number unlettered 3*, I call your attention to this question: "Did Miller ever give you any stock in Embassy?

"Answer: He gave me his stock as collateral on the loan that I made to him."

Now, it is your testimony, is it not—it was—that you were not a stockholder of Embassy at this time? A. That's correct.

Q. Therefore, when you received Bill Miller's stock as collateral, you didn't become the owner of the stock, did you? A. Frankly, I don't know legally whether I was or not, Mr. Brigadier.

Q. You are the one that employed this word, Mr. Marcus. What we are— A. Well—

Q. Just listen. What we are trying to figure out (1579) is when you answered this question, "He gave me his stock as collateral on the loan that I made to him," what did you understand the word to mean? You employed it. A. Well, frankly, I have a vague knowledge of what the word "collateral" means. I think I have better knowledge and understanding of it today, because I looked it up in the dictionary. And my impression of "collateral" today means when a man gives me something that he owns, that he actually owned before he gave it to me. That's my impression of "collateral" today. When I used the word "collateral" back in '46, I was just a layman using a word that to me didn't particularly have any specific meaning.

In Mocambo stock, Miller owned that stock, it was his, and when he gave it to me, I believe that word meant collateral, because he did own that stock, it was his property when he gave it to me.

Milmar stock he never owned, so it wasn't collateral.

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*Permanent page number is 733.

Samuel Marcus—Defendant—Recalled—Cross

Q. So, as I understand it, the word meant one thing to you in 1946 and it means something now altogether different? A. Yes, sir; I have learned what the word means.

Mr. Brigadier: At this point I would also like to add that I will read into the record from the depositions where it appears that 12 different places in (1580) the deposition the word was employed.

Q. Mr. Marcus, on September 14, 1948, when you entered into whatever transaction you did on that date with William Miller, was Robert Schwartz participating with you in that transaction, as a participant in the price to be paid? A. He was not.

Q. Did you have any arrangement with him on that date, or prior to that date, that he was to participate in the $125,000 that you were to receive on that day, or the price agreed upon that day? A. No agreement between him and me whatsoever, other than what he gathered at the meeting of 8-26.

Q. The meeting of what? A. Of August 26.

Q. On August 26. A. That's correct.

Q. And at the meeting on August 26 was there anything said by you to him, or by him to you, that he was participating in this sale? A. No words between us whatsoever.

Q. Nothing whatsoever was said by either you to him or he to you? A. That's correct.

Q. And you say, as I understand both from your affidavits and your direct evidence, it is your contention (1581) that you could not have agreed to sell the 125 shares of stock owned by Robert Schwartz because you had not acquired them by September 14, isn't that right? A. That's correct.

Q. And that you had no arrangement with him by September 14 under which you were authorized to sell those shares, isn't that right? A. That's correct.

Samuel Marcus—Defendant—Recalled—Cross

Q. And that the first arrangement you had with him of any kind was subsequent to September 14, isn't that right? A. Yes, sir.

Q. The first arrangement being that writing in which it is referred to as a mortgage, isn't that right? A. That's right.

Q. And the second one is the letter as to which there is this question about the date, isn't that right? A. That's correct.

Q. You heard Mr. Schwartz testify on deposition that the date on that letter was wrong, didn't you? A. Yes, I believe he said that was wrong, that's correct.

Q. He volunteered himself the statement in the deposition that that date should have been 1949 and not 1948, isn't that right? A. The best of my recollections is he did say it was (1582) incorrect.

Q. Mr. Marcus, you did acquire the 125 after September 14 from Robert Schwartz? A. I did.

Q. Where are those certificates? A. Mr. Schwartz claims he turned them over to my secretary. My secretary says she never got them.

Q. You heard Mr. Schwartz' testimony in the taking of the deposition? A. I believe that's what he said.

Q. Did he testify he had turned them over to you even prior to September 14? A. All I recall him testifying, that he turned them over to my secretary.

Q. Prior to September 14? A. I don't recall whether he said prior or after.

Q. At any rate, you do not have them? A. That's correct.

Q. And they are not produced here? A. That's right.

Q. And you are testifying that you do not have them in your possession? A. I cannot locate them in my possession at the present time.

Samuel Marcus—Defendant—Recalled—Cross

Mr. Brigadier: The reason I am stressing this, (1583) if your Honor please, one of the reliefs we are seeking is the delivery up for cancellation any shares of stock that are in his possession.

Q. You say there are none in your possession other than what you have already produced, the 500—the certificates for the 500 shares. A. I haven't been able to find them in my possession, other than what I have produced.

Q. Mr. Marcus, you have testified on direct examination to the making of a great many loans, both to Bill Miller's Riviera and Milmar, have you not? A. That's correct.

Q. Which you say you haven't been repaid? A. That's right.

Q. I show you what purports to be a photostat of a chattel mortgage, dated January 23, 1948, recorded in the Bergen County Clerk's Office, January 26, 1948, Book 369, page 56, from Bill Miller's Riviera to Sam Marcus. Did you receive that mortgage dated on that date? A. I think I did, yes.

Q. There is a signature on the mortgage, Bill Miller's Riviera, Inc., William Miller? A. That's correct.

Q. And there is an affidavit of consideration made by you, Sam Marcus? (1584) A. There is.

Q. How much did you lend under this mortgage, Mr. Marcus? A. I don't recall the exact amount. Does the mortgage show it?

Q. Will you look at it?

(Document handed to the witness.)

A. It says $4,750.

Q. Will you look at the affidavit of consideration, Mr. Marcus—do you know what an affidavit of consideration is? A. No, I don't.

Q. It is the affidavit signed by you, which you have identified as your signature. Will you read that carefully? A. Yes.

Samuel Marcus—Defendant—Recalled—Cross

(Witness examines document.)

Q. Now, will you tell us what the amount of the loan was, Mr. Marcus? A. It says here a loan of $4,000 in cash.

Q. And for what period was the loan? A. I really don't know what the period of the loan was.

Q. Look at the mortgage. A. What does it say?

Q. The mortgage is dated January 23, 1948, right? (1585) A. Yes.

Q. And it is due in two installments, on May 15, 1948, and June 15, 1948, right? A. That's correct.

Q. And you charged for that $4,000 how much? A. $750.

Q. For that short period of time. A. Because I paid for —the same amount for it when I borrowed it. I borrowed it to loan it to the people.

Q. Now, I direct your attention to the fact that your affidavit of consideration reads as follows, "The loan of $4,000 in cash to the mortgagor, and $750 representing rental, legal and bulk interest charges which the mortgagor agreed to pay in view of the risks attendant this loan."

You know that this was a mortgage on all the alcoholic beverages in the place, was it not? A. That's correct.

Q. That's what it was limited to? A. That's right.

Q. And you kept them under lock and key? A. I don't believe this one was kept under lock and key. There was another loan made to another company that kept it under lock and key. I don't believe this was the loan for that.

(1586) Q. Will you tell us then what you were charging for rental, legal and bulk interest? A. I don't remember this entire transaction at this time. If I am not mistaken, there was a bigger amount than $4,000 given on this loan. I would have to check with the people that loaned me the money, and check with the people that paid out the money, to see exactly what the total amount of this loan was.

Q. Mr. Marcus, you swore to this affidavit, didn't you? A. I swore to the affidavit, but I believe—

Samuel Marcus—Defendant—Recalled—Cross

Q. Before a Mr. Abraham L. Nickelsporn. A. But I believe additional amounts was given Mr. Miller on this loan.

Q. But you don't set that forth in the affidavit? A. It is not set forth in the affidavit. Sometimes I am not too careful in reading affidavits, and I sign them.

The Court: That's a dangerous admission to make.

The Witness: It is, your Honor, but I am careless that way, and I will have to admit it, that's all.

Mr. Brigadier: I offer it.

(Document shown to counsel.)

The Clerk: DME-61, photostat of chattel mortgage, dated January 23, 1948.

(1587) (Received and marked Exhibit DME-61.)

Mr. Brigadier: Would you allow us about a five minute recess? I think I have got almost everything covered.

The Court: We will take a five minute recess.

(Short recess.)

The Witness: Mr. Brigadier is interested in it. I have some facts about that loan, if he would like to learn the real facts about it.

The Court: Take it up with him later and maybe he would like to know.

Do you hear what he said, Mr. Brigadier?

Mr. Brigadier: His attorney can bring out on redirect anything he needs to explain the transaction.

The Court: Keep them all and give them to Mr. Grosman.

The Witness: This paper wasn't in deposition, your Honor. Proving my contention, what I just said.

Samuel Marcus—Defendant—Recalled—Cross

Mr. Brigadier: I haven't asked you any question yet, Mr. Marcus.

By Mr. Brigadier:

Q. Here is the question, Mr. Marcus. Prior to September 14, 1948, did Michael Schimmel state to you, "One day we are going to sell the mortgage and it might get into unfriendly hands, then you ought to try to get someone to (1588) take it over." A. I don't particularly recall that conversation.

Q. Would you say he didn't say it? A. I wouldn't say—if Mr. Schimmel said he said it, Mr. Schimmel is an honorable man, and I will say that he said it.

Q. Did he also say, "I would give a $15,000 discount"? A. As a matter of fact, I think I heard him say—

Mr. Tepper: May I ask if Mr. Brigadier will produce Mr. Schimmel? Does he intend to produce him?

Mr. Brigadier: I stated last week I was calling Mr. Schimmel.

Mr. Tepper: That's all I want to know.

The Witness: Yes—

Mr. Tepper: Then it seems to me that this is improper cross examination. Mr. Schimmel is going to be here.

Mr. Brigadier: I have a right to ask him.

The Court: He said it's improper cross. He wants to know why you think it's proper cross examination.

Mr. Brigadier: I have a right to ask this party, who is a party to the action, whether or not he had this conversation about this mortgage because of his testimony that there were fraudulent representations made (1589) to him about the mortgage.

Mr. Tepper: Mr. Schimmel wasn't in that testimony in any fashion. Is he referred to in that testimony?

Samuel Marcus—Defendant—Recalled—Cross

Mr. Brigadier: He used the word "Marden," and we are going to prove—

Mr. Tepper: Is he referred to in that testimony?

Mr. Brigadier: We are going to prove that the man he had any conversations with about this was Schimmel, and that this is what Schimmel said to him.

The Court: That if there were any fraudulent representation, that they were made by Schimmel and not by Marden, is that right?

Mr. Brigadier: That's right. I will repeat my question so that the stenographer won't have to look back and find it.

Mr. Grosman: May we have our objection noted?

The Court: Yes, sir.

By Mr. Brigadier:

Q. Did Mr. Schimmel say to you, "I would give a $15,000 discount"? A. I don't think Mr. Schimmel said that to me. Mr. Marden was- -

Mr. Grosman: Now, please.

The Court: He asked whether Schimmel did.

A. I don't recall Schimmel saying that to me, no.

(1590) Q. Did Marden say it to you? A. My recollection, the one time, in a friendly, social conversation with Mr. Marden, Mr. Marden said something, "If you boys can get somebody to buy this mortgage, I think I could save you some money." I forget the exact amount. He said, "I can use the cash and if you boys could get somebody to buy the mortgage, I will give you a discount." I have that from Mr. Marden's own lips, yes.

Q. Mr. Marcus, in your reply to the plaintiffs' answer to the counterclaim of Samuel Marcus—it must have been filed around the 30th of November, 1954; it's probably the

last pleading filed by Mr. Marcus in the case—Paragraph L on page 4 reads as follows: "The resignation signed by this defendant as officer and director of Milmar Estate, Inc., referred to in the 12th affirmative defense was executed conditionally and deposited in escrow with Honorable Abraham Lieberman. The condition upon which said resignation was executed was that said resignation was to be had in escrow by the said Honorable Abraham Lieberman until such time as the moneys due to him from the sale of 50 per cent of his stockholdings in the defendant Milmar Estate, Inc., was fully paid and not otherwise."

Do you know that you have set that up in your answer? A. Frankly, I don't recall seeing that paragraph. It (1591) isn't what I told my attorney.

Q. Now, this is what I want to know, Mr. Marcus. You said that is not what you told your attorney? A. I told my attorney I had no recollection of signing any resignations in Milmar Estates.

Q. In the affidavit that you filed in connection with the application for the receivership you stated that that resignation had been obtained by fraud, trickery and device, right? A. I merely said I had no recollection of signing a resignation of Milmar Estates.

Q. But in this answer that you have filed you say that you signed it with the understanding that it was to be held in escrow. A. I didn't write the phraseology of that, Mr. Brigadier.

Q. Well, what we want to know, Mr. Marcus—I and the Court, I am sure, want to know, too—is what is your position now. This is what your answer says. A. My position is still the same as before. I had no recollection of ever signing a resignation from Milmar Estates.

Q. And you do not wish to be bound by this admission that you have made in Paragraph L as your answer, is that it? A. My answer is the same, sir. My attorneys can take

(1592) care of their handling of the case. I don't handle the case.

Q. Now, Mr. Marcus, I direct your attention to page 202 of the deposition—February 13, 1952—where you were questioned about the transaction of September 14, 1948. "Relying upon Mr. Miller's remarks, and I had full confidence in Mr. Miller, full confidence in his honesty and operations. I had no reason prior to believe otherwise."

Do I understand that prior to September 14, 1948, that you had full confidence up to that date in Mr. Miller's honesty and operations? A. Well, I had no proof of his dishonesty.

Q. Well, didn't you testify just as I read to you from the deposition?

> The Court: Apparently, if he had no proof of it, he means that he did have confidence in him.
>
> Mr. Brigadier: All right.
>
> Mr. Grosman: There is no date fixed in there, if your Honor please.
>
> Mr. Brigadier: Yes, if you will read the whole thing, you will see, "In the late summer of 1948 when we had no money to pay my rent," et cetera, and it leads up to that transaction.

Q. Now, I direct your attention to the testimony you gave on direct examination, on February 1, 1955, G-34*, (1593) where you were being questioned about the Bill Miller's Riviera stock in 1947, and didn't you answer, on page G-34, as follows, "And so knowing the fact that the Milmar depended entirely upon the Riviera being successful in making money, I went to my friends and told them they can trust me, I will give them personal guarantees.

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*Permanent page number is 877.

They did have my personal notes on moneys they had advanced me, and they could trust me. 'I think it's the best idea, because, frankly, I don't think we can ever get an honest count from Miller, anyway, as far as income is concerned.' "

Now, did you make that statement to your friends as far back as July, 1947? A. Yes, I did.

Q. And this is your testimony as to how you felt about Bill Miller, this which I have read from the deposition, up to September 14, 1948? A. I had—

Mr. Grosman: Now, wait a minute. There is nothing in there about September, 1948. It refers to the late summer of 1948.

Mr. Brigadier: I will take the late summer of 1948, Mr. Marcus.

Mr. Grosman: All right.

A. There again, I hadn't—I hadn't had any definite proof of Miller's dishonesty, so I assumed the man was not (1594) guilty, if I hadn't proved that he was guilty.

Q. But you didn't believe, in 1947, you could get an honest count from him? A. It was just a remark to my friends that, "We may as well let Bill Miller have the Riviera, let him run the Riviera. What's the sense? We can't be watching every dollar that goes in there." It was merely an offhand remark, "We can't stand there watching the register," and so on and so forth. It wasn't particularly anything definite—proof I had against Miller's dishonesty. It was merely a supposition to my friends, so that they would give me their stock back, telling, "We can't be watching the cash register there every night. What's the sense of trying to hold onto stock there?"

Mr. Brigadier: If your Honor please, that completes my cross except for the portions which I can later read

into the record directly from the deposition. As a matter of fact, I can offer them as part of my case, because they are admissions made by a party to the action.

Mr. Grosman: I think you ought to do it now and get through. I don't want to break in.

Mr. Brigadier: No, I am not going to do it now.

Mr. Grosman: All right. I respectfully insist, your Honor, that if he is through, he is through; if he is (1595) not through, he is not through.

Mr. Brigadier: I said I am through. I said I will offer them as part of my case, as admissions made by a party to the action, which are admissible against him, under the Federal Rule as to the use of depositions.

The Court: When do you intend to offer them?

Mr. Brigadier: When I get back to my rebuttal.

Mr. Grosman: Well, now, if your Honor please, I have got to have time to correlate.

The Court: Yes, I agree with you.

Mr. Grosman: Otherwise you will have me floundering around here, making your Honor and everybody else impatient.

The Court: Will you be ready tomorrow morning?

Mr. Grosman: I will try to be.

The Court: We will have to make it at 10:30 tomorrow morning.

(Whereupon, the hearing was adjourned to be resumed Wednesday, February 16, 1955, at 10:30 A. M.)

Samuel Marcus—Defendant—Recalled—Redirect

(1596) Newark, N. J., Wednesday, February 16, 1955.

(Hearing resumed pursuant to adjournment.)

(Appearances as previously noted.)

SAMUEL MARCUS, resumed the stand.

Mr. Grosman: Mr. Brigadier, are you through with your cross examination?

Mr. Brigadier: I am.

Redirect examination by Mr. Grosman:

Q. Mr. Marcus, you were asked on cross examination something about your having—or being in the habit of suing, being a chronic suer, corporations, and so forth. How many years have you been in business? A. Since I came out of the Army in 1917.

Q. And during that period approximately how many suits have you brought against corporations for rescission, and so forth? A. It was only—there is this suit for rescission and there is one suit pending now for rescission. They are the only two rescission actions I have ever had.

Q. Against whom? A. The Weimet Company.

Q. Is that a corporation? (1597) A. That is a corporation.

Q. That's a suit for rescission? A. Yes, sir.

Q. That is pending now? A. That's pending in the Supreme Court now, yes.

Q. And what is the basis of that rescission action which you brought? A. In selling my stock to them they showed me an inventory of $11,000. And based on that inventory I sold my stock at book value. Four months afterwards I found out that they had secreted a quantity of 600 expensive aerial cameras, sold them to the government for $375,000.

Samuel Marcus—Defendant—Recalled—Redirect

Q. And that is the basis for your action for rescission? A. Yes, sir; it is.

Q. Now, Mr. Brigadier asked you about a statement contained in one of the pleadings with respect to stock which you signed. Do you recall that? A. Some stock that I signed? I don't recall.

Q. He asked you with respect to a statement contained in one of the pleadings filed by me on your behalf. Do you recall that? A. Oh, yes. Yes, I recall that.

Q. Did you have anything to do with the preparation of those pleadings? (1598) A. None whatsoever.

Q. And are you satisfied to stand by whatever Mr. Tepper and myself put in those pleadings? A. Oh, surely.

Mr. Brigadier: Judge, for the sake of the record, and your own correction, it was about the resignation, not about the stock.

Mr. Tepper: Yes, it had to do with the resignation.

Mr. Grosman: I stand corrected.

Q. It was something about your resignation from Milmar. I made some reference to it in one of the pleadings. A. That's correct, yes.

Q. And you stand by the statement I made in those pleadings? A. Oh, yes, definitely.

Q. Now, there was some talk about when the last statement, bank statement was presented—or who received the last Milmar bank statement subsequent to September, 1948; did you receive that? You testified, I believe, that you received the last bank statement— A. I received—

Q. Subsequent to September, 1948? A. Yes, sir; I did.

Mr. Brigadier: If your Honor please, I will (1599) concede I was in error. Mr. Margulies called it to my attention.

Mr. Grosman: As long as I have it here, I might as well put it in.

Samuel Marcus—Defendant—Recalled—Redirect

Q. Is this the statement that you received? A. Yes, sir; this is October 31, from the Public National Bank. October 31 statement.

Q. Milmar Estate, Inc., showing a balance of— A. That's correct. There was a balance, October 1, of $44.53, which I withdrew on October 14.

Mr. Grosman: I ask that this be marked. Do you want to see that?

Mr. Brigadier: No.

The Clerk: DM-35, statement from the Public National Bank & Trust Company.

(Received and marked Exhibit DM-35.)

The Court: That was the last one you got?

The Witness: That's the last one. I closed out the account at that time.

Q. Now, Mr. Marcus, with respect to the management of the Embassy Club, I think you were asked as to this Exhibit 303 for identification—the original number was 303 for identification, I don't know what the new Exhibit number is.

Mr. Margulies: DME-40.

(1600) Q. (Continuing) —as to when you took over, or when you became associated with the management of that club. Do you remember that? A. Was I asked that question?

Q. Yes. A. I wasn't. I don't think I was asked that question. I think Mr. Miller was asked that question.

Q. Wait a minute. Just hold it.

I show you Exhibit DME-40 and ask you to look at it. Who signed that? A. This is signed by Miller and myself.

Q. Who originally prepared that letter and where? A. Mr. Schwartz originally prepared the letter.

Samuel Marcus—Defendant—Recalled—Redirect

Q. And was it retyped somewhere else? A. It was retyped in my office, yes.

Q. I show you a writing dated April, 1946, and ask you to look at it. A. That's the original letter Mr. Schwartz brought over to my office.

Q. Typed in his office? A. Typed in his office.

Q. And retyped— A. And then it was redictated and retyped in my office.

Q. Why was that done? A. When he read it to me, there were several little (1601) suggestions we had on there, and which wasn't in the original, and he retyped it—he redictated it and had it retyped in my office.

The Court: Did he redictate it?

The Witness: He redictated it, and typed it, yes.

Mr. Grosman: All right. I offer this original writing.

Mr. Brigadier: May I see it, Judge Grosman?

Mr. Grosman: Yes, surely.

(Document handed to counsel.)

The Witness: Frankly, I am not sure—he does his own typing. He may have typed it himself.

Mr. Grosman: Please, please. There is no question. Shall I go ahead?

Mr. Brigadier: Yes.

The Court: He says he would like to clarify his answer.

The Witness: May I clarify that answer?

Q. Yes. A. He may not have dictated this, because I see no secretary's signature on here. He may have typed this himself, because Schwartz is a typist, and often types memorandums himself, and often came to my office and used (1602) our typewriter.

Q. While we are talking about Schwartz, he was your attorney at that time? A. That's correct.

Samuel Marcus—Defendant—Recalled—Redirect

Q. And was he on a retainer basis? A. He was.

Q. How much? A. $200 a month, for just the normal services, plus extras for any court action.

Q. Yes. How often would he come to your office? A. Mr. Schwartz' office was a block or two from mine, and he would almost—drop in once or twice a week, he would drop in at my office on his way to his office.

Q. Did he have the use of a desk or typewriter? A. Yes, it was always available for him. Sometimes he would ask for permission, sometimes he would use it on his own.

Mr. Brigadier: Would you try to tie it down as to time periods?

Mr. Grosman: Yes.

Q. Now, when did Mr. Schwartz become your attorney? A. I believe some time in either '45—some time in late '45, I believe.

Q. And he continued as such until— A. Until right after '48, shortly after—I would say (1603) late '48 or '49, some time late in '49, possibly.

Q. Late '49? A. I believe. Some time around late '49, I think—I would have to check on that and find it exactly.

Q. He was also associated with you in business transactions; you did business with him? A. He loaned me money on several occasions. And he was—he bought stock in the Milmar Estates.

Q. When you borrowed money from Schwartz did you pay him for the use of his money? A. I did.

Q. You paid him interest? A. That's right.

Q. Did you pay him any premiums? A. I did.

Q. Did you ever give him your real estate or part of your real state as security for loans? A. I did.

Q. What real estate was that? A. I had a building on 32nd Street where one of my retail stores was situated.

Q. You are now talking about New York City? A. New York City, 136 West 32nd Street. And some time in early

'48, when I was sorely strapped for money, I couldn't raise any more money in the banks, because I had (1604) borrowed all the money I could from the banks, and I asked Bob Schwartz whether he could negotiate a loan for me. And he said he would if I would give him—he would make me an offer, he would buy my building from me and pay me a fair market value. And I told him I wouldn't sell my building. But I needed money badly—but I would accept his offer with the provision that I would have the option to repurchase it within a year's time.

Q. And you made that transaction? A. And he loaned me $15,000 on that purchase of that building. And I gave him a deed to the building. And I also gave him as additional security my stock in the Weimet Film Corporation, which was worth over $50,000 at that time.

Q. Now, was there a time when you had a falling out with Mr. Schwartz? A. There was.

Q. When? A. Well—

Q. Approximately. A. One particular—some time around—some time late '49 or '50, there was one particular occasion. I had a building—I owned a building on Duane Street, and which the city authorities were contemplating taking over, and he called me one day and he said to me, "Sam,—"

(1605) Q. I don't want you to go into all that, Mr. Marcus. You had a falling out over some condemnation proceedings? A. That's correct, yes. No, it wasn't proceedings, it's a case where he sent me over—he sent me over a letter whereby I agreed to pay him everything above assessed valuation for his services. And I didn't know whether that was proper. I signed the letter, with a messenger—I had the letter signed. And as I had the letter signed, in giving it to the messenger, my accountant, Mr. Dobkin, happened to call me. And I said, "Mr. Dobkin, I am glad you called. Is it proper and natural for a lawyer

to get everything above the assessed valuation as his fee in a condemnation proceeding?"

He said, "Sam, if you sign that, you are crazy."

So I immediately called Mr. Schwartz on the phone and I said, "Bob," I said, "is that natural for a lawyer to demand everything above an assessed valuation on that type of a proceeding?"

He says, "Well, it could be proper. Do you think it's too much?" I said, "I don't know, Bob. What is the regular fee in that situation?"

He says, "Well, the fee can be anything a laywer wants to charge."

I says, "Well, I have been advised that this is (1606) outrageous."

He said, "What do you think is right?"

I said, "I don't know, Bob. You tell me what is right." "Is 50 per cent okay?" I said, "Well, if you say it's right, I will sign it as 50 per cent." And I signed the letter for 50—then I don't remember if I corrected that letter or he sent me down—whether I tore it and he sent me down a new letter for 50 per cent above assessed valuation.

The Court: Was there a condemnation proceeding on the Duane Street property?

The Witness: Yes. He told me it required—

The Court: You answered my question.

The Witness: There was just in process—

Mr. Grosman: Will you answer the Judge's question?

The Witness: Yes, there was, your Honor.

Q. Now, did you have a falling out with him concerning that 32nd Street property— A. We did.

Q. —which you pledged with him as security? A. Well, I never knew I had a falling out with him, until he expressed himself. I remember—

Samuel Marcus—Defendant—Recalled—Redirect

Q. What did he say? A. I never knew he was mad at me about that situation (1607) until one of our telephone calls and he says to me—

Mr. Brigadier: Will you fix the time?

The Witness: I can't fix the time right now. The date is on one—

Q. Approximately. Can you give us the year? A. It would be, I believe, in '52. It is one of our conversations of '52.

Q. Is that when you learned that he was put out with you? A. That's right. And he said—

Q. What did he say to you? A. He said to me, "Sam, you know you gave me a rotten deal in that 32nd Street proposition."

And I said, "What are you talking about, Bob?"

He says, "You put me to a lot of trouble of drawing up a lot of papers," and I don't recall whether he sai' selling some stocks, or something or other so he could give me the money—" and then you repaid back the money in a shorter space of time than you promised."

And I said, "Bob, I don't think you know what you are talking about. I paid you over $1,500 on that loan." I said, "You charged me 15 per cent interest on that money, and I paid you approximately $1,500 interest on your $15,000 which you loaned me." I said, "I don't understand why you think I didn't treat you right on that (1608) deal."

He said, "Well, I have got the papers—I can't find my papers on it right now, but I will talk to you again about it some other time."

Q. Now, tell me this, Mr. Marcus, did you ever do business with Robert Schwartz without a writing? A. Never did.

Samuel Marcus—Defendant—Recalled—Redirect

Q. Now, you recall after the present suit was instituted I asked you to bring Mr. Schwartz over to see me so that I might talk to him; remember that? A. That's correct, yes.

Q. And in pursuance of my request did you go over and invite Mr. Schwartz to come over and see me? A. I did.

Q. Did he impose any conditions upon his coming over to see me? A. He did.

Q. What conditions did he impose? A. The first thing, he tried to get me to give him something in writing to the effect of our oral understanding that he was to get additional moneys when I got my additional moneys for the balance due of our stock.

Q. With respect to the Milmar stock? A. Yes, with respect to the Milmar stock he sold me.

Q. Don't let's go over that again. (1609) A. All right. And then when I told him I wouldn't give him anything in writing at this late date, he said, "Well, I won't go over to see Judge Grosman unless you sign releases, releasing me of—" I don't know just what words he used, but he wanted me to sign releases.

Q. What did you do when he made that request of you? A. I believe—if I recall correctly, Judge, if I am not mistaken, I think I called you up and asked you, "Is it all right to sign releases of that kind?"

Q. Now, did you— A. I am not sure, but I have a recollection I did ask you.

Q. Did you sign some releases? A. I did.

Q. Who were they to, in whose favor?

Mr. Brigadier: You had them in writing?

Mr. Grosman: Yes.

A. I believe one was in his personal favor and the other was in favor of Alfange & Friedman, the law firm he is connected with.

Samuel Marcus—Defendant—Recalled—Redirect

Q. Now, I show you two copies of letters, one addressed to Robert J. Schwartz, 9 East 40th Street, New York, New York, dated March 3, 1952; the other the same date, addressed to Alfange & Friedman—

(1610) Mr. Brigadier: Sorry, Judge, would you tell me that date?

Mr. Grosman: March 3, 1952.

Q. Are these carbon copies of the writings which you signed? A. Yes, sir; they are.

Q. Who prepared those wri ngs? A. Mr. Schwartz did.

Q. And who gave you the copies? A. Mr. Schwartz did.

Q. And where were these copies prepared and—where were the originals prepared and the copies given to you? A. In his office, before we left.

Mr. Grosman: I offer in evidence this writing, the original writing, or the original draft of Exhibit DME-40.

The Clerk: DM-36, writing dated April blank, 1946.

(Received and marked Exhibit DM-36.)

The Clerk: Do you want to make this one Exhibit?

Mr. Grosman: We better mark them separately.

The Clerk: DM-37, carbon copy of writing dated March 3, 1952. DM-38, carbon copy of writing dated (1611) March 3, 1952.

(Received and marked Exhibits DM-37 and DM-38.)

The Court: Just hold it a minute. I want to read those.

(Documents handed to the Court.)

The Court: All right, proceed.

Samuel Marcus—Defendant—Recalled—Redirect

By Mr. Grosman:

Q. Mr. Marcus, prior to your signing these two letters, marked DM-37 and DM-38, had you asserted any claim against Mr. Schwartz? A. None whatsoever.

Q. Or against his firm? A. None whatsoever.

Q. And do you know why Mr. Schwartz exacted from you these two writings? A. Haven't the slightest idea.

Q. Now, what was Mr. Schwartz' method, if any, of calculating interest? A. He was quite meticulous about that. He would come up to my office, whenever he happened to find me there, and he would take a piece of paper cut, and pencil, and calculate interest by the day. He would figure the certain amount of a loan, so many days, at so much per day, and he would total up the total amount, and I would pay him that interest money.

(1612) Q. You are now talking about loans that he made to you? A. Loans that he made to me, yes.

Q. And the interest you refer to is the interest on those loans? A. On those loans; that's correct.

Q. Now, Mr. Marcus, there was some talk about a $6,000 note that you had down somewhere, and was supposed to be paid—you were supposed to have claimed it was coming to you and they showed you that it was paid. How many $6,000 notes were there exchanged between you and Milmar? A. I believe there were two.

Q. Now, have you both those notes? A. No, the other one—I don't think I have the other one.

Q. The other is in evidence? A. I have this other note here.

Mr. Brigadier: I object to this as not proper redirect. If he is going to put any more notes in, they should have been put in on the original case. If he is putting in any more documents on the proof of loans, or moneys paid, this is not proper redirect at all.

Samuel Marcus—Defendant—Recalled—Redirect

The Court: Well, I don't know what the purpose of this is.

(1613) Mr. Grosman: Well, it was made to appear that Mr. Marcus was making a claim on a $6,000 note. They produced an entry showing that that note was paid. We are producing another note to indicate that there were two $6,000 transactions.

The Court: And that one is still unpaid?

Mr. Grosman: That's my understanding of it. Is that right?

The Witness: Frankly, I don't think we have made any claim on this other note. I didn't know whether it was paid or not. It is not in our schedule. We are not claiming this note at all. And the payment was shown on the schedule, as was paid. It is on our schedule. So I don't know whether this thing is to be bothered with at all. I just happened to find this second note here, that is all.

Mr. Brigadier: I press my objection, that it is not proper redirect.

The Court: He says he doesn't intend—

The Witness: We are not pressing this.

The Court: You are not pressing that one.

The Witness: No, sir; we are not.

By Mr. Grosman:

Q. Now, is there one $6,000 note that wasn't paid? (1614) A. Frankly—

Q. Whether you are claiming anything on it or not? A. No, this note here shows payment stopped on January 5, so I presume that it wasn't paid. But I haven't included that in our schedule. So I don't know just what you want me to do with it.

Q. How about the other $6,000 note?

Mr. Brigadier: If your Honor please—

The Court: Hold everything just a minute. Do you insist, Judge Grosman, that he prosecute a claim, if he doesn't want to prosecute it?

Mr. Grosman: No, I don't know. I am trying to straighten him out on a question of whether or not he deliberately made claim for a $6,000 note that wasn't due to him. That's the way it would seem to appear.

The Court: I don't know about that. He sets it up in his schedule of payments. $6,000 paid.

The Witness: Yes, sir; it's right in the schedule of payments.

The Court: I don't get that impression, that he is trying to collect twice.

Mr. Grosman: All right, I will not pursue the subject any further.

By Mr. Grosman:

(1615) Q. Now, when do you say that you bought the stock from Robert Schwartz? A. To the best of my recollection, when Robert Schwartz definitely made up his mind to sell his stock was some time—oh, a month or six weeks after his first visit in my premises, which was about October 1. I would say it would be some time around the first part of November, or so.

Mr. Brigadier: I didn't get that.

The Witness: The first part of November.

Mr. Brigadier: What year?

The Witness: 1948.

Q. Now, you paid him his proportionate share, as you described— A. Yes.

Q. —70 per cent— A. 70 per cent.

Q. —of his investment. A. 70 per cent of his investment, against what I was getting over the over-all picture.

Q. Yes. A. That's right.

Samuel Marcus—Defendant—Recalled—Redirect

Q. Was there a computation of interest made at that time? A. Not at that time, no.

(1616) Q. Well, at the time that he agreed to sell and you agreed to buy? A. I agreed to pay him the same interest rate that I was getting on my money.

Q. Was the interest eventually computed on the purchase of Robert Schwartz' stock? A. His first interest payment, I believe, was given to him—

The Court: Is the answer yes or no?

The Witness: Yes.

Q. All right. That's all I asked. A. I'm sorry. I didn't quite get it.

Q. Now, do you recall as of what date that interest payment was computed, or how much it was? A. I can't recall at this particular moment. I know we gave him an interest payment. I can't recall the exact date right now, but it was some time early in November, if I am correct.

Q. Do you remember whether you paid him $217 interest? A. Yes, one of the checks, I believe—one of the checks had $217 interest on there.

Mr. Brigadier: If your Honor please—

Mr. Grosman: Do you object?

Mr. Brigadier: —unless you want to produce (1617) them. You promised to produce them before and they have not been produced.

Mr. Grosman: Did I? I am sorry. In the excitement we have overlooked them, but I will produce them.

Q. Did you take those checks back? A. No, you have them, Judge.

Mr. Brigadier: I don't want to delay your examination.

Mr. Grosman: No, it's all right.

Mr. Brigadier: You can get them some time today.

Mr. Grosman: I would rather get them now, if I can, Mr. Brigadier. It will only take me a minute.

Q. I show you a series of checks, Mr. Marcus, and I ask you if these are the checks that you used to pay Robert Schwartz for the stock, for his 125 shares of stock of Milmar, Inc.? A. They are.

Mr. Grosman: I offer them in evidence.

Mr. Brigadier: The same as you had at the deposition?

Mr. Grosman: Yes.

Mr. Brigadier: All right.

The Clerk: DM-39, series of ten checks.

(1618) (Received and marked Exhibit DM-39.)

Mr. Grosman: Are they to the order of Robert Schwartz?

The Clerk: Payable to the order of Bob and Robert Schwartz.

Mr. Grosman: All right.

The Court: Are you going to use those now, Judge?

Mr. Grosman: No. Do you wish to see them?

(Documents handed to the Court.)

Mr. Grosman: These checks are dated, for the record, May 10, 1949; June 1, 1949; July 5, 1949; August 3, 1949; September 6, 1949; October 4, 1949; January 9, 1950; June 9, 1950; July 13, 1950; and April 5, 1950.

By Mr. Grosman:

Q. Mr. Marcus, I show you a writing entitled, "From the desk of Samuel Marcus," with a number of dates and

figures thereon; whose writing is that? A. I believe this is Mr. Schwartz' writing.

Q. In what connection was that computation made, if you know? A. I don't know. I didn't receive this.

Q. Where did you get this from? A. My secretary recently found it at home and she gave it to me.

(1619) Q. And who is "she"? A. Mrs. Maginn.

Q. Well, now, reading it, can you tell me what these figures represent? A. Yes.

Mr. Brigadier: Now, wait a minute. He doesn't even identify whose it is. Does he testify it is Schwartz'?

The Court: That's Schwartz' handwriting.

Mr. Brigadier: Or did he say he believes it is?

The Witness: I feel—

The Court: Now we are going to have the same "I believe" when he states a fact. He says "I think" when he states a fact.

Is that Schwartz'—

The Witness: Well, now—

Mr. Grosman: Will you wait? Now everybody is talking. Will you listen to what the Judge is saying?

The Court: Do you know that to be Mr. Schwartz' handwriting?

The Witness: It looks like Mr. Schwartz' handwriting.

The Court: You certainly are an overcautious man at times, except when you sign affidavits.

Mr. Brigadier: I am going to object to his (1620) testimony.

The Court: If you can't say—

The Witness: My secretary will take care of that.

The Court: Oh, she knows his writing?

The Witness: Yes, sir.

Mr. Brigadier: Let her testify. Is she here?

The Witness: She is here.

Mr. Brigadier: She should testify, not Mr. Marcus.

Mr. Grosman: Well, I thought he knew his former lawyer's handwriting. If he doesn't, why, he doesn't.

The Witness: It looks very much like it, but I am not an expert.

The Court: You don't have to be an expert. It is only in disputed documents that you need experts.

The Witness: I would say it is his handwriting.

Mr. Grosman: All right. I ask that it be marked.

Mr. Brigadier: All right, if he says it is.

Mr. Grosman: He says it is his handwriting. That is a writing, a list of figures and dates in the handwriting of Robert Schwartz.

The Clerk: It will be marked DM-40.

(1621) (Received and marked Exhibit DM-40.)

By Mr. Grosman:

Q. You say you received this from whom? A. My secretary.

Q. And her name? A. Mrs. Maginn.

The Court: What was it given in connection with?

The Witness: This shows, the upper righthand corner, the figure $11,250, being his original stock investment, and he takes 70 per cent of that—

The Court: It is in connection with the sale of stock.

The Witness: The sale of stock.

Q. To Robert Schwartz— A. That's right.

Q. —from Robert Schwartz. A. The purchase of his stock. From Robert Schwartz, that's right.

Q. All right. Now, these checks, DM-39, do you know how much they total, Mr. Marcus? A. Oh, I believe they are around $8,200, or something of that kind.

Q. And you agreed to pay Mr. Schwartz how much? A. I agreed to pay him 4 per cent interest.

(1622) Q. No, please. For the stock? A. I agreed to pay him $7,875.

Q. And can you account for the excess amount of those checks? A. Yes.

Q. How? A. On the July 5 check is $217 interest, which he calculated by himself, in his own inimitable way, day by day.

Q. Interest on what? A. Interest on the $7,875, up to that day.

Q. Up to what date? A. Up to July 5. In other words—

Q. What year? A. 1949.

Q. That $217 you refer to— A. $217 is interest from the day we entered into an agreement to purchase his stock to this date, July 5.

Q. What day do you say you agreed to purchase his stock? A. I say it's some time around—oh, the beginning of November, something around there, the first week of November or—

Q. What year? A. 1948.

(1623) Mr. Brigadier: Have you had that marked?

Mr. Grosman: Yes.

Mr. Brigadier: I just wanted to look at it.

The Court: It's DM-40.

Q. Now, Mr. Marcus, the $217 interest you refer to, can you tell us for what period—can you tell us what period of time that interest covers?

The Court: He has given you the one. He says he thinks it is from November, 1948.

The Witness: The beginning of November—

The Court: I am talking now. Please.

The Witness: I am sorry.

Samuel Marcus—Defendant—Recalled—Redirect

The Court: You have a terribly rude habit of interrupting constantly.

Mr. Grosman: Nervousness, your Honor.

The Court: I know you don't do it intentionally. He said he thinks it is from the time he agreed to buy, and he thinks November of '48, down to the date of that check, July 5.

The Witness: That's correct.

Mr. Grosman: It is my impression, your Honor, that he gave me a figure in months and days, and I want to get that.

The Court: More accurately, you mean?

Mr. Grosman: Yes.

(1624) A. Yes, sir. I remember a little pencil writing, and I think it's figured to—I think I gave it to you, a little piece of diary paper—it was eight months and eight days, something like that, at $2—let's see, it was twenty-six fifty a month, and eighty-seven and a half cents a day. That's how he calculated those things right down.

The Court: Without an interest book he does this?

The Witness: All mentally.

A. (continuing) And it figured to twenty-six fifty a month, I think, so eight months—and then eight days, at eighty-seven and a half cents a day. And that was the figure, $217.

The Court: Did he charge you interest again on the last payment?

The Witness: Oh, yes.

The Court: There is more interest.

The Witness: More interest on other payments, yes.

Samuel Marcus—Defendant—Recalled—Redirect

By Mr. Grosman:

Q. Mr. Marcus, let me have this Exhibit, please. Mr. Brigadier asked you concerning interest that you charged on a loan that you made to Milmar Estates. A. Riviera.

(1625) Q. Riviera? A. That's right.

Q. What was the amount of that loan? A. I believe the loan was $4,000 on that.

Q. And the interest? A. The interest charged, I think, was $750.

Q. You said that you had gone out and borrow that money and paid interest on it yourself? A. That's correct.

Q. From whom did you borrow that money? A. I borrowed that money from a finance company called Louis Davis Company.

Q. That was the name? A. Louis Davis is his name. That's his business, financing, loaning money.

Q. And I show you a writing. What is that writing? A. This is where I set up my real estate building as collateral for the loan of $6,000.

Q. And is that the loan that you referred to? A. Yes, sir; I did.

Q. Now, how much did you pay for the use of those $6,000? A. I paid $850.

Q. Of that $6,000 you turned over $4,000 to Mr. Miller?

(1626) A. That's right.

Q. On behalf of the Riviera? A. That's correct.

Q. And you charged him $750. A. And I charged him $750.

Q. Is that approximately the proportionate share of what you paid? A. I guess it is a little bit larger than the proportionate share, but, frankly, I think I had additional expenses out of this. Out of pocket expenses, too. And I charged him seven hundred and fifty, which I thought was the proper share for what I was giving to him.

No. 839

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IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12073

AL BIERMAN and WILLIAM MILLER,
Plaintiffs-Appellees,

vs.

SAMUEL MARCUS,
Defendant-Appellant and Cross Claimant-Appellant,

and

MILMAR ESTATE, INC., a corporation organized under the rules of the State of New Jersey,
Defendant-Appellee.

AL KEVELSON,
Defendant on Cross Claim-Appellee.

Civil Action (No. 1026-50)

On Appeal from Final Judgment of the United States District Court for the District of New Jersey

Sat Below: Modarelli, U.S.D.J.

APPENDIX TO APPELLANT'S BRIEF

[Volume IV—Pages 1217a to 1600a]

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Samuel Marcus—Defendant—Recalled—Redirect

Q. And at that time you signed this writing? A. I did. I borrowed the money on my corporation. I mean, I couldn't get any more money from the banks at that time—

Q. Yes, you told us that. A. That's right. And I borrowed this on the corporation.

Q. You borrowed this in the name of the Factory Surplus Merchandising, Inc.? A. That's the concern that had the building on Duane Street.

Q. And that was one of your corporations? A. That's correct, yes.

The Court: Off the record.

(1627) (Discussion off the record.)

Mr. Grosman: I offer this in evidence.

Mr. Brigadier: I object to it going in evidence unless there is documentary evidence to show a connection between Factory Surplus raising of money and the lending of money to Milmar. There are books and records. They should be brought in under the best evidence rule to establish the transaction.

The Court: Are you sure that is not in already?

Mr. Brigadier: No. We have offered the chattel mortgage. This is a mortgage—or a loan made by Factory Surplus.

Now, before this can be received in evidence I submit that under the best evidence rule there must be some proof here, or some records, showing the transaction running from Factory Surplus to Marcus to Milmar, or to Riviera. All we have is his statement that this is the money that was borrowed by Factory Surplus, etcetera, etcetera, etcetera.

The Court: You want it traced back to the source?

Mr. Brigadier: That's right.

Samuel Marcus—Defendant—Recalled—Redirect

Mr. Grosman: We can't do any more than to meet the facts brought out on cross examination. The man swears under oath that he was the owner of this corporation, he put up his building in order to borrow the money, which he (1628) loaned to Miller and the Riviera, and that he did not charge them $750 interest on it, or bonus, for his own benefit, but he merely charged them the proportionate part of what he paid to this loan company, whatever it was.

The Court: Maybe I can help out.

At the time you loaned Bill Miller this money, did you tell him of this transaction?

The Witness: Yes, sir; I did.

The Court: Did he know that you were borrowing it, too, and paying this exorbitant rate?

The Witness: Yes, sir; he did. We have something—I believe the Judges has something else.

The Court: How about that, Mr. Brigadier?

Mr. Brigadier: I still press my objection under the best evidence rule.

The Court: The objection is overruled. I suppose Mr. Miller will deny it, anyway. I am getting used to that.

Mr. Grosman: I don't know how he is going to deny this one, unless he is going to plead insanity.

The Clerk: DM-41, copy of a document dated the 15th day of January, 1948.

(Received and marked Exhibit DM-41.)

The Court: Is it a mortgage, real estate mortgage?

The Witness: I don't know what it is. It is (1629) some security.

Mr. Grosman: It is a lien, on his life, I guess.

Mr. Tepper: Including the real estate.

Samuel Marcus—Defendant—Recalled—Redirect

By Mr. Grosman:

Q. Now, Mr. Marcus, when did you turn this money, or any part of it, over to Mr. Miller? A. Well, a few days—as soon as I received—as a matter of fact, I think—

The Court: Well, if you look at that instrument will it refresh you?

Q. How long after you signed this instrument? A. Well, I—

Q. Approximately. A. Immediately after I signed this instrument.

Q. Did you get a receipt from Mr. Miller at the time? A. I did.

Q. How much money did you turn over to him at the time you obtained—strike that. Is this the receipt that you obtained from William Miller? A. It is.

Q. Dated January 18, 1948? A. That's correct.

Q. How much is that receipt for? (1630) A. $2,000.

Q. Well, when did you give him the remaining $2,000? A. When I received the money from Mr. Davis. I think Mr. Davis gave me an initial deposit before the papers were drawn up, as Miller needed some money fast, and I gave him that money. And then—

Q. Was there ever a time when Miller needed the money slow?

The Court: Yes, I was just wondering. Every time he says he needed it fast.

Q. All right. Go ahead. A. And I asked Mr. Davis, whom—I had borrowed money from him before—

Q. Please don't. A. —would he give me $2,000 fast.

The Court: In advance.

The Witness: In advance.

The Court: All right. And you got it?

Samuel Marcus—Defendant—Recalled—Redirect

The Witness: And I got it.
The Court: Did you give it to Miller?
The Witness: I gave it to Miller.

Q. And this is the receipt he gave you? A. That's correct.

Q. That's his signature? (1631) A. That is.

Q. Bill Miller's Riviera, Inc., William Miller. Now, there is an Exhibit mark on here. Was this offered in evidence? A. No, it was in the deposition.

Mr. Grosman: I offer this in evidence.
The Clerk: DM-42, writing dated January 18, 1948.

(Received and marked Exhibit DM-42.)

The Court: We will take a five minute recess.

(Short recess.)

Q. While we are speaking about the checks that you gave Mr. Schwartz for his stock, I call your attention to Exhibit DME-52, a letter signed by you, addressed to Robert J. Schwartz, which is in evidence. I think you have told us that the date on that letter, May 13, 1948, is erroneous? A. That's correct.

Q. Do you recall when you signed that letter? A. I don't recall when I signed the letter. I know we entered into an agreement about the first of November. Whether I signed the letter at that time or not, I am not completely certain.

Q. But did you sign this letter before, or after, or at the time— (1632) A. I believe—

Q. Wait, will you please? A. I'm sorry.

Q. That you fixed the price you were to pay Mr. Schwartz for his stock? A. Yes, I signed this—I signed this at the day—at the time, I believe, that we agreed on the price. I think he came over with this letter, or he typed it—I just

forget what it is—but at the time we agreed upon the price I signed this letter, yes.

Q. You didn't sign this letter before you agreed upon the price, did you? A. No, of course not.

Q. You heard Mr. Schwartz testify on deposition? A. Yes.

Q. Did you hear what he said about the date of this letter, whether it was accurate or not? A. Well, he did say that the date was in error.

Q. And did he explain—or attempt to explain how it is that he put the date, May 13, 1948, down on this letter? A. Frankly, I don't recall his explanation.

Q. Well, if you don't recall it, you don't recall it. A. I don't recall it.

(1633) Q. With respect to the $46,000 which you claim to be due you from Milmar, in addition to the checks that you have produced, have you any further proof of what is due to you? A. Yes.

* * *

(commencing at 1634-11)

Q. I show you a paper writing and ask from whom you obtained it? A. I received this from Mr. Hoffman.

Q. Jack Hoffman, the accountant? A. Jack Hoffman, that's correct.

Q. Do you know whether it is in his handwriting? A. It is.

Q. What does it pertain to? A. It pertains to the general conditions of the Milmar Estates, as per books—as per the books of Milmar Estates, of the 1946 period.

Q. Does it show anything with respect to the loans made by you to the company and their repayment? A. Yes, there is a column here, "S. Marcus," meaning, "S. Marcus loans."

(1635) Q. What is this writing on the back; is that part of it, or did you add it on there? A. I added this on to it.

Samuel Marcus—Defendant—Recalled—Redirect

Q. Let me take it off, then. A. Yes.

Q. Hoffman didn't give you that? A. No this is my own compilation.

Q. What does this paper writing shew with respect to the loans due to you, and for what period, and from whom? A. It shows on July, amount, $2,000.

The Court: July what?

The Witness: It doesn't give a date here, your Honor.

The Court: What year?

The Witness: '46. This is all '46.

The Court: Does it also show payments on there, if they are repaid?

The Witness: Yes, it shows cash disbursements here. Let's see now, if there is anything—

The Court: What I am trying to avoid, I don't want to go into a lot of figures that have nothing to do with loans. If you know where the loan figures are there and the repayments of loans, you may use them.

Q. Does it show loans? A. This shows a column here of loans due Sam Marcus.

(1636) Q. Does it show repayments? A. Now, I don't—there is no column here that says anything—repayments.

Q. Let me see it.

(Document handed to counsel.)

A. I think these are—

Q. Please don't mumble to me. Whatever you have to say, say it out loud. A. I believe those items are reflected in the books of Milmar.

Q. Do you know what this is, what this statement is? A. Mr. Hoffman gave me this statement when I asked him to give me a statement of what Milmar owned me. This was—

Samuel Marcus—Defendant—Recalled—Redirect

Q. Is that an itemized statement of the amount due, or is this general totals? A. This is general totals, but I asked him, "Please give me a listing of what is due me from Milmar." This was about early in spring of '47 when I was beginning to have a little trouble with Mr. Miller. And he brought me this schedule down. He says, "Here is your list of loans."

Q. What does that paper show to be due to you for the year '46? A. It includes January and February of '47 and it totals about $28,000.

(1637) Q. Well, now, is that in addition to the checks that you produced here, or are some of the checks included? A. Some of the checks I have produced here are part of this here.

Q. Yes. A. And some of the checks which I don't have, I couldn't find, are listed in here.

Mr. Grosman: I ask that this be marked.

Mr. Brigadier: I object, if your Honor please, on the ground that the thing is incompetent to prove anything relevant to any issue in this case.

Mr. Grosman: It is a statement issued by Mr. Hoffman, whose name has been repeatedly mentioned here as being the accountant for Milmar Estates, and in response to Mr. Marcus' request that he give him a statement of what was due to him, he gave him this statement.

The Court: Mr. Hoffman is going to testify, I take it?

Mr. Grosman: He did testify.

The Court: Well, only for a very limited purpose, so far. This was in response to a request from you, is that right?

The Witness: Yes, your Honor.

The Court: Taken from Milmar's books.

The Witness: Yes, your Honor.

(1638) The Court: I will allow it.

The Clerk: DM-43, paper writing—

The Court: Do you know how to identify it? Did you hear what Mr. Marcus said it was? Statement prepared by Mr. Hoffman, at his request, showing what the books of Milmar referred to him on personal loans to Milmar, is that correct?

The Witness: That's correct, your Honor.

The Court: For the period indicated in there. That is what it is supposed to be.

(Received and marked Exhibit DM 43.)

Q. Now, does that cover all of the loans due to you, between the checks and this statement? A. It does. Up to that period.

Mr. Brigadier: I object. It calls for a conclusion. After all, the statement will show what it covers, or his direct testimony should be as to the items. I object to the over-all conclusion.

The Court: Wouldn't he be bound by such a statement, which might be more damaging than even documents or other proof? Now he is precluded from offering any other evidence as to any loans.

I am wondering who is going to reconcile all these figures. I am not an accountant, I will tell you right now.

By Mr. Grosman:

(1639) Q. Mr. Marcus, you were asked about having been an officer of Bill Miller's Riviera, Inc.? A. That's right.

Q. Now, were you at one time an officer? A. I believe I was.

Samuel Marcus—Defendant—Recalled—Redirect

Q. When? A. At the very inception.

Q. Did you thereafter resign? A. I did.

Q. I show you a copy of a letter dated June 26, 1946, addressed to Dun & Bradstreet, 290 Broadway, New York City, and a letter of acknowledgment from that firm. Did you send the original of that letter to Dun & Bradstreet? A. I did.

Q. And did you receive this acknowledgment thereto? A. I did.

Mr. Grosman: I offer it in evidence.

Mr. Brigadier: I object, self-serving declaration, written by this man to Dun & Bradstreet, and not evidentiary.

The Court: It is concerning whom?

Mr. Grosman: It concerns the period when he was no longer an officer of Bill Miller's Riviera. Your Honor will recall that on cross examination Mr. Brigadier brought out the fact that even though he said he was not an officer of Bill Miller's Riviera, he had been at one time (1640) an officer. And I offer this for the purpose of showing when he made a statement to Dun & Bradstreet that he was not an officer of Bill Miller's Riviera.

The Court: Well, do we need that? Isn't it conceded that he was and then he was not?

Mr. Grosman: Well, I would like to show when he ceased to be an officer. This letter is dated June 26, 1946.

The Court: Is that the date?

The Witness: Yes, sir.

Mr. Grosman: That's the date of the letter.

The Witness: Prior to that date.

Mr. Grosman: Their acknowledgemnt is dated June 27, '46.

Samuel Marcus—Defendant—Recalled—Redirect

The Court: Well, does he know now when he ceased to be an officer of Bill Miller's Riviera?

Mr. Grosman: Prior to that date.

Q. What date? A. Prior to June 26.
Q. And the year? A. 1946.

The Court: Why do we need that, just to clutter up the record?

Mr. Grosman: Well, we don't need it, except that ordinarily a letter written to Dun & Bradstreet would (1641) be proof of its contents.

The Court: You don't dispute it, do you, Mr. Brigadier, that he resigned as an officer?

Mr. Brigadier: My objection is simply to the introduction of any letter written to Dun & Bradstreet, or any reply. I don't dispute that he resigned. I don't know at this moment what the date is. It would take some time for me to check it. I simply object to this going into evidence. It is pure hearsay. It is entirely incompetent.

Q. Let me ask you this. Did you ever show this to Mr. William Miller? A. Yes, I did.

Q. The original of the letter which you sent to Dun & Bradstreet? A. I showed him the duplicate letter that I sent, and told him I was sending it out, that I didn't want to have any further connection with him at the Riviera, in the operations of the Riviera.

Mr. Grosman: I now offer it in evidence.

Mr. Brigadier: I still press my objection that it is incompetent, even if he shows what was in that letter to Mr. William Miller. This is being offered as proof of the resignation—I don't want to repeat what I said, that it is a hearsay declaration.

(1642) The Court: Of course, it doesn't prove that he resigned, because he asked Dun & Bradstreet for a statement of some kind.

Mr. Grosman: No, he notified Dun & Bradstreet that he was not an officer of Bill Miller's Riviera.

The Court: Let me see it.

(Document handed to the Court.)

Mr. Grosman: He also showed the letter to Bill Miller, who was the president.

The Court: Well, I don't know why we need it. It is just cluttering up the record with Exhibits that are not necessary.

Mr. Grosman: All right, your Honor. We feel that the fact is established.

The Court: I believe it is satisfactorily established.

Mr. Grosman: All right.

The Court: Do you withdraw the offer.

Mr. Grosman: I withdraw the offer.

By Mr. Grosman:

Q. Mr. Marcus, I think you told us that between the statement of your loans, given to you by Mr. Hoffman, and the checks you have produced, you have accounted for everything on Schedule D annexed to your counterclaim—your answer and counterclaim, with the exception of two (1643) checks? A. I believe so, yes.

Q. Would those two checks, or the amounts represented thereby, be shown on the books of Milmar Estates?

Mr. Brigadier: I object, if your Honor pleases. The best evidence of what was shown are the books themselves. They have been furnished a photostatic copy. If they have it, why don't they put it in evidence?

The Court: Suppose he knows that it is in there, can't he answer yes?

Samuel Marcus—Defendant—Recalled—Redirect

Mr. Brigadier: You mean what my contenti a is?

The Court: Yes.

Mr. Brigadier: That he cannot, that it is the books that are in evidence, not his testimony.

Mr. Grosman: I agree with that, but we have been trying to get the books of Milmar in order to establish this thing, your Honor, and they have been—

Mr. Brigadier: You have got the books, up to September 14.

Mr. Grosman: Wait a minute.

Mr. Brigadier: These are all items prior to September 14.

The Court: We will settle this right away. Did you see those checks in the books?

(1644) The Witness: Some of those checks were not in the book.

The Court: They are not in the book?

The Witness: They are not in the book.

The Court: These two, that Judge Grosman just asked you about?

The Witness: I don't believe those two are in the book. But it can be proven with the bank book, the bank deposit book.

Mr. Grosman: The one they have been using here?

The Witness: That's correct.

Mr. Grosman: May we have it, please?

Mr. Brigadier: Sure.

(Instrument handed to counsel.)

Q. I show you pass book of Milmar Estate, Inc., marked for identification DME-54; is this the book that you refer to? A. Yes, I think so.

Q. Well, now, take a look in there and see which of those entries you say corroborate your statement. A. Will

you let me see the schedule, please, see which checks I am missing.

Q. Sure.

(Document handed to the witness.)

(1645) A. Here is an item right here, which was missing here, July 7, $3,000. And it is marked in here personal—"personal, $2,500." And there isn't a three thousand, but it's marked here "personal, $2,500." And I just don't reconcile why it is three thousand on here. But I think it was some—it's marked—some check was given to me "NG," and I covered that check by depositing $2,500. I have a notation of $3,000, which may be an error. And maybe I can find out just what it is.

The Court: What is the date?

The Witness: July 7, personal, $2,500.

Q. July 7. And you set that up in your counterclaim—A. As $3,000. Let me see what this record here shows. Now, I have got the record on my sheet here as—

The Court: Mr. Brigadier, did you go into that particular item on cross?

Mr. Brigadier: What I went into, sir, was the schedule.

The Court: Did you go into that item?

Mr. Brigadier: No, all I did was to go into each item for which there was nothing in the Exhibit and asked him what did he rely on to support those items. And I am assuming that that is what Judge Grosman is doing. I am trying to follow it, and I don't follow it at all.

(1646) The Court: You questioned that particular item, because I remember that three thousand being crossed out.

Mr. Brigadier: You mean when I went through the book?

The Court: Yes.

Mr. Brigadier: I don't remember which ones. I took at random a number of them. I didn't take them all.

The Witness: My sheet of compilation shows $3,000, so maybe—

Mr. Grosman: For what item?

The Witness: For July 7. Although the bank book—the bank book shows in pencil twenty-five hundred, what the exact—the actual deposit is there could possibly be checked on the statements.

The Court: The bank book shows the $3,000 deposit. They didn't write twenty-five hundred above it, you did.

The Witness: That's right. And my compilation sheet shows $3,000 deposit.

Q. Now, what is the other check? A. The other one here is August 15. What is the amount?

Q. $3,500. A. Thirty-five hundred. Now, I have August 15, $3,500, (1647) on my sheet here.

Q. What does the book show? A. The book shows $2,500 . Let me see if some other date—sometimes we make a deposit without the bank book, and I would have to check—this $3,500 I think came from my 42nd Street store.

Mr. Brigadier: I have the transcript, if that will help him.

The Witness: Here it is right here. I have it right here, your Honor.

Mr. Grosman: Wait a minute. Mr. Brigadier is speaking.

Mr. Brigadier: He says sometimes they don't show up in the bank book. I have the transcript, if that will help him.

The Witness: I would like—the bank statements would show that, your Honor. If I could see the bank statement for that day I could reconcile it in a minute.

The Court: He says he could do it in a minute. Show it to him.

The Witness: Give me the August bank statement.

Mr. Grosman: I have no objection to its going in.

Mr. Brigadier: Will you mark it as one of my (1648) Exhibits?

The Clerk: DME-62, transcript of bank statement, Milmar Estates, Public National Bank & Trust Company, beginning January 18, 1947, up to and including October 14—no year shown.

(Received and marked Exhibit DME-62.)

Q. I hand you these statements—

Mr. Brigadier: Can I stand alongside of you?

Mr. Grosman: Go right ahead.

A. I don't see the August one here. Where is August? You haven't given me the August statement.

Mr. Brigadier: Of what year are you talking about.

The Witness: This would be August of 1947.

Mr. Brigadier: Here is August.

The Witness: Oh.

Mr. Brigadier: Incidentally, let me interrupt for a moment, your Honor.

Mr. Grosman: Go ahead.

Mr. Brigadier: You produced in the depositions the month-to-month ones yourself from your file. You have them. This is the one we got from the bank, but here is what you produced in the depositions. They must be in your file.

The Witness: Which ones are those?

(1649) Mr. Brigadier: The ones you actually got, month by month, from the bank.

The Witness: Do we have them? I didn't think we had them.

Mr. Brigadier: Here's a photostat you furnished me with.

The Witness: Let me see it.

Mr. Grosman: I don't remember.

Mr. Brigadier: I would suggest you use your own Exhibit.

The Witness: Have you got them? I wasn't sure we had them. Let me see what this is.

Mr. Grosman: I only have what you gave me.

Mr. Brigadier: You mean your client?

Mr. Grosman: You have given me nothing but grief.

The Witness: Here is an item here of August 20, $3,500—no, no—

Mr. Brigadier: That's a withdrawal you are looking at.

The Witness: You are right. That's evidently—I can't reconcile that, evidently. There is $2,500 on the 15th. The 15th shows $2,500.

The Court: Deposit or withdrawal?

The Witness: Deposit, $2,500 on the 15th. We (1650) have here thirty-five hundred. It may be an error. It must be an error of our calculations there. August 15 is thirty-five hundred on our sheet, it is $2,500 deposit in here. So there would be an error of a thousand dollars in there. And that amount is not in the bank book. So it is a deposit made without the bank book.

The Court: They also have your deposit slips—don't you?—photostats of each one of them.

The Witness: Yes. The peculiar part I have here, my accountant gave me—

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The Court: Speak up so Mr. Brigadier can hear you.

The Witness: This is an old sheet that my accountant gave me back in '46.

Mr. Brigadier: Who is your accountant?

The Witness: I don't remember. This is evidently —this is one of my regular bookkeepers in the place.

Mr. Brigadier: I object.

Mr. Grosman. Just stop.

The Court: Stop. He objects.

Mr. Brigadier: Certainly I object.

The Court: I will have to sustain it.

Mr. Brigadier: Something his bookkeeper gave him.

(1651) The Court: Just a minute. I thought Judge Grosman directed your attention to this item of July 7, 1947.

The Witness: Yes.

The Court: And you are way up in August.

The Witness: We got that July 7.

Mr. Grosman: There were two items.

The Witness: We got it straightened out. The second one is August 15. August 15 our schedule shows $3,500.

The Court: And here there is a deposit—

The Witness: Of twenty-five hundred.

The Court: On August 14.

The Witness: August 15, sir. Right here, sir, August 15, $2,500.

The Court: The bank book says August 14. Have we got the same year? Sure, '47.

The Witness: '47.

The Court: The bank book shows August 14, '47, $2,500.

The Witness: Here it is, the 15th.

The court: On there it says the 15th, on the transcript, one day difference.

Mr. Brigadier: This says the 14th.

The Court: Here it says the 14th. Where do you (1652) get August 15?

The Witness: I got it here. It's a transcript. Here is the 15th right here, August 15, $2,500.

Mr. Brigadier: Are you looking at the right year?

The Witness: Yes. August 15, '47, $2,500. Have we got the right bank, the Public National Bank & Trust Company? There it is, August 15 on here, and August 14 in the bank book. So I guess the banks can make mistakes, too.

Mr. Tepper: On the transcript that they gave him is it the 14th?

Mr. Brigadier: No, it's the 15th. No, it's the same. The transcript is the same that Mr. Marcus has in front of him.

The Witness: It's August 15. How does that show in here?

The Court: So you concede it should be twenty-five hundred?

The Witness: Yes, sir; I will concede. But I will double check on this just the same.

The Court: He concedes that in his counterclaim the $3,500 item of August 15, 1947, should be $2,500. Is that correct?

(1653) The Witness: That's correct, your Honor.

The Court: Next question.

The Witness: Then I think there is one more item open here of $600 on February 3.

The Court: What year?

The Witness: On February 3—did we have a deposit slip for that? I don't know if it was an open item or not.

Mr. Grosman: I don't know. I think all the deposit slips were put in evidence.

The Witness: Oh, yes. This seven ninety-one would be a check given to Michael Realty on interest on a mortgage, so it wouldn't be a deposit to Milmar.

The Court: We went over that.

The Witness: That would be Michael Realty, interest on the mortgage, so it wouldn't appear in the books. So the only other one open now is the $600 item of February 3. Let's see February 3. Yes, $600 deposit here, February 3, 1948.

The Court: That's right, the transcript of the record shows that on February 3, 1948, there was a deposit of $600 in the account of Milmar Estate, Inc.

The Witness: That's marked here "personal."

The Court: And the book shows it marked "personal."

(1654) All right. Are we through with that now?

Mr. Brigadier: I think we better mark that in evidence.

The Court: It is only for identification. You might as well put it in evidence.

Mr. Brigadier: Judge Grosman, you have no objection to the book being marked in evidence?

Mr. Grosman: No.

The Clerk: DME-54, formerly marked for identification, now marked in evidence.

(Received and marked Exhibit DME-54.)

By Mr. Grosman:

Q. Now, Mr. Marcus, you were asked on cross examination about the fraud that you complain about. I am not going to ask you to tell us about that all over again in detail, but will you tell us, please, were there any representations made to you with respect to the ability of Bill Miller's Riviera to pay the rent?

* * *

Samuel Marcus—Defendant—Recalled—Redirect

(commencing at 1657-23)

Q. During the year 1947-1948, who made the representations to you, if you know? A. Mr. Hoffman—

(1658) Q. Wait. A. —and Mr. Miller. I'm sorry.

The Court: He said that already.

Mr. Grosman: All right.

Mr. Brigadier: He testified to that on direct.

The Court: That's right, that Hoffman and Miller both made them, how they tried to persuade him how he would be crazy if he didn't sell, or words to that effect.

Mr. Brigadier: I think he also included Bierman.

The Court: Yes, Bierman was also accused of trying to persuade him.

Mr. Brigadier: I did not touch on it on cross.

Mr. Grosman: All right.

Q. Did you say Hoffman told you that, too? A. Yes, Hoffman told me that a number of times.

Mr. Grosman: Now, I don't remember, your Honor, whether I asked him exactly what Mr. Hoffman told him with respect to this one subject, rent.

Mr. Brigadier: I will object, of course, to anything that Hoffman told him as not being binding on us.

The Court: That is what I was wondering, too. Who authorized Hoffman?

(1659) Q. Well, now, what was Hoffman's connection with Bill Miller's Riviera? A. He was accountant and comptroller.

Q. Was he an officer of the company? A. I don't think he was an officer, but he signed the checks.

Q. Now, was he the comptroller of the company? A. Comptroller. I believe he signed as comptroller.

The Court: That's the designation on the check, comptroller.

Mr. Brigadier: Also his individual accountant throughout that whole time.

Mr. Grosman: We know that.

The Court: How would you like to sit up here and hear it said over and over again, as if I am a moron, who doesn't remember that he wasn't his individual accountant.

By Mr. Grosman:

Q. Now, during the year 1947-1948, did you ask Mr. Hoffman and Mr. Miller what the financial condition of the Bill Miller's Riviera was? A. Yes, I did.

Mr. Brigadier: I object. I withdraw the objection.

The Court: Well, he has told us this before, (1660) Judge Grosman. I don't know why you want him to reiterate it. There is no jury here and no reason why it has to be emphasized by reiteration of the subject.

Mr. Grosman: No, that wasn't my purpose, your Honor. Now, I want to ask him one more question with respect to this period.

Q. What did these two men tell you as to the financial status of Bill Miller's Riviera during the year '47 and '48? A. Practically in every conversation with Mr. Hoffman—and he visited me almost once a week, or every second week, and brought me rent money—he would say to me, "Sam, you know I am your friend. I drug this out of Bill Miller. You know, things are in pretty bad shape out there. They haven't got the money to pay their creditors with. I'm your friend." And he would bring me a thousand dollars now and then, pay me something on account—

The Court: All right. "I am your friend," so what?

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A. (continuing) And he told me constantly that business conditions was very bad and he was afraid that things would fold up.

The Court: He told us that before.

Q. Through what period? (1661) A. Through the years of 1947 and especially toward the end of '48, into July and August of '48.

Mr. Grosman: All right.

The Court: He told us all that before. Is there something else you want to ask Mr. Marcus at this time?

Mr. Grosman: I am looking for a memorandum, a notation.

I think I have the records of the First National Bank. They have been marked in evidence on the deposition. And there were the ones referred to by Mr. Brigadier.

The Court: That's the Fort Lee Bank, Judge?

Mr. Grosman: First National Bank, Fort Lee.

The Court: Yes.

Q. Would they help you to establish any of the items which you now claim to be due to you? A. Oh, no. Is that Fort Lee?

Q. Yes. A. I think we have already established that with Mr. Hoffman's statement.

Mr. Brigadier: I don't want this witness' statement on the record—I move that be stricken—what he testifies he has already established.

The Court: That time he didn't say, "I think I have already established," or "I believe."

(1662) You made a bold assertion of fact there, which is very much in dispute by your adversaries.

The Witness: The accountant, I take his word for it.

The Court: Would it help if we adjourn for lunch now? It's 12:30.

Mr. Tepper: Very much so.

The Court: Maybe you can see if you want to ask him any more when you come back. We will adjourn for lunch.

(Noon recess.)

AFTERNOON SESSION

SAMUEL MARCUS, resumed the stand.

Redirect examination by Mr. Grosman (Continued):

Q. Mr. Marcus, you were asked on cross examination concerning your association with the Embassy Club, whether or not you received any compensation for your association.

Mr. Brigadier: I don't recall asking him a single question about the Embassy Club. Does your Honor (1663) remember my asking him about it?

The Court: I think if you would have I would have stopped you. I am not interested in the Embassy Club. I think that I made the remark that I have got enough trouble with Bill Miller's Riviera without worrying about the Embassy. I have no recollection of your asking him about the Embassy Club.

Mr. Grosman: Exhibit DME-40, your Honor, refers to the fact that Mr. Miller and Mr. Marcus were each to withdraw $250 a week as compensation. Now, I don't know why Mr. Marcus thinks it is so important, but he wants to bring out the fact that he didn't receive any compensation from the Embassy Club.

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Q. Is that so? A. That's correct. May I add, nor the Riviera.

The Court: I don't think anybody contends that you ever did.

Mr. Brigadier: I ask that be stricken.

The Court: I don't think anybody ever said that you got anything out of the Riviera as compensation.

The Witness: I'm sorry.

Mr. Grosman: What was the last question I asked him before the recess?

(Record read.)

The Witness: May I correct that? In that checkbook (1664) I believe there are some entries there, marked on the side there, in Hoffman's handwriting, of loans of Sam Marcus.

Mr. Grosman: You mean—

The Witness: On the stubs of that checkbook.

By Mr. Grosman:

Q. This checkbook? A. Yes, sir.

Q. Whose checkbook is this? A. That is the checkbook of the original deposit in Fort Lee—

Q. Whose checkbook is it? A. Milmar Estates.

Q. And do you say that Hoffman's handwriting appears in that? A. These are all Hoffman's handwriting, yes.

Q. Well, what about it?

Mr. Brigadier: May I ask, is this a book we were ever given before?

The Witness: Yes, that was in the deposition. It is marked right here, Exhibit No. 74 for identification.

Mr. Brigadier: I thought it was, but my colleagues thought it was in error. I thought we had a photostat of that.

Samuel Marcus—Defendant—Recalled—Redirect

The Witness: Now, what was your question?

Mr. Grosman: You volunteered some information.

(1665) The Witness: Yes. Here's an entry here, Sam Marcus, $2,000.

The Court: That's written opposite the stubs of check No. 1007.

The Witness: That's correct, sir. Here is an entry here, Sam Marcus, $3,500, note issued.

The Court: And that's dated October 29, 1946.

The Witness: That's correct.

By Mr. Grosman:

Q. Whose handwriting is that in? A. I feel sure it is Mr. Hoffman's handwriting. Here is December 4, Sam Marcus, $3,500. Here is December 28, Sam Marcus, $5,100.

The Court: It is all '46.

The Witness: That's right.

A. (continuing) And here is January 2, Sam Marcus, $3,500.

Q. What year? A. This is January 2, '47.

The Court: They are opposite the stubs of check No. 1016.

A. Now, we have here—this is Riviera, so this would have nothing to do with me. I believe that is all the entries.

The Court: That is all that is in there.

(1666) Q. This is one of the books of account of Milmar Estates, Inc.? A. That was the original checkbook of the bank account of Milmar Estates.

Q. It was in your possession? A. No, this was in Mr. Hoffman's possession. It was delivered to me in March or April of '47, when I insisted that the books come back to me, and he said Miller wouldn't give it to him, but he did

bring me this checkbook because I was closing this account out there, anyway.

Mr. Grosman: I offer this in evidence.

The Clerk: DM-44, checkbook, First National Bank, Fort Lee, New Jersey.

(Received and marked Exhibit DM-44.)

Q. I think you told us just before we adjourned, Mr. Marcus, that both Miller and Hoffman represented to you that the financial condition of Bill Miller's Riviera was very poor and it appeared that they would be unable to pay the rent? A. Yes, sir.

Q. Do you know whether that statement was true or false?

Mr. Brigadier: I object, if your Honor please. That is no way of proving whether it is true or false, whether (1667) he knows whether the statement is true or false. He can only testify as to whether he knows, what he actually knows. Can he testify—just say, "The statement is not true"?

The Court: He will have to support it with evidence, naturally.

Mr. Grosman: I am going to support it, certainly. I know that.

Mr. Brigadier: That's what you should ask him.

Mr. Grosman: Let me put the evidence in, if you don't mind, Mr. Brigadier.

Mr. Brigadier: I object to the question, this specific question—is it true or false? It calls for a conclusion.

Mr. Grosman: If your Honor please—

The Court: I have heard your proffer. You may answer the question.

A. I believe that statement is absolutely false.

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Q. Now, do you believe it to be false or do you know it to be false? A. I know it to be false.

Q. How do you know it to be false? A. I heard a remark, that someone told me, that Hoffman had told them that the Riviera had made tremendous profits (1668) in 1947 and 1948.

Mr. Brigadier: I move that the answer be stricken.

The Court: Hold it. The objection is sustained. The answer will be stricken, what somebody told Hoffman, who told somebody else.

Q. Did you ever talk to Hoffman himself? A. I did.

Q. After September 14, 1948, with respect to the condition of the Riviera? A. I did.

Q. What did you say to him and what did he say to you with respect to the financial condition of the Riviera?

Mr. Brigadier: I object on the ground that there is no proof that Hoffman was authorized to make any admissions that would be binding, even assuming that the Riviera was his principal or that Milmar was his principal. There has to be proof that he would be authorized to make such a statement. He was not an officer in 1948 and any admission he would make would not be binding upon the corporation.

Mr. Grosman: My understanding, your Honor, is that he was comptroller of this company. He is one of the men who, together with Miller, made the representations to Mr. Marcus as to the financial condition of the Riviera (1665) upon which he relied in agreeing to sell out his stock interest to Milmar. Certainly the comptroller of a company is authorized to speak concerning its financial condition.

The Court: Why isn't that so, Mr. Brigadier? Who would know better than the comptroller?

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Mr. Brigadier: There is no proof that he was the comptroller, to begin with, after September 14, 1948. The only evidence about his being comptroller was when Marcus was in possession and control. There is no proof that he has any authority to bind the corporation by any statement that he made.

I press my objection, sir.

Mr. Grosman: He still is the financial officer of the corporation. Now, we have shown, up to—as far as we could, that he was the comptroller of this company.

Now, the general rule of law is that we, having established a fact to exist, it is presumed to continue, till shown to the contrary.

The Court: When is this conversation supposed to have taken place?

The Witness: This conversation took place at a law suit where he was present there.

The Court: I know, but I don't know anything (1670) about the time In point of time.

The Witness: Some time in 1949, either in 1949 or 1950. And he was going to be a witness in some case.

The Court: I am not interested in that. All I asked was when it was.

Mr. Grosman: All right.

The Witness: And I—

Mr. Grosman: Wait.

The Court: Just a minute, please.

Mr. Grosman: It seems to me that the comptroller of a company ought to be—if anybody ought to know the financial condition of the company, it ought to be the comptroller. They say that he was not the comptroller of the company beyond a certain date. Let them show it.

The Court: Assume he did say it. Is that the kind of proof that you have to decide on whether a thing is false?

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Mr. Grosman: If your Honor please, we are trying to lay a foundation for the remark that the man made.

The Court: I will allow it.

Mr. Grosman: All right.

The Witness: What was the question, sir?

The Court: What was the remark he made to (1671) you, at the time you said he made it, after September 14, 1948?

The Witness: I asked Mr. Hoffman—

By Mr. Grosman:

Q. Wait a minute. With respect to the financial condition of Bill Miller's Riviera. A. I asked Mr. Hoffman, "How are things going over there?" He says, "We are going great. We made tremendous profits."

The Court: Referring to what year?

The Witness: Frankly, I don't recall him mentioning any year. I didn't ask him. I just said, "How are things going over there, Jack?" He said, "We are doing great. We are making tremendous profits."

The Court: Next question.

Mr. Brigadier: I wish I had known that was the answer. I would have saved you a lot of time.

The Court: That's right.

Mr. Grosman: Well, you don't give us a chance.

Mr. Brigadier: I never dreamt you were going to get that kind of an answer.

Mr. Tepper: What is wrong with that kind of an answer?

The Court: What are you asking for? I am the one to decide whether an answer is a good one or not.

(1672) Q. Was there any discussion between you and Hoffman with respect to your seeing the books of Milmar,

or of the Riviera? A. Yes, I did speak—I says, "It's peculiar, Jack," I says, "back in '47 and '48 you weren't doing any more business than you are doing now and yet you are making tremendous profits now and yet in '47 and '48, why, you were losing your shirt, and you told me you had to run for the hills, that Bill Miller was going to close up and I better save what I could save." I says, "How about you showing me the books of 1947 and '48? I would like to look at them."

Q. And his answer? A. His answer was, "No chance in the world. Miller would never let you look at those books."

Q. Now, some question was raised as to why you didn't demand payment of your loans prior to the time that you did; can you tell us why you didn't? A. Yes. We had—we always considered ourselves a stockholder of Milmar, and we had had an arrangement whereby I wouldn't ask for my loans before—prior five year period, that I would advance money to Milmar and the money would be repaid to me in five years from surplus.

Q. Now, was that reduced to writing? A. I believe it was.

1673) Q. Well, do you know, as a fact, that it was reduced to writing? A. Yes, I am fairly certain. I think that was one of the agreements of our July 23 transaction.

Q. Do you know the document that it was contained in? A. Well, it would be contained in that lease of July 23, or one of the accompanying documents.

Q. July 23, what year? A. '47.

Q. I show you Exhibit No. DME-28, which is a lease dated July 23, 1947. A. That's correct.

Q. Now, will you find that provision in there? A. I think it is the fortieth paragraph. No, this is not it. Can I see the other agreement that went along with this, Judge? It's probably in one of the accompanying papers, Judge.

with this lease, because I don't particularly see it in the lease. There are two or three other papers joining with this lease.

Q. Now, pass that for the moment, Mr. Marcus. Is there any other way in which you can show that the representations made to you by Miller and by Hoffman with respect to the income of the Riviera not being sufficient to pay the rent, and all the rest of it that you told us, (1674) is there any other way that you can show that statement to be untrue?

Mr. Brigadier: Just a moment. I object to the question. It calls for a conclusion, not only of fact, but a conclusion of law.

Mr. Grosman: I am asking him if there is any other way that he can show it.

The Witness: Yes, sir; there is.

Mr. Grosman: Wait.

The Court: Answer it.

Q. How? A. By an examination of the books of Riviera and Milmar.

Q. You think the books of Milmar and Riviera will show that these representations made to you were false? A. Yes, sir; I was told that they kept two sets of checks and two sets of books.

The Court: By whom?

Mr. Brigadier: I object to that part of it—

The Witness: By people who had worked there before.

The Court: Oh.

Mr. Brigadier: I ask that that be stricken.

The Court: The answer will be stricken.

Q. Well, now, you think that the books would show (1675) that the representations made to you in respect to the things I have stated are false?

Mr. Brigadier: I object to the question.

The Court: That calls for a conclusion. How does he know that? Have you got any facts to go by?

Q. Do you have any facts to go by? A. My accountants have told me that they could—

The Court: If I would let them look at the books, maybe they would find it, is that right? That's not a fact, that's a guess.

The Witness: I'm sorry, sir.

The Court: We want facts here. You could have done all that before you sold out on September 14, 1948, if you didn't believe these so-called, if you didn't believe these people. The books were accessible to you then.

Q. Well, did you believe these people when they made this statement to you prior to September 14, 1948? A. I did.

Q. Miller and Hoffman. A. That's correct.

Mr. Grosman: Would your Honor pardon me a moment while I take a look at my copy of this lease?

The Court: Yes.

Q. Now, do you know whether Mr. Hoffman made a statement, under oath, at a time subsequent to September 14, (1676) 1948, as to the true income of Bill Miller's Riviera during the years 1947 and 1948?

The Court: I missed one of those words. Will you repeat that?

(Question read.)

The Court: I missed the words "true income."

Mr. Brigadier: I object to the question. I think it is incompetent. I think there is no proof that Hoffman

can bind us by anything he might have said anywhere under oath; and further, that the way to prove what Mr. Hoffman said under oath is by bringing in the transcript, or evidence, whatever there is available of what was said under oath, as the best evidence thereof, and not what he heard someone say.

Mr. Grosman: We have to lay a foundation for it. Now, I have the transcript that he is talking about. But I can't just walk in, unless you consent to it, and present a transcript to your Honor.

The Court: Well, I presumed that you did have a transcript.

Mr. Grosman: Certainly I have the transcript, and his statement under oath as to the income of Bill Miller's Riviera in the years 1947, '48, '49, '50, '51 and so on.

The Court: In order that you will be set at (1677) ease, if I find that I made a mistake about letting this in about Mr. Hoffman I shall strike it out. My present impression is that it is admissible.

Mr. Grosman: Now, may I say this, your Honor. At the time that Mr. Hoffman made this statement he appeared as a witness on behalf of Milmar Estate and Bill Miller's Riviera in—

The Court: At the time of the condemnation.

Mr. Grosman: Yes.

The Court: I can imagine how they built it up then.

Mr. Grosman: Well, all right, they swore to it.

The Court: It's all right. It's good evidence, that's right. I agree with you. I am not making any allowances for people who blow hot and cold, depending what is in issue.

Mr. Brigadier: I still submit, sir, that that transcript is the evidence, and not whether he heard something.

The Court: He just wants to lay the foundation. Then he is going to show him the transcript.

Mr. Brigadier: All he has to do is simply come forward and say, "I have here a copy purporting to be a transcript," and ask me whether I stipulate that it is the transcript, and that's the end of it.

(1678) The Court: All right.

Mr. Grosman: Will you stipulate?

Mr. Brigadier: Certainly he is not the witness by which to prove it.

Mr. Grosman: All right.

Mr. Brigadier: Let me see it.

Mr. Grosman: Have it your way.

Mr. Brigadier: Let me see it, Judge. If it's an official record, of course I will allow you to put it in.

Mr. Grosman: I assure you I didn't write it.

The Court: Do you know what page it is on?

Mr. Grosman: It starts at 131, 132.

Mr. Brigadier: Go ahead, put it in evidence.

Mr. Grosman: All right. I offer this transcript in evidence and ask that it be marked.

The Clerk: The transcript referred to will be marked DM 45. The transcript is entitled Milmar Estates, Inc., versus New Jersey Highway Department.

(Received and marked DM-45.)

Mr. Grosman: Your Honor, in order to save you the time of going all through this, may we read the figures into the record?

Mr. Brigadier: I want you to read what the page says into the record, not figures.

(1679) Mr. Grosman: The whole thing is in.

Mr. Brigadier: It refers to gross profits.

Mr. Grosman: And to net profit. It's in evidence.

Mr. Brigadier: Are you going to read from it, sir?

Mr. Grosman: I was going to, Mr. Brigadier.

Mr. Brigadier: I will stand alongside you.

Excerpts from Exhibit DM-45 Read Into Record

Mr. Grosman: All right. You may.

The Court: Is this Hoffman testifying?

Mr. Grosman: Yes, your Honor. I will start reading from the beginning of page 130.

"Question: What is your business, Mr. Hoffman?

"Answer: I am a CPA.

"Question: Where is your office?

"Answer: My offices are at 130 West 42nd Street, New York City, and at 153 High Street, Closter, New Jersey.

"Question: You have been identified with this enterprise, the Riviera, for a great many years, haven't you?

"Answer: Since the inception in 1946, with Mr. Miller.

"Question: I want to ask you about the existing lease which is in evidence, the photostat which you furnished to Mr. Goldfarb when he came over to see you.

(1680) "Answer: That's right.

"Question: That lease provides for a rent of $2,000 a week or a total of $104,000 a year when the property is occupied for 52 weeks a year, is that right?

"Answer: That's right.

"Question: It provides a minimum of $63,000 or $3,000 for 20 weeks under any circumstances, is that right?

"Answer: That's right.

"Question: And it provides for a sliding scale above 20 weeks if it is used more than 20 weeks, is that right?

"Answer: If it is used more than 26 weeks, then it is at the rate of $2,000 a week, but no total can be more than $104,000.

"Question: What is the maximum that has ever been paid for one year's rental under that lease?

"Answer: $81,540.

Excerpts from Exhibit DM-45 Read Into Record

"Question: The minimum has been how much?

"Answer: $40,000.

"Question: What was paid last year?

"Answer: $50,000 for the past two years."

Now, this testimony was given on the 16th of December, 1953.

"Question: Is it a fact that Mr. Miller is both the landlord and a substantial stockholder in Milmar Estates and (1681) a tenant as practically the sole owner of Bill Miller's Riviera?

"Answer: That is true.

"Question: So that there were various conversations in making the lease other than the most money that could be obtained by the landowner, is that correct?

"Answer: That is true.

"Question: About the operations of this company, just briefly, how many shows do they have there per night?

"Answer: We had as high as four shows in one night, but on the average, Friday, Saturday and Sunday we would have, I would say, just Saturday, we would have three shows. On Friday we would have two shows on the average.

"Question: Through the rest of the week you would have two shows?

"Answer: Two shows is the least, the minimum.

"Question: How many people can you seat?

"Answer: We have had as high as 1,106 people at one sitting. It wasn't very comfortable.

"Question: How many on an average?

"Answer: On an average, about 950.

"Question: So you have about the same number of people for more than one show?

"Answer: Yes. We have had as high as 3,200 people (1682) a night.

Excerpts from Exhibit DM-45 Read Into Record

"Question: Can you give us some idea about the volume of business done?

"Answer: Well, starting in 1947 for a physical period ending March 31 of each year we started for a 39-week operation the first year. There was $753,000 worth of business. For the period ending March 31, 1948, for a 46-week period, we tried going that whole year, and we did $1,098,500. That was for a 46-week operation. In 1949, $1,023,384.38 for a 26-week operation. In 1951, $1,279,392.15 for a 26-week operation. March 3, 1951, $1,192,339 for a 25-week operation. For the year ending 1952, March 31, $1,277,910.43 for a 25-week operation. For last year, ending March 31, 1953, $1,394,467.45 for a 25-week operation.

"Question: I don't think we ought to press you too closely about that. Does Bill Miller's Riviera make any money?

"Answer: For the past three years it has made money."

Mr. Brigadier: And this was given what date?

Mr. Grosman: December 16, 1953.

"Question: Can you give us a rough idea of how much?

"Answer: Well, I have a gross profit on sales for the entire period. I could just give you a run-down on this very fast. The gross profit for the first year, 1947, (1683) $177,000. The gross profit for 1948 was $188,000. The gross profit for 1949 was $201,000. The gross profit for 1951 was $276,000. The gross profit for 1951 was $307,000. The gross profit for 1952 was $241,000. The gross profit for 1953 was $284,000.

"Question: Out of that gross proft you have to charge depreciation, is that right?

"Answer: We have expenses, depreciation, officers' salaries, repairs, etcetera."

Colloquy

The Court: Isn't that marked off?

Mr. Grosman: We got this thing only this morning.

The Court: Oh.

Mr. Grosman: "Question: The big thing is, when you are through with all those expenses you still made substantial profit, is that correct?

"Answer: Oh, yes.

"Mr. Winne: Thank you, Mr. Hoffman, that is all.

"Cross examination."

Mr. Brigadier: I would like the record to show that he has omitted a great many pages in between, so that your Honor—

The Court: He obviously had to.

Mr. Brigadier: —would not think it is consecutive. So there is no tie-in between the last (1684) statement and what is in between.

Mr. Grosman: One or two pages. I don't want to burden the record. The whole thing is in evidence.

Mr. Brigadier: Why don't you put the record in evidence?

The Court: I don't want to read the whole thing.

Mr. Brigadier: Just these six pages of Hoffman's testimony. I think you should have the whole thing, so I can refer to it in the course of argument, as to whether there is anything in there showing net profits, that he said he was going to show.

Mr. Grosman: All right.

Mr. Brigadier: You don't have to read it. The stenographer can copy it later into the record. I have no objection.

Mr. Grosman: If your Honor please, the net figures are here on page 136 and 137. He skips around from year to year, so it would take me a little time.

Colloquy

Mr. Brigadier: Is there anything there, Judge, for '47, '48, which is what you represented you were offering proof of?

Mr. Grosman: I don't know.

The Court: Yes, he reports a gross profit for '47 and '48.

(1685) Mr. Brigadier: I am talking of net, sir.

The Court: I didn't hear anything about net profit yet.

Mr. Grosman: Now, the whole thing is in evidence, your Honor. The only reason I read this is because I want to set it up so that your Honor wouldn't have to go through the entire record.

The Court: That might be better. Let him go over it after court, and anything in there that he thinks should go in, may be marked.

Mr. Grosman: May we withdraw this witness for a few minutes?

The Court: Yes.

Mr. Grosman: I have a witness who cannot come back here again, your Honor. She is a very short witness. She is the secretary whom we have talked so much about.

The Court: Mrs. Maginn?

Mr. Grosman: Yes.

(Witness temporarily excused.)

Adeline Maginn, called and sworn for the defendant Samuel Marcus, testified as follows:

The Clerk: May we have your full name and address, please?

The Witness: Adeline Maginn.

The Clerk: And your address for the record, (1686) please?

Adeline Maginn—for Defendant Marcus—Direct

The Witness: 33 Maldon Street, Malverne, Long Island, New York.

Direct examination by Mr. Grosman:

Q. Mrs. Maginn, did you at one time work for Samuel Marcus? A. Yes, I did.

Q. Where? A. At 18 East 42nd Street.

Q. In what capacity? A. I was his secretary.

Q. And do you know Mr. Robert Schwartz? A. Yes.

Q. Well, who is he? A. I knew of him as being Mr. Marcus' attorney.

Q. Now, did you know Mr. William Miller? A. Yes.

Q. Do you remember a meeting in Mr. Samuel Marcus' office between Mr. Schwartz, Mr. Miller, Mr. Marcus and anyone else? A. Well, I do recall a meeting.

Q. When was it? A. It was some time in August, '48.

Q. And how do you fix the time? A. Well, I believe that was shortly after I had come back (1687) from my vacation.

Q. When was your vacation that year? A. I think it was the two weeks previous to that.

Q. Now, have you told us all who were present? A. There was Mr. Marcus, Mr. Miller, Mr. Schwartz and another gentleman, I didn't know his name.

Q. And what capacity did he act in, if you know? A. This other gentleman?

Q. Yes. A. I don't know.

Q. Did you overhear any conversation between these people on this occasion? A. Well, I did hear Mr. Marcus that he wouldn't consider selling Mr. Miller any of his stock without cash.

Q. Was this conversation in your presence? A. I was right there in the office, but I was doing my other work, but this was in loud talk.

Q. What did Miller say, if anything? A. Mr. Miller became very excited and walked out.

Q. How long did this meeting last? A. I think it must have been about an hour or an hour and a half.

Q. Now, after Mr. Miller walked out, what happened? A. Mr. Marcus was very excited and he walked out the door, also.

(1688) Q. And who remained in the office? A. Well, as far as I recall, I think it was just Mr. Schwartz and this other gentleman.

Q. Did anything transpire between them at that time? A. Mr. Schwartz came over to me and asked me to take down a short memorandum, which I did, and I typed it up and gave it to him.

Q. Would you know that memorandum again if you saw it? A. Yes, I would.

Q. I show you an agreement, in evidence, Exhibit DME-3, is this the writing that you have reference to? A. No.

Q. Did you ever see that writing before? A. (Witness shakes head.)

Q. Is that written on any machine that you used in Mr. Marcus' establishment? A. I couldn't tell, sir, only that it has the same type.

The Court: Raise your voice, please. We all have to hear you.

A. I couldn't tell. I mean, it may be the same type, it's the elite type, the small type, but I didn't type this up.

(1689) Mr. Grosman: I see. All right.

Mr. Brigadier: Judge Grosman, are you aware that you haven't shown her the Exhibit on which we have been waiting for a concession? That's not the Exhibit. It's the one of August 26. I don't know why you are showing her that one.

The Clerk: DME-2.

Mr. Brigadier: Yes.

Mr. Grosman: I thought that was the one you gave me.

Mr. Brigadier: I didn't know what you were doing or I would have broken in on you before.

By Mr. Grosman:

Q. Did you ever see this Exhibit, DME-2? A. (Witness shakes head.)

The Court: Answer, don't shake your head.

A. No, I haven't.

Q. Did Mr. Marcus ever dictate this Exhibit to you?

Mr. Brigadier: Will you identify the number now, Judge?

Mr. Grosman: DME-2 I said.

Mr. Brigadier: I want to make sure.

A. No, he never dictated this to me. He never dictated that to me.

(1690) Q. Why do you say that? A. Well, first of all, that is not my typing. That has closed punctuation here in the salutation of the letter. I don't type that way. And I don't recall any of the information that is contained in there. Mr. Marcus never dictated that to me.

Q. Is that his language? A. No, it isn't.

Mr. Grosman: All right.

Mr. Brigadier: I understand you just asked her whether Marcus dictated it. You haven't asked whether Schwartz dictated it.

Mr. Grosman: Well, of course, you can ask her on cross examination.

Mr. Brigadier: I will.

By Mr. Grosman:

Q. Do you know whether Mr. Schwartz, Robert Schwartz, dictated this instrument to you? A. I didn't type it. And Mr. Schwartz didn't dictate it to me, no.

Q. And you say you didn't type it? A. I didn't, definitely.

Q. And why do you say that? A. I can say definitely from the way the letter is drawn up.

(1691) The Court: You wouldn't draw it that way, would you?

The Witness: No, sir; I wouldn't.

The Court: That's why she had to say no to Schwartz, too.

Q. Do you know anything about the Robert Schwartz stock?

The Court: In Milmar.

A. Yes, I do recall one incident where Mr. Marcus came to me and mentioned that he was going to purchase Bob Schwartz' stock in the Milmar Estates.

Q. Now, do you know when that was?

Mr. Brigidier: I object to this and ask that it be stricken. Whatever Mr. Marcus told her would be pure hearsay. He could have told 150 other people the same thing. Would that be evidence?

The Court: It would not.

Mr. Grosman: And the Judge, of course, knows that.

Mr. Brigadier: Why do you ask it and put it in?

Mr. Grosman: Because I am laying a foundation for something.

Mr. Brigadier: I press my objection.

The Witness: Did you ask me a question, sir?

(1692) The Court: Do you want it repeated?
The Witness: Please.

(Question read.)

A. That was some time after the meeting which was in our office. That was—let me see, that was August, 1948. That would be around November, '48.

Q. Now, subsequently, did you talk or hear any statement made by Robert Schwartz with respect to this stock? A. Well, he came to me later and handed me a notation as to monthly payments that were to be made to him.

The Court: That's that handwritten memorandum?
The Witness: Yes.
The Court: You remember it was handwritten?
The Witness: He gave it to me.

Q. I show you a memorandum. DM-40, and ask you whether that is the memorandum that Robert Schwartz handed to you? A. That's right, sir.

Q. You say in November of '48? A. Around that time.

Q. Yes. And what did he say to you, if anything, when he gave you this memorandum? A. He just gave me this notation and said these were to be monthly payments of $1,000 per month to be made to him for the purchase of his stock in the Milmar Estates.

(1693) Q. Now, what did you do with this memorandum after Schwartz gave it to you? A. Well, I made my own memorandum on the basis of what Mr. Marcus told me.

Q. Yes. A. And this—

Q. What did you do with this particular memorandum, DM-40; did you give it to Mr. Marcus? A. Well, I gave this to Mr. Marcus. I came across it when he asked me to come across some other things.

Q. Now, I show you a batch of checks marked DM-39. Did you draw any of those checks—I mean, is the handwriting yours? A. They are mine.

Q. Will you look at all of them, please? I am not talking about the signatures, I am talking about the checks. A. No, the check. I made all these, but the last two I didn't.

Q. The last two are not in your handwriting, that is, those of June 9, 1950— A. Oh, that's because I wasn't—

Q. All right. You weren't there any longer? A. No.

Q. I should say you were no longer Mr. Marcus' (1694) employee? A. That's right.

Q. And July 13, 1950? A. That's right.

Q. How about this very last one, green? A. No, sir.

Q. That is not yours? A. No, sir.

Q. Now, did you have any conversation with Robert Schwartz with respect to the delivery of the Milmar stock which he had owned, delivery to Marcus? A. Yes, I do recall having asked Mr. Schwartz for the stock certificates, because Mr. Marcus told me that after making so many payments—I don't recall how many at the time—that I was to ask Bob Schwartz for the stock certificates, which I did.

Q. Did you ask him? A. I did; yes, sir.

Q. And when would you say that was, about? A. I don't recall, but I imagine after having made around five or six payments.

Q. What did he say to you—what did you say to him and what did he say to you? A. Well, I asked him for the stock certificates, such as Mr. Marcus requested. And he said that his father was in (1695) Florida at the time, and he had the key to the vault, and these stock certificates were in the vault, and as soon as his father returned he would get the stock certificates and give them to either me or Mr. Marcus.

Q. Now, to your knowledge, did he ever deliver that stock to you or to anyone else? A. Not to me sir. But once after that I recall having asked him again.

Q. About when? A. Oh, I don't recall. It was shortly after that, though. And he mentioned to me that he was going to Mr. Marcus' house for dinner that night, and he had the stock certificates, and he would give it to Mr. Marcus at that time.

Q. Well, now, was that after your—was that your first conversation? A. That was after, sir. I am sorry. That was after.

Q. About how long—how many payments had been made in the meantime? A. I don't—

Q. If you know. A. I don't recall, sir.

Q. Were payments made in the meantime? A. Oh, yes.

Q. Between the first and second conversation? (1696) A. Yes.

Q. You don't know if he ever delivered the stock? A. I don't recall frankly. I mean, I don't know. Mr. Marcus never mentioned it again to me.

Q. Now, do you know Mr. Jack Hoffman? A. Yes, sir.

Q. And who is he? A. Well, I knew of him as the accountant for the Milmar Estates.

Q. Did he ever come to Mr. Marcus' place? A. Yes, sir; he did.

Q. Subsequent to August or September of 1948 did he ever come to Mr. Marcus' office? A. Well, I do recall when Mr. Marcus came to me and had given me some notation about having sold some of his stock, Mr. Marcus came into the office with some outfit that he gave me to put with the books, and Mr. Hoffman had come into the office and requested this outfit.

Q. Well, what did he ask for? A. The Milmar Estates Corporation outfit.

Q. Did you give it to him? A. Yes, I did.

Q. And about when was this? A. I can't say, but I know it was some time after this meeting.

(1697) Q. In? A. In '48. In other words, this must have been around—I really don't know, sir, it must have been a couple months later.

The Court: When did you leave Mr. Marcus' employ, madam?

The Witness: In March, 1950.

The Court: Was it the beginning, middle or end of March?

The Witness: It was St. Patty's Day.

The Court: That's a good way to remember it.

Q. Now, are you the lady who has been referred to as "Pat"? A. Yes, sir.

Q. And what is that, a nickname? A. Well, that was short—my name was Paternitti, and rather than call me Miss Paternitti—nobody could pronounce it—they called me Miss Pat.

Q. Did Mr. Marcus ever call you on the telephone or visit you after you left his employment? A. Yes, sir; he did.

Q. Did he ask you to look for the documents pertaining to the Milmar transaction? A. Yes, he did.

Q. And did you look for them? (1698) A. I did, sir.

Q. Did you find any? A. I couldn't find anything but whatever—I found two pieces of paper, I think, that I gave to Mr. Marcus.

Q. Namely, what? A. I believe it was this Bob Schwartz notation and also a letter.

Mr. Grosman: Pardon me. What is it, DM-40?

The Clerk: DM-40.

Q. What else? A. A listing of all the duties, my specific duties, when I left Mr. Marcus' employ, that I had to turn over to—there was a duplicate copy.

Q. To your successor? A. That's right. There is a duplicate copy I had had in my files.

Q. That had nothing to do with Milmar. A. No.

Q. Would it? A. It had a few notations on it, but—

Q. Did you keep a diary while you were in the employ of Marcus? A. It wasn't a diary, it was a memorandum book that I kept certain notations Mr. Marcus gave me from day to day.

(1699) Q. And did he ask you to find that for him? A. Yes, he did.

Q. Were you able to do so? A. No, I wasn't.

Q. What was your practice in respect to making deposits to the Milmar account, did you have a duplicate slip? A. Oh, yes, I'd make up a duplicate slip to the bank that it was being deposited in and I'd keep it in Mr. Marcus' file.

The Court: Was that the only record you kept?
The Witness: That's all, sir.
The Court: Just a duplicate deposit slip?
The Witness: Just a duplicate deposit slip.
Mr. Grosman: Cross examination.

Cross examination by Mr. Brigadier:

Q. Mrs. Maginn, I show you DME-50 for identification. Did you type that? A. Yes, I did.

Q. What kind of a typewriter have you got—I mean, what kind of a typewriter was that typed on? A. That was an elite typewriter. It was one of these Magic Margin type of typewriter.

Q. Well, elite is the kind of type. A. It's the tiny type.

(1700) Q. The name of the typewriter is what I am after. A. I think it must have been a Royal. I am not too sure, sir. It may have been a Royal. If I really thought about it deep enough—I think it was a Royal.

The Court: I wish you would, because it may become very important in this case at some time, if you can remember.

Q. Will you notice particularly the "June, 1947," on that? A. Yes.

Q. You typed that, didn't you? A. Yes, sir; I did.

Q. You notice that "4" on that? A. Right.

Q. Now, you notice the initials "SM AP"? A. Right.

Q. And the "AP" was— A. Adeline Paternitti.

Q. That's right, yourself? A. Right.

Mr. Brigadier: Incidentally, I don't think I ever put this in evidence, and I would like to put it in evidence now that she has identified it.

The Court: Fotoshop stationery?

Mr. Brigadier: That's right.

(1701) The Clerk: DME-50, formerly marked for identification, now marked in evidence.

(Received and marked Exhibit DME-50.)

Q. I show you DME-51 and I ask you whether you typed that? A. No, I didn't type that.

Mr. Brigadier: No, I think the testimony was that it was not by her.

I will have to ask the question.

Q. I show you DME-51 and I ask you whether you typed that?

(Document handed to the witness.)

A. I didn't type that.

The Court: Didn't you generally put your initials on it if you did it?

The Witness: That's "M" there. Mine is "AP."

The Court: Yours is "AP."

Adeline Maginn—for Defendant Marcus—Cross

Q. When did you become Maginn? A. In June—I'm ashamed, I don't know the year.

The Court: Don't tell your husband you forgot when you got married.

The Witness: Isn't that a shame?

The Court: It's bad enough when husbands forget.

The Witness: It was in June—

(1702) The Court: I think we will take a short recess, because I want to do a little thinking about that typewriter, too. It's very important.

Mr. Brigadier: I would like her to study the documents, perhaps during the recess.

The Court: Let her look at them.

Mr. Brigadier: Perhaps that would help.

(Short recess.)

Q. During this intermission you conferred with Mr. Marcus and Miss Bergler with respect to these three documents, DME-2, DME-50 and DME-51? A. We were just discussing them; yes, sir.

Q. And you discussed them with the documents in front of you? A. Right.

Q. In other words, you went over the various parts of the documents, right? A. That's right.

Q. Again I ask you—you admit that you did type DME-50, is that right? A. Yes, sir; my initials are there.

Q. And you recall typing it? A. I do.

Q. What about DME 51? A. I am doubtful about this one, sir.

(1703) Q. You never recall using the initial "M"? A. No, I don't. I may have. I don't realy recall whether I used "AM," Adeline Maginn, or just "M" for Maginn.

Q. I see. Do you know of any secretary who Mr. Marcus had who had the initial "M" other than yourself? A. He had no secretary other than myself.

The Court: Doesn't the date help you, either, March 26, '48? You were with Mr. Marcus at the time, weren't you?

The Witness: I was; yes, sir.

The Court: You don't have any recollection of this?

The Witness: I don't remember typing this.

The Court: Do you remember ever just putting an "M" in there?

The Witness: I may have. It's possible that I may have.

Mr. Grosman: Were you married then?

The Witness: I was.

The Court: Off the record.

(Discussion off the record.)

The Court: How about that other one, Mr. Brigadier, DME-2?

Mr. Brigadier: I'm going to come to that in a moment. I am giving her some others.

(1704) Q. I show you DM-18, Mrs. Maginn, and ask you whether you typed that? A. I don't recall. I may have also typed that, because it has the "M" on it. That may be the "M" for Maginn.

Q. Well, I am also suggesting that you look at the similarity of the types, and the figures, particularly. Does that help you in any way? A. Well, only that it does have the elite type, sir.

Q. I show you the two letters that are a part of Exhibit DM-19. I ask you whether you typed those? A. No, I definitely didn't.

Q. You didn't look at the second one. A. No, I tell you, sir, I can tell by the way it is punctuated.

Q. Your answer is no, definitely, as to both. You haven't yet looked at the second one. A. Well, this one I didn't, because I can tell by the way it is punctuated.

Adeline Maginn—for Defendant Marcus—Cross

Q. I want the record to show that you are talking about the first one, right? A. This one here. (Indicating.)

Q. The one on top? A. Right.

Q. Well, there is a second one. A. Well, that's the second page. Oh, I see.

(1705) Q. That's right. The second letter. A. The second letter. I don't think I typed that.

Q. Now, in September, 1948, and in August, 1948, were you the only secretary employed by Mr. Marcus at the office at which you were working? A. Yes.

Q. There was no other secretary or typist employed? A. Oh, there were other typists. There may have been one or two other typists, upstairs on the third floor, but I did most of Mr. Marcus' typing.

Q. Do you know their names? A. No, sir; I don't recall.

Q. You don't know whether any of their names began with an "M"? A. No, I don't recall. I'm sorry.

Q. I see. Now, I show you Exhibit DME-2, which is the one you were questioned about on direct examination. Did you type that? A. I didn't.

Q. You are positive that you did not? A. Positive, because of the punctuation. It has closed punctuation in the salutation.

Q. Is that the only reason, or are there any other (1706) reasons? A. Well, I don't recall having typed that.

Q. What makes you feel certain is the fact that the punctuation is different than you would have employed, isn't that right? A. Right.

Q. I show you Exhibit DM-20, and direct your attention to the way in which you have set up—this one is yours, right? A. Right.

Q. This you did type. Will you look at the way you have set up the address on this, beginning with the heading, "Special Delivery," does this suggest anything to you as to whether or not you might have typed DME-51; is it set

up in almost the identical form? A. Well, except that I put, "Registered, return receipt requested" on one line, and this has two lines.

Q. I am speaking of from, "Mr. Bill Miller, care of" and "Fort Lee." A. I really couldn't say. I don't recall having typed that. But then again, I may have, because of that "M." That is what has me doubtful.

Q. But the "M" appears on the others and doesn't have you doubtful that you did not type those? A. Because of the way the punctuation was in the (1707) salutation of the letter, sir.

The Court: Did you always set the saluation up the same way?

The Witness: Always.

The Court: Always?

The Witness: Just second nature to type that way.

Q. Mrs. Maginn, you say you do recall the incident of August, 1948, in which Mr. Marcus, Mr. Miller, Mr. Schwartz and another gentleman were in the office, right? A. I do.

Q. And that after something had occurred in the office, there was some argument or dispute, is that it? A. That's right.

Q. You don't know what the nature of the dispute was, except that you did say it was something over Marcus wanting cash, isn't that right? A. Well, they were discussing the sale of some of Mr. Marcus' stock to Mr. Miller, in the Milmar Estates.

Q. And what was the dispute about? A. That's what I just said, that it was concerning the sale of some of the stock in the Milmar Estates to Mr. Miller and Mr. Marcus mentioned that he would consider no such sale unless there was some cash involved, he would (1708) accept no more notes.

Adeline Maginn—for Defendant Marcus—Cross

Q. And Mr. Miller had offered him notes, is that it? A. Evidently. I didn't get the entire conversation, sir, just the loud talk that was going on.

Q. I see. But Mr. Miller left first, isn't that right? A. That's right.

Q. And was he angry when he left? A. He was excited.

Q. And as far as you knew they had certainly arrived at no agreement, is that right? A. That's right.

Q. And then Mr. Marcus left? A. Shortly after.

Q. And you said he was excited. A. Also.

Q. And they had arrived at no agreement? A. None that I had heard.

Q. And then this other gentleman remained with Mr. Schwartz? A. Right.

Q. And you don't know the identity of the other gentleman? A. I don't.

(1709) Q. You have never seen him since? A. No.

Q. Or prior to this particular occasion? A. No, sir.

Q. And Mr. Schwartz then proceeded to dictate a memorandum to you? A. That's right.

Q. And what did you make, an original and copy of that memorandum? A. That was my usual procedure, I did.

Q. And what did you do with that memorandum? A. I gave it to Mr. Schwartz.

Q. Both the original and the copy? A. And the carbon copy.

Q. And that memorandum is definitely not DME-2? A. Definitely not.

Q. You are positive that it is not DME-2? A. Positive, because it was just a few notes that I had taken down from him. It wasn't anything as lengthy—

Q. Did you keep a copy, in addition, for your files of that memorandum? A. No, I didn't.

Q. Did you tell Mr. Marcus about that memorandum when you next saw him, or at any time thereafter? A. I may have. I don't recall whether I did or not, sir.

(1710) Q. Do you recall anything about the memorandum? A. No, I'm sorry, I don't.

Q. Do you recall anything at all? A. No, I don't.

Q. Will you look at the one that is in front of you now and will you please read it to yourself?

(Witness examines document.)

Q. Is there anything in there that refreshes your recollection as to what the memorandum might have been that was dictated to you? A. I don't recall.

Q. You are positive—

Mr. Brigadier: I don't want to ask that again.

The Court: Please don't.

Mr. Brigadier: No, I will just limit it as much as I can.

Q. Let me ask you this. Do you recall whether anything was in the memorandum about the sale of any stock? A. I couldn't say, sir. I'm sorry.

Q. Or about the purchase of any stock? A. I don't recall.

Q. Or any purchase price? A. I couldn't say. I do recall, he gave me a few notes to take down, and I typed it up for him, and gave it to him, and it was near closing time, and I left.

(1711) The Court: What it was about, you have no recollection?

The Witness: I'm sorry, I don't.

The Court: I don't blame you.

The Witness: I can't remember when I was married. I'm ashamed.

Adeline Maginn—for Defendant Marcus—Cross

Q. Mrs. Maginn, as I understand it, you used to take down little notes that happened on various days, of what you thought might be of interest to Mr. Marcus, is that right? A. I merely kept memorandums on certain things that had to be followed up for Mr. Marcus.

Q. From day to day? A. That's right, sir.

Q. And in those memorandums there would be the various transactions involving Mr. Marcus, is that right? A. Whatever I had to follow up for him.

Q. Moneys that he might loan, or moneys that he might have to receive, etcetera, is that right? A. That's right; yes, sir.

Q. And you kept them in a book? A. That's right.

Q. And you had looked for that book and you can't find it? A. Yes, sir; I looked for all the books.

(1712) Q. And you were first asked for that book when by Mr. Marcus, approximately? I am not trying to tie you down. A. No. I recall Mr. Marcus having called maybe about a year or a year and a half ago.

Q. I see. A. To look for something, or the books. And I looked for it. That's the first I ever tried to locate the books since I left Mr. Marcus' employ.

Q. Did you take that book with you when you left his employ? A. I took everything with me, all the books.

Q. You did? A. That's right.

Q. Now, you said that there was at your office the Milmar checkbook, is that right, at your office? A. I didn't say that, sir. I said the corporation outfit, which I never looked into, the outfit, at all.

Q. You made out the deposit slips, isn't that right? A. That's right.

Q. For Milmar? A. The duplicate deposit slips?

Q. Yes, when moneys were being deposited in the Milmar account, didn't you make out the deposit slips? (1713) A. I may have. I don't recall.

Adeline Maginn—for Defendant Marcus—Cross

Q. I thought you testified in answer to a question the Court asked— A. I may have misunderstood you.

The Court: No. If you look at the handwriting, there are very few in her handwriting.

Mr. Brigadier: But there are some that she may—

The Witness: I may have.

Mr. Brigadier: I thought that Mr. Marcus did testify that some of these were in Mrs. Maginn's handwriting.

The Court: Most of them were Mr. Marcus'.

Q. Was the bank deposit book in your office?

The Court: You just recollect the best that you can.

The Witness: Yes, sir.

Mr. Brigadier: Just tell us what you know.

The Court: We realize that you have been married and your mind has not been on Milmar, I'm sure, or Mr. Marcus.

Mr. Brigadier: I simply want her to tell us whether she knows what any of these records are for.

Q. Do you recognize that? A. Yes, I believe this was at our office.

(1714) Q. That's Exhibit DME-54. Was that kept in your office? A. If I can recall correctly, I believe this was in our office.

Mr. Brigadier: Let's get this in evidence and then we will know that it is marked.

The Court: Is that the Fort Lee book?

Mr. Brigadier: No, that's the Public National.

The Court: Mark it.

The Clerk: DME-57, formerly marked for identification, now marked in evidence.

(Received and marked Exhibit DME-57.)

Adeline Maginn—for Defendant Marcus—Cross

Q. Mrs. Maginn, was this book kept at your office? When I say "your office," I mean the office where you were employed for Samuel Marcus. A. Yes, it was.

Q. Now, you say the corporation outfit was kept at the office. The outfit meaning the stock book, the minute book, the transfer book. You know what a corporation outfit is. A. I know what it consists of; yes, sir.

Q. Was that also kept at your office? A. The corporation outfit, the box.

Q. What about the account book, was that kept at your office? (1715) A. Just that box and this book.

Q. But the accounting books, the book of account was not kept there? A. I don't believe so. I never had to refer to any of that.

The Court: You don't recall ever having seen it?

The Witness: Never. I never looked inside of that outfit, I don't believe.

Q. Then you wouldn't know if it were inside that outfit? A. I don't.

Q. Do you know a Mr. Steckler? A. No, the name doesn't sound familiar to me.

Q. You knew Mr. Hoffman? A. Mr. Hoffman.

Q. Do you know whether Mr. Hoffman ever sent a man into your office to make entries, or to get information with respect to the making of entries in the Milmar books while you were there? A. No, the only information was when Mr. Hoffman came there himself, I would give it to him.

Q. And you don't recall a Mr. Steckler—you say you don't know a Mr. Steckler? A. No, I don't.

Q. You never saw anyone make any entries in any (1716) account books of Milmar in your office, is that right? A. I don't recall.

Q. I don't want to spend too much time on this, but I show you a batch of photostats of deposit slips. Aren't a great many of these in your handwriting?

Mr. Tepper: The Exhibit number, please.

Mr. Brigadier: I believe these were produced by you in the deposition. They are not in evidence yet in this case. A. All but about one or two.

Q. And this batch, too; will you look at those?

The Court: Don't you think you ought to have the deposition number?

Mr. Brigadier: The deposition number is P-20 on the first batch that I have shown her.

I'm sorry. They are each numbered separately. One hundred and six to 120, inclusive, was the first batch.

A. All but one.

Q. All but one in the second batch are in your handwriting? A. Right.

Mr. Brigadier: And that's P-121 to 145, inclusive.

I don't know what these are, but I will show them to you, anyway.

(1717) (Documents handed to the witness.)

The Witness: This one is.

The Reporter: I can't hear you.

Mr. Brigadier: I'm sorry.

The Witness: I'm sorry. All these that I am holding are.

Mr. Brigadier: Just these?

The Witness: That's right.

Mr. Brigadier: Seven in the Exhibit which is marked from P-86 to P-105.

The Court: That's the last seven she identified?

The Witness: That's right.

Adeline Maginn—for Defendant Marcus—Cross

By Mr. Brigadier:

Q. Mrs. Maginn, I show you Exhibit DME-32—I would like to do this as rapidly as possible by condensing it, if we can—and will you select the checks in which the name Sam Marcus is endorsed on the back in your handwriting? A. On the back, right?

Q. That's right.

(Documents handed to counsel.)

A. All of these.

Q. Seventeen of the checks in this Exhibit, the name Sam Marcus appearing on the back thereof was in your handwriting, endorsed by you, is that right? (1718) A. That's right.

Q. Now, did you receive these checks at the office yourself when they arrived? A. Well, evidently these are the—I don't know.

Q. What I am trying to find out, Mrs. Maginn, is how your name came to be on the back. A. I endorsed them and deposited them in Mr. Marcus' account.

Q. Well, how did you come to do that, did Mr. Marcus tell you to do that, did you open the mail—was it customary for you to open the mail? A. Yes, it was customary for me to open the mail.

Q. So when these would arrive by mail, you would open the envelope? A. Yes.

Q. You would make a note, I assume, somewhere of the receipt of this? A. A duplicate deposit slip.

Q. Did you make a note in your book, as well? A. No.

Q. Did you make a duplicate deposit slip? A. Right.

Q. And then would you deposit it? A. Right.

Q. Now, when this first check, dated October 1, (1719) 1948, arrived, did you show this check to Mr. Marcus? A. I don't recall. No doubt he knew of the check coming in.

Adeline Maginn—for Defendant Marcus—Redirect

Q. Did you notice that it was signed Milmar Estate, Inc., Al Kevelson, president? A. I wouldn't say so, sir.

The Court: I can't hear you.

Mr. Grosman: Keep your voice up.

A. I couldn't say. I wouldn't know.

Mr. Brigadier: I thought you were having trouble hearing me.

The Court: No, I have no trouble hearing you.

Mr. Brigadier: All right.

Q. You don't recall at any time any conversation between you and Mr. Marcus as to the signatories upon these checks that you have singled out as the ones that were endorsed by you? A. No. I mean, the only connection is with the name Al Kevelson, that Mr. Marcus gave me a notation of checks that were to be received by me from Mr. Kevelson.

Q. But you don't recall any other discussion at all about the fact that these came in as Milmar Estate, Inc., Al Kevelson, president? A. No, I don't recall questioning that at all.

(1720) Q. Or the checks that came in—wait a minute. Maybe one did come in. Yes. —checks such as this, William Miller, Milmar Estates, Inc., William Miller, without a line being drawn through the president or secretary? A. No, I never questioned that, never discussed that.

Mr. Brigadier: I have no further questions.

Redirect examination by Mr. Grosman:

Q. Mrs. Maginn, let me ask you one or two questions. How often would Mr. Robert Schwartz come to Mr. Marcus' place? A. Well, he was in the office quite often. I'd say on the average of once or twice a week.

Adeline Maginn—for Defendant Marcus—Recross, Redirect

Q. Did he have the use of a typewriter, desk, or a typewriter? A. Yes. Several times he asked me for the use of a typewriter. And if I wasn't using mine, he would use mine. Otherwise, I would refer him to the third floor.

Q. Was there one on the third floor? A. There were several on the third floor.

Q. Now, when he asked you for the use of your typewriter, what, if anything, did he do? A. Well, he just—he would sit down and type up whatever information—

Q. Was he able to type? (1721) A. Oh, yes. He typed very well.

Mr. Grosman: That's all.

Mr. Brigadier: Just one question I omitted to ask her.

Recross examination by Mr. Brigadier:

Q. The other gentlemen that was there with Mr. Schwartz, did he type on your typewriter that day? A. No.

Q. Do you recall— A. I didn't see him.

Q. Do you recall Schwartz typing on your typewriter that day? A. No, I don't.

Q. You have no recollection of him typing on that day? A. No recollection.

Q. You know what I mean by "that day," do you? A. Yes, the day of the meeting.

Mr. Brigadier: No further questions.

Redirect examination by Mr. Grosman:

Q. Did Mr. Schwartz go upstairs to the third floor that day? A. He may have. I didn't see him. I left him in the office when I left for the evening. He was left up in our office.

(1722) The Court: What was your usual quitting time?

The Witness: About 6 o'clock.

The Court: Six o'clock?

The Witness: Right, sir.

The Court: Was Mr. Marcus still there when you left?

The Witness: He was in the store when I left. And I happened to mention that I left our office open, because we locked it, either he or myself would lock it after us. And I told him I had left Mr. Schwartz up in the office, that it was still open.

The Court: Did you hear a lot of raised voices that day while you were there?

The Witness: Yes, sir.

The Court: Did you hear the word "Judge" used at all that day?

The Witness: I don't recall that word being used; no, sir.

The Court: I take it you don't know Judge Lieberman, do you?

The Witness: I don't.

The Court: From Weehawken.

The Witness: I don't sir.

The Court: The name means nothing to you.

The Witness: Nothing to me.

(1723) The Court: You had never seen that gentleman before in your office?

The Witness: Never.

Q. Could you describe this man for us, this third man? A. I couldn't.

Mr. Brigadier: Fourth.

Q. Fourth. A. I couldn't sir, I'm sorry.

Adeline Maginn—for Defendant Marcus—Redirect

Q. Was he blonde or was he dark? A. I couldn't say.
Q. Did he have long whiskers, or what? A. Could have.

Mr. Grosman: All right.
The Court: Is that all from Mrs. Maginn?
Mr. Grosman: That's all.
The Witness: Thank you.

(Witness excused.)

The Court: Next.
Mr. Grosman: Well, Mr. Marcus is on the stand. And it's pretty close to quitting time.
The Court: Mr. Brigadier, are you of a mind to stop now? It's a quarter to four.
Mr. Brigadier: Very much so, sir.
The Court: All right. We will adjourn now till (1724) 10:15 tomorrow morning.

(Discussion off the record.)

The Court: Make a note on the record that Judge Grosman requests leave to take with him Exhibit DM-45 for the purpose of examining it very carefully. And then you will return it tomorrow morning, I suppose. Mr. Brigadier may want to look at it.

(Whereupon, the hearing was adjourned to be resumed Thursday, February 17, 1955, at 10:15 a.m.)

(1725) Newark, N. J., Thursday, February 17, 1955

(Hearing resumed pursuant to adjournment.)

(Appearances as previously noted.)

Mr. Grosman: If your Honor please, we have the accountant here. I would like to put him on for a few

minutes in order to establish our contention that we require an examination of the books in order to proceed properly.

HERMAN J. DOBKIN, called and sworn for the defendant Samuel Marcus, testified as follows:

The Clerk: May we have your full name and address?

The Witness: Herman J. Dobkin, D-o-b-k-i-n.

The Clerk: And your address?

The Witness: 25 West 43rd Street.

The Clerk: New York City?

The Witness: New York City.

Direct examination by Mr. Grosman:

Q. Mr. Dobkin, you are a certified public accountant, are you? A. I am.

Q. And have been for how long? (1726) A. Sixteen years.

Q. Now, were you asked to look at the books of Milmar Estate, Inc.? A. I was.

Q. For the period preceding September 14, 1948? A. I was.

Mr. Brigadier: I didn't hear your answer.

The Witness: I was.

Q. What were you shown? A I was shown a general ledger, and a general journal, and some cash receipts and disbursement pages.

Mr. Brigadier: You were shown the originals, weren't you?

The Witness: I was shown the originals, yes.

Q. I show you DM-6, Bill Miller's Riviera, Inc., for the fiscal year ending March 31, 1949. Were you shown that? A. I don't believe so.

Q. What were you shown on Friday last? Was it Friday last that you were here, or a week ago Friday? A. A week ago, Friday. I was shown books in a very sketchy form, by having to hold papers over certain parts of it. And I couldn't recognize the books now, whether these were the same books that I had at that time.

Mr. Grosman: Will you produce the books, (1727) please, that were shown to this witness a week ago Friday?

Mr. Brigadier: Are you talking of Bill Miller's Riviera?

Mr. Grosman: I don't know what books were shown to him.

Mr Brigadier: Wait a minute. I want to know what you are asking for, Judge. I think this is ridiculous. We have to be told what he is referring to. There are two different times at which books were shown, one under the order of your Honor that they were entitled to examine the Milmar books up to September 14—here is the original that was shown to him then two weeks ago in the course of the proceedings there was an interruption and your Honor ruled on his application that we were to show him Bill Miller's Riviera, whatever we had, up to September 14. We had only books beginning, as I recall, with March 31, 1948. Since some of the items ran beyond September 14, I understand he was shown everything up to September 14, and paper was put over items beyond September 14.

Now, what is this chowder that we haven't shown you the books? It's in evidence already.

Mr. Grosman: Wait a minute, please.

Mr. Brigadier: This is the book and it was put in evidence.

(1728) Mr. Grosman: Are you through? I want to address the Court.

Now, if your Honor please, I merely asked that the witness be shown, and counsel produce, the books that were shown to him with all these papers, and what not, a week ago Friday.

Mr. Theodore Chazin: If your Honor please, I was sitting there with Mr. Dobkin. That's exactly what was shown. I don't know where Judge Grosman gets all the papers. That's a figment of imagination. There were no papers. Those are the books. I was sitting with Dobkin. I covered up the parts after '49. Mr. Dobkin wrote till he got tired, and wanted to go home—maybe everybody got tired and wanted to go home—and those are the books. And Judge Grosman was coming in and out.

The Court: Don't get excited. These are the books that were shown to him a week ago Friday, is that right?

The Witness: I believe so, your Honor.

The Court: All right. Then what is everybody getting excited about?

Mr. Brigadier: Sir, just one thing. Let the record show this is what Judge Grosman himself put into evidence.

(1729) The Court: Exhibit DM-6, Bill Miller's Riviera, Inc., fiscal year ending March 31, 1949. And the witness says those were the sheets or books that were shown to him. Is that right?

The Witness: Yes, sir.

The Court: A week ago Friday?

The Witness: I believe they were.

The Court: All right.

Mr. Grosman: Now, this is in evidence.

The Clerk: DM-6.

By Mr. Grosman:

Q. Now, were you shown Exhibit DM-15? A. Yes, I was shown Exhibit DM-15.

Q. Were you shown Exhibit DM-14? A. Yes, sir; I was.

Q. Now, were you able to gather sufficient information from those books to make an intelligent and comprehensive report as to the financial condition of the respective companies up to and including September 14, 1948?

Mr. Brigadier: I object to the question. It calls for a conclusion, it calls for a conclusion of law as well as of fact. The witness can testify as to what he looked at and what he found was in them, and what he found was not in them, and then it is for your Honor to (1730) decide whether or not these books are books from which it could be determined what the financial status of Milmar and Bill Miller's Riviera is.

The Court: Well, I suppose after this gentleman answers this question then Judge Grosman will proceed to find out why he can't, is that right?

Mr. Grosman: That's right.

The Court: I will allow it.

The Witness: Would you repeat the question?

(Question read.)

A. Are you referring to the books of Milmar or to the books of the Riviera?

Q. Both.

The Court: Let him take one at a time. What about Milmar?

Q. Take Milmar. A. On the books of Milmar, having only the general ledger, and a few sketchy sheets, the information that appears in the general ledger are not conclusive as the information would be if it came from a book

of original entry, which is not conclusive. And there were many items which could be interpreted in one manner, and through conversation with the client, I understand that the purpose of those entries was different entirely.

So that, to make a conclusive summary from the books (1731) I had before me would be almost impossible—would be impossible.

Insofar as the books of the Riviera are concerned—

Q. Just a moment. All right, go ahead. A. Insofar as the books of the Riviera are concerned, the only book shown to me was the general ledger, and knowing at that time that a complete picture could not be obtained without the books of original entry, I made some sketchy surveys of the accounts, none of which could be conclusive.

Q. Now, you say these books shown to you were not books of original entry? A. No, sir; they were not.

Q. Now, what do you mean by books of original entry? A. Well, the book shown to me, if I may give it to you in reverse, was a general ledger. The information coming into the general ledger comes through sources which we consider books of original entry, such as a cash book, a sales book, a disbursements book, petty cash vouchers. Those books of original entry were not made available to me. So that the only information I could possibly derive from the general ledger was the conclusion, not whether the conclusion was correct or incorrect.

Q. Let me ask you, Mr. Dobkin, is it customary (1732) in the accounting profession to open a new set of books for a going concern each year? A. Is it customary? I'd say no.

Q. What is the general practice? A. The general practice is to maintain books until they are used up and then buy new books.

Q. Now, if I were to give you the gross profits of Bill Miller's Riviera for the year, 1948, for the year, 1949, 1950, could you, with the aid of the books of that concern,

tell us what the net profit was for those years? A. Oh, surely.

Q. Gross profit or gross income? A. I am taking it in the accounting term of gross profit. That's different than gross income.

Q. Well, gross income. In order to give you the gross income for those two years for Bill Miller's Riviera, could you, with the aid of the books, tell us what the net profit for those years would be? A. Yes, sir.

Q. Can you do it without the books? A. Not very well. Not at all.

Q. You can't do it at all. A. Not at all.

Q. Now, if the gross profits for Bill Miller's Riviera for the year 1948 amounted to $1,098,500, could (1733) you, with the aid of the books—I should say gross business—could you, with the aid of the books, tell us what the net profit of that concern was during that period? A. Yes, sir.

Mr. Brigadier: If your Honor please, I think it should be made clear, because it is very misleading unless it is made clear, when we speak of 1948, are you speaking of the fiscal year? The books, as you know, run from the fiscal year beginning April 1, 1948, and ending March 31, 1949, and since this transaction involves up to September 14, 1948, what was the condition, it should be very clear to your Honor that: Is he referring to books after September 14, for business done subsequent to that year to the time?

Mr. Grosman: I don't want to be discourteous to Mr. Bridagier, but I do think that is a proper subject for him to cross examine the witness on.

Mr. Brigadier: I think you are absolutely right Judge Grosman. I thought that you wanted the Court to know what I was saying, as well.

Mr. Grosman: I do, but I think that we ought to go about it according to the Rules.

Q. Now, assuming that the—not assuming, but if the gross business of Bill Miller's Riviera for the year 1949 was $1,023,384.38, could you, with the aid of the (1734) books of that concern for this period, tell us what the net profits of the concern are?

Mr. Brigadier: I wish to object on the ground that there is no issue in this case as to what the profits were that were made in the year 1949. The fraud in this case obviously could only be misrepresentations prior to September 14, 1948. The issue that I understand we are trying is that and nothing else.

Mr. Tepper: May I say this to your Honor. We all know by this time that there is a charge, a definite charge that profits were suppressed from Mr. Marcus during a certain period of time. We have already in evidence DM-45, which is the testimony of Mr. Hoffman in the condemnation matter. And the inquiry now fans out into this—and your Honor was a prosecutor, your Honor was a U. S. Attorney, and your Honor was a practicing attorney—now, suddenly the volume which was greater in 1948 than it was in 1950, according to the testimony of Mr. Hoffman, produced, according to Mr. Hoffman, in 1948 no profit, whereas, with a lower amount of gross sales, of good business, it commences to move upward until in 1953, for a 26-week operation, as opposed to a 46-week operation, there is a gross profit of almost $200,000—a hundred and eighty-nine thousand, which is gross, not before the payment of the executive salaries and depreciation.

(1735) Now, what we are trying to do, very frankly speaking, is to prove that this was a hoax, a formula,

a blueprint from the very beginning to defraud Mr. Marcus of what he was rightfully and legally entitled to, and the misrepresentation which was made by Mr. Hoffman, according to the statement made by Mr. Marcus on the witness stand, at the time that Mr. Marcus was being promoted to sell his stock in 1948.

Now, we are sitting here without a jury. We are sitting here on the equity side of the Court, the Court wants the searchlight of truth thrown upon everything, and I think the time has come now when, through the mouth of this witness, he says it is necessary for him to have the books of the Riviera, and the books of Milmar, and thus enable him to say what the net profit was, so that we may—and, after all, we have now shown ourselves to be entitled to an examination of these books, because we have a right to have a certain inquiry, to a certain extent, with certain latitude here.

So I say to your Honor, this business about past September 14, 1948, is out the window at this moment. They have, through their mouths, through their witness' mouth, through the mouth of the comptroller, stated exactly what the gross sales were, and what they said the profit was. And we have a right to show now that with fewer sales, and (1736) for a shorter period of operation, they were making much more money than they represented to him in 1948.

And what is more natural than for them, if they did it in 1948, to continue it in this testimony before the Condemnation Commission, because this suit was pending at that time. Judge Grosman and I had already made an appearance before the Condemnation Commissioner and asserted our claim to this reward. So what is more natural than for them to continue that as a pattern prior to 1948? We require the books, your Honor, to continue our cross examination.

And, of course, I am alluding to the period beyond 1948. Certainly not prior to 1948.

The Court: Well, I suppose that I would have to presuppose that the books prior to the time that Mr. Marcus allegedly stepped out of this corporation were deliberately and wilfully miskept, is that right?

Mr. Tepper: Yes, sir.

The Court: In other words, it was a giant conspiracy hoax before he went out, to practice all this deception, is that it?

Mr. Tepper: Yes, sir. And if you remember Mr. Marcus' testimony, he heard rumors about double sets of tabs.

Mr. Brigadier: That was stricken, if your (1737) Honor please.

Mr. Tepper: That was not stricken.

The Court: I certainly did strike it. They were only rumors—no foundation in fact, no authority for it.

Mr. Tepper: I am not speaking of the last testimony. Prior to that there was testimony—what were these things that he had heard which caused him to become suspicious? He didn't give it to prove the fact. It was what alerted him as a result of these rumors which he had heard that he went to Mr. Roth. Mr. Roth, if your Honor will remember, told him that fraud is a very difficult thing to prove—go out and inquire into the situation and bring back the information. That's what took so long. That's why your Honor signed an order permitting us to withhold our answer and counterclaim from being filed until after the coming in of certain depositions, which took two years or three years.

The Court: Well, as I understand Mr. Dobkin at this point, that unless he has the books of original

entry, or the sheets of original entry, you cannot make a proper examination, is that right?

The Witness: That's correct.

The Court: All right. Now we will settle that right away.

Mr. Brigadier, do you have the sheets or books of (1738) original entry?

Mr. Brigadier: Of Milmar, I have.

The Court: Yes.

Mr. Brigadier: But that he has in front of him. I don't have them of Bill Miller's Riviera.

The Court: All right. So what do we do in that posture?

Mr. Grosman: You give us an order, your Honor, for the books. We will make a demand and we will not be satisfied with a statement by counsel who, obviously, is not informed—he is merely telling us what, probably, his client told him, or maybe other counsel told him. I want somebody to take the stand and state under oath that these books are not available and why they are not available.

Now, as I understand it, Mr. Hoffman testified that under his supervision all of the books were removed over to Mr. Kevelson's place, and, as far as he knows—at least, when he testified, I think, last week—they are still there.

Now, let us go as far as we can. We will cross our bridge when we come to it. If they haven't got the books, let somebody explain what happened to these books for this particular period.

Mr. Brigadier: If your Honor please, we went (1739) through the whole business of calling not only Mr. Hoffman, but Mr. Kevelson. You recall, we interrupted the examination of Mr. Marcus because they said they couldn't go on with the examination. All

the witnesses were called. Your Honor questioned them. He told you there were 20 cartons. He had gone through all the cartons and that was all that was found.

What is this that we are going to get each time over again? Now let me show you how many incorrect statements can be made within the space of about ten minutes.

You were told that Mr. Hoffman testified to gross profits and tremendous net income. Do you know that Mr. Hoffman testified—and Mr. Chazin attempted to show you yesterday as you were leaving the bench—that for the fiscal year of 1949 there was a net loss of $4,800? That's what his testimony is.

Now, when they say to you—we show certain gross sales and then gross profits, and all that comes off it is salaries, and I think he said depreciation, were the two items I heard him say—what about items such as this that come off it: Internal revenue, $16,340, to the United States Government for taxes. I could go through this list—it totals—from the $284,315 do you know what is left? $15,000. This is for the year—the best year—'53.

Now, when he tells you that the figures show that (1740) after he got out there was a year in which we did—what did he say?—less business than when they were there—isn't that the remark he made? That's what I understood him to say. Well, for the fiscal year ending March 31, 1949—that would be the year that Marcus gets out; he gets out on September 14—you end up that year with—incidentally, this is all taken from income tax returns, and these are all available to them, just as they are to us. And if there is any doubt about it, I will give consent to their obtaining anything they need from the Federal Government, if our consent is required.

Colloquy

So that for the first year, ending March 31, 1949, you have gross sales of $1,023,384; you have gross profit of $201,000; then after you deduct income tax, salaries, withholding, advertising, all these other items that he didn't mention, you end up with a net loss of $4,800.

In the next year—that would be ending March 31, 1950—you have an increase from one million twenty-three thousand to one million two hundred and seventy-nine thousand. Then you have gross profits of of two hundred and seventy-six thousand. Then when you deduct the expense, you only end up with ten thousand seven hundred and sixty-five.

The Court: Net profit.

Mr. Brigadier: As the net. And this is all, I (1741) and told by Mr. Chazin, in this transcript.

The Court: He heard what you said and he repeated it.

Mr. Brigadier: I could give you the rest of them, but I just say that is the picture you will get from the income tax returns. And I will give the consent, unless we have them and can produce them ourselves, I will give the consent for them to obtain them from the Federal Government.

The Court: Now maybe they suspect that you filed a fraudulent income tax return.

Mr. Grosman: That's been done, your Honor.

Mr. Brigadier: Now, when they say that we haven't given them—

The Court: Just a minute. Hold it. It's all right to be suspicious and to make all kinds of charges, but proving them is another thing, and you know it.

Mr. Grosman: Yes.

The Court: Nobody knows it better than you gentlemen of the bar. And I don't want to go into weeks

of going through books and come up with nothing, except what we already have. I know what it means to go through books when they are not properly kept, too.

Mr Brigadier: If your Honor please, I haven't finished about the Milmar books, which I think you ought to (1742) know.

Mr. Grosman: If your Honor please, is there an objection?

Mr. Brigadier: Oh, yes. I am replying to a ten-minute speech.

The Court: He is answering the charges that you made and Mr. Tepper mad..

Mr. Grosman: All right.

Mr. Brigadier: There is a constant mixing up of two things that your Honor should not be mixed up about. It is true that I have nothing in Bill Miller's Riviera except that book, and you have, I think very importantly, asked about these other sheets that he says he needs. But you are being misled about what this witness has been shown in Milmar, because this is the book that was shown to him under your Honor's order. And he even wrote a letter himself on December 16, 1953, with respect to this set of books. And this reads, "General ledger, journal and cash book." And yet the impression has been left here this morning that he did not see the cash book, or the general ledger, or journal of Milmar. Isn't that the impression that you have at this moment?

The Court: Yes, sir.

The Witness: If I may say so, my answer included cash book, general ledger and general journal on (1743) Milmar.

Mr. Brigadier: That you did see them?

The Witness: Yes.

The Court: I think he did say so. But not as to the Riviera books.

The Witness: That's right.

Mr. Grosman: Now, if your Honor please, the most —you say I am overly suspicious. I am in the position of—I don't like to use this illustration, but I think it is the most apt one to use—of a policeman who sees a man walking along with a suitcase late at night in a strange neighborhood. And he asks, "What have you got in the suitcase?" and the man refuses to answer. He asks, "Let me see what you have got in the suitcase," and he still won't tell him, and he still won't show it to him.

Now, if I was walking along the street late at night, in a strange neighborhood, with a suitcase, and a policeman asked me to show him what I have, I would open it and show it to him, and so would your Honor.

The Court: We would, but a lot of people don't agree with us in that philosophy.

Mr. Grosman: I know, but sometimes it pays to waive our strictly constitutional rights.

Now, the thing that makes me more suspicious than (1744) ever is the fact that they are battling so hard against showing us theses books.

Now, there is nothing in these books to hurt them. If these books are truthfully kept, have been truthfully kept, the simplest thing, instead of resisting us, time and time and time again, is to say, "Here, take a look at the books." That is all there is to it. That would be the end of it.

Now, we don't have to take Mr. Brigadier's curbstone on it of these figures. We want an audit made by Mr. Dobkin, who is competent, and authorized by law to make an intelligent audit. He tells you that he cannot make an audit without the books of original entry. Those have never been produced.

You asked us—"Well, they say they haven't got them." Is that all there is to it; they come in here and say they haven't got them and that is the end of it? If that were so, nobody would ever get any books.

The Court: Suppose I order them to produce the books and they still swear under oath that they don't have them. Where do we go from there?

Mr. Grosman: All right. We will send somebody over, under the approval of the Court, to look at the books that they claim they have over there in Kevelson's storehouse. We don't have to take Hoffman's word for it (1745) that he went there—Mr. Hoffman is a hostile witness—that he went there and he looked and he couldn't—of all these books—you will remember he said there are 20 cartons of books—the only books he couldn't find were for the years '48 and '49. Now, isn't that a suspicious circumstance in and of itself?

The Court: Now you are talking to a man who was a prosecutor. Of course it is.

Mr. Grosman: All right. You don't have to be a prosecutor for that. The answer suggests itself. There is something in those books they want to hide.

The Court: Of course, since you say it doesn't make it so, either.

Mr. Grosman: No.

The Court: I could be suspicious, too. I don't know whether he did say that the only ones missing are for '48 and '49.

Mr. Brigadier: We have offered '48 and '49.

The Court: No, he said something about the books of original entry in connection with the Riviera. You see, you mustn't forget this, Mr. Brigadier, that Marcus claims that since it was represented to him by Hoffman, Miller, and I think even Bierman, that the business of the Riviera was so poor, that that was the

only income that Milmar really had, they had no other income than (1746) Milmar, that upon that representation he was induced to sell, or to part with his stock. That is what he says.

Mr. Brigadier: Yes, let's assume that is what he says.

The Court: All right. Now, dosen't he have the right to inquire and find out whether, in fact, the business of the Riviera was that poor, or was as bad as represented?

Mr. Brigadier: You haven't heard me say once that he hasn't, sir. All I say is that every charge of fraud he makes is something that must have happened prior to September 14, 1948.

The Court: Unquestionably, because I can't believe that the figures of business done in '48 were put in books for '49 or '50. That's ridiculous.

Mr. Brigadier: Therefore, the only question is: What should he look at? I say he should look at—

The Court: He should look at all the books—

Mr. Brigadier: —everything prior to September 14, 1948, everything. But we had this already, not once, but a dozen times. In fact, your Honor went so far as to interrupt the examination and call the witnesses out of turn—he called them, he called Hoffman, he called Kevelson, to establish what happened (1747) to Bill Miller's Riviera books. And your Honor heard the evidence, and you heard what happened, and how they were moved out, at the time they were moved out, when they had to get out of the building. What more are we going to do than tell you what happened? We don't have them. The only thing we have is the original books that we brought here from—

Please. I don't whisper while you are addressing the Court.

Mr. Tepper: I apologize to you.

Mr. Brigadier: We produced the first book that we have, from March 31, 1948, to April 1, 1949.

Now, what is this? Are we going to have an interruption of the trial, for another month, or two, or three, so that they can conduct another investigation? They have had every opportunity of investigating.

We come back to the proposition that they have made a charge on which they didn't have even the remotest bit of evidence, sir.

The Court: Don't go into that.

Mr. Tepper: Your Honor will recall when they were resisting, months ago, and weeks ago, the production of these books, I made the observation that I hope we do not get to the point where if the Court orders the production of these books and permits us to examine these (1748) books that they will say, as they said in the other case, "We do not have the books."

Why resist the examination of the books and then ultimately come up with the argument, "We do not have the books"?

In this testimony of Hoffman's according to what Mr. Brigadier just read—he reads down to the point where there is a $10,000 profit, which is the statement made by Mr. Hoffman. Even if that be so, even if that be true, we have a right to examine these books to see whether or not, as a result of what we can see there, we can prove to your Honor that in 1948 the representation that the Riviera, Bill Miller's Riviera, couldn't pay the rent to Milmar Estates was incorrect and false, because if there were only a $10,000 profit, that reflects already the payment of rent.

Your Honor will also recall the testimony which was read into the record yesterday where, as between Miller and the Riviera, and Milmar Estates, it wasn't

too important how much rent was prescribed, because of the interest which Hoffman testified Miller had in the Riviera, as well as in Milmar. Which indicates a control, a juggling of arrangements, upward or downward, as the case may be, by Mr. Miller to suit his purpose.

And I respectfully say whether the books are (1749) available or not, whether we can prove, after the order is made by your Honor to produce these books, that they are being secreted or not, is immaterial at this point. The point is: Are we not now entitled to an order on the part of your Honor to examine these books? You will remember, your Honor, time and time again—

The Court: Books for what period?

Mr. Tepper: Beyond 1948, as well as prior to 1948; beyond 1948, within the period testified to in the condemnation by Mr. Hoffman, so that we can tack it on to explore and analyze from '48 right on down to 1953. And that is what the witness says he requires in order to give us the net profit for that particular period.

The Court: In other words, if it could be shown—let's see if I can follow you on this; I am no man for accounting, I told you that before—if it could be shown that in the year 1948 they did a bigger gross business than in the year 1950, and in 1950 they did a lesser gross business, but still showed a bigger profit, that from that I would have to conclude something, would I?

Isn't it possible that you can do a bigger gross business, Mr. Dobkin, and get less profit?

The Witness: Oh, certainly.

The Court: Of course it is. How naive am I (1750) supposed to be?

Mr. Tepper: Your Honor—

Colloquy

The Court: I will not give any permission to examine any books after the date in question, unless I am shown by competent that there is a need for it. And it has not been shown. All I hear is what you and Mr. Grosman and your side wants to conclude. That's all I hear. I want proof upon which I can act. And if you bring proof from people on that stand, under oath, and I am satisfied, you can examine to the year of Kingdom Come. But not before. I don't want to hear any more.

Mr. Tepper: May I make one statement?

The Court: Yes, sir.

Mr. Tepper: I presume your Honor has considered that for a period of 26 weeks or 24 weeks—

The Court: That is entirely possible. I have asked people in the business when I heard that. I was surprised.

Mr. Tepper: We were laying the foundation so that after these facts are before your Honor we can bring experts in that particular industry before your Honor.

The Court: But, my dear Mr. Tepper, how can I consider anything that happened after the time that he claimed that he was defrauded? I must stick to that time, (1751) the representations that were made prior to September 14, 1948. If you haven't read the cases, and don't know what the criteria are to set aside a contract for fraudulent inducement, I beseech you that in the next few days you read them, and you will find out what you are up against, as Mr. Roth advised Mr. Marcus, properly. I have had a case like this before, involving more money than this. So I know. I have read those briefs again since. But I am not going to let you go on an expedition just to satisfy your curiosity.

Mr. Tepper: Is discovery which is prayed for in this suit going on an expedition?

Colloquy

The Court: I will not permit it, I told you. I have made the ruling. If I am wrong, there is a Circuit Court of Appeals.

Certainly you choose to believe that everything was fraudulently done before in a giant conspiracy, as if they knew that by doing this that Marcus, who is a smart businessman, would sell. That is what I have to—

I don't want to hear any more. I can draw my own conclusions.

Mr. Tepper: I am addressing myself now not to the period beyond '48, about which your Honor has already ruled definitely at this moment, I still think—

The Court: If you want the right to go and (1752) look in Mr. Kevelson's—what is it, a garage, or what is it?

Mr. Margulies: Office.

The Court: —office where those records are—

Mr. Grosman: The 20 cartons.

The Court: —that can be arranged very easily. If you are suspicious that they didn't find them deliberately, I am sure Mr. Kevelson and nobody on that side would object to it.

Mr. Abraham Chazin: At the same time, your Honor, I would like to arrange to go to Mr. Marcus' warehouse, and to all of his businesses, and all those corporations, through which those loans came, to look at those appearing and disappearing records that are here when he wants them and he hasn't got them when he doesn't want them.

The Court: Listen, I noticed that. You don't have to remind me of that. As I told you, I am very observant, very observant—how people can find records that favor them, but never can find those that disfavor them. I have had that before here, too. Don't think I am not observant.

Colloquy

Mr. Tepper: Now, if we should do that, your Honor—

(1753) The Court: I mean, you have a right to look, if you feel that maybe—

Mr. Tepper: If we should do that, and if we should be fortunate enough to be successful in that connection, then how would the finding of those books square with your Honor's ruling now that we are not permitted to examine those books?

Mr. Brigadier: Are you arguing it again?

The Court: I told you before September 14, '48, if you can find the books of original entry—isn't that what you want to find?

Mr. Tepper: Yes, sir.

The Court: Because Mr. Dobkin says the way it is now he can't make—

Mr. Tepper: Yes, sir.

The Court: They will permit you to go in and find them.

Mr. Tepper: All right.

The Court: With supervision, go in and look for them in this interim we are going to have now.

Mr. Tepper: All right. I presume your Honor's ruling still holds, as previously, if, before the conclusion of this, we can make a showing before your Honor which would entitle us to the books after 1948, your Honor will so rule.

(1754) The Court: Certainly, upon competent proof under the law, I would so rule. Naturally.

Mr. Tepper: As I understand it, the Court has ruled that prior to 1948 any books of original entry that are available—

The Court: You are entitled to look at them and have Mr. Dobkin go over them. There is no doubt about that, absolutely none.

Samuel Marcus—Defendant—Recalled—Redirect

Mr. Grosman: Cross examine.

Mr. Brigadier: No questions, Mr. Dobkin.

The Court: Now, if they find them, Mr. Dobkin, I am sure you will hear from them.

The Witness: Thank you.

Mr. Grosman: Well, I am sure we won't find them.

(Witness excused.)

The Court: Who are you going to call next?

Mr. Grosman: Mr. Marcus is on the stand.

The Court: Suppose we take a five-minute recess.

(Short recess.)

SAMUEL MARCUS, resumed the stand.

Redirect examination by Mr. Grosman (Continued):

Q. Now, Mr. Marcus, I show you Exhibit DM-2, and ask you if this is the Exhibit that you referred to with (1755) respect to the five-year delay in bringing suit on your claims against Milmar? A. Yes, for moneys loaned, that's right. Yes, that's it.

The Court: Is that the one you couldn't put your hands on yesterday?

Mr. Grosman: May I read into the record, your Honor, the paragraph?

The Court: Yes.

Mr. Grosman: DM-2, memorandum agreement made in Fort Lee on the 23rd of July, 1947, Paragraph 2 on page 2 reads as follows:

"In accordance with the terms of the lease between Milmar Estate, Inc., and Bill Miller's Riviera, Inc., all moneys advanced by Miller and Marcus for taxes, amortisation and interest will be considered as a loan to Milmar Estate, Inc., and Milmar Estate, Inc., will

execute non-interest bearing five-year notes as evidence of indebtedness, repayable from surplus funds only."

Q. Now, were you given such notes? A. Well, I was—I should have made the notes myself. I never wrote them to myself, no.

Q. Were you given these notes? Let's get through with this. A. No, I should have given them to myself, but I didn't.

(1756) Q. I didn't ask you that. A. No, I didn't get the notes.

The Court: You didn't.

The Witness: I should have written them.

The Court: You certainly should have, if you had that protection there.

The Witness: I never bothered writing them out to myself. I figured the checks were sufficient.

Q. Now, Mr. Marcus, I show you Exhibit DM-45, which is a transcript of the testimony given by the witnesses in Milmar Estate, Inc., versus the New Jersey Highway Department Condemnation Proceedings, and ask you whether you have read the testimony, particularly that of Mr. Hoffman? A. I have not.

Q. Well, have you looked at it at all? A. I haven't seen it at all.

Q. All right. You took it home with you last night, didn't you? A. I didn't, no.

Q. But you heard the figures read. A. I heard the figures read. Mr. Leichtman told me what was contained therein, but I didn't read it myself.

The Court: Who is Mr. Leichtman?

Mr. Brigadier: His social counsel. I didn't (1757) mean that contemptuously. I happen to like this gentleman very much. But he has been identified as the social counsel by Mr. Marcus.

Mr. Grosman: Social counsel?

Mr. Brigadier: That's the way he was introduced.

The Witness: Mr. Leichtman is an old friend of mine and he has agreed to—

Mr. Brigadier: I am objecting to anything that Mr. Marcus said that Mr. Leichtman told him about what is in the record. The record speaks for itself. I have no objection to it going into evidence. In fact, it has got to go into evidence, because parts of it were read, and I want it all in.

The Clerk: It is in.

Mr. Brigadier: Oh, it is in.

Mr. Grosman: It is marked DM-45.

The Court: Well, I suppose that Judge Grosman could put Mr. Leichtman on and say that he accurately read to Mr. Marcus.

Mr. Grosman: No, I am not going to do anything of that sort.

By Mr. Grosman:

Q. You heard me refer to the figures? A. Yes, I did.

(1758) Q. And that was in this courtroom? A. That's correct.

Q. Now, are those figures, particularly as to gross income, gross sales—I can't make up my mind from this transcript whether Hoffman refers to these figures as gross business or gross sales, they are gross something—gross profit on sales, that's what he calls it—on page 132, the last answer on the page. Did Mr. Hoffman or Mr. Miller ever tell you during the course of the negotiations for the sale of part of your stock that Bill Miller's Riviera had made the gross profit on sales you have heard me read in this courtroom from this transcript? A. They never gave me any figures whatsoever, other than the fact that business was—well, they owed so much to the credit-

ors that they feared the creditors would close them up any day.

Q. Were you told that any gross profit was made at all during the years '47, '48, '49? A. Absolutely none whatsoever. They ended up with a big deficit every year, is what he told me.

The Court: But they never discussed figures with you.

The Witness: Never gave me the actual figures, they just told me they ended up with a terrific deficit.

(1759) The Court: Did they ever discuss figures, accurate or inaccurate?

The Witness: Oh, yes.

The Court: That's all I want to know.

The Witness: Yes, Mr. Hoffman did.

Q. What was said to you in that regard and by whom? A I remember Mr. Hoffman—the first six weeks, I believe, he told me that the business at the Riviera was about averaging $80,000 a week.

The Court: Is that the '48 season?

The Witness: '46. I asked him how things were up there. He said—

The Court: '46. What about '47? Any representation about that?

The Witness: In '47, I believe he told me at one time that they were averaging about seventy-five thousand a week.

The Court: Gross business.

The Witness: Gross business.

A. (continuing) And I said to him, "How come," I says, "with seventy-five thousand a week you can't make some profit out of that?"

He says, "Well, Sam, you know this is a pretty big operation, 400 people working—captains, waiters, big

(1760) shows." He says, "It's a hard thing to make a profit in this business."

And I said, "It's amazing to me." And I still had complete faith and trust in Mr. Hoffman.

The Court: I can understand that, too, sir. Now, how about '48, was there any representation made about business?

The Witness: On one or two occasions I asked Mr. Hoffman how business was, and I think at one time he told me, "Our last week's business was sixty-eight thousand." Another time I think he told me they had a terrific week. I think they had—was it Jackie Gleason?—or some big star was there. I think he told me at one time they grossed ninety thousand in one week with some particular act they had there. That's about the only two occasions I remember asking him.

The Court: All right. Now, did you have all these representations in mind at the time you entered into this contract?

The Witness: Did I have—I had the representations—he also told me, naturally, when I asked him, "What about profits? Can't you people afford to pay your rent here? Can't Bill Miller pay me these $19,000 notes?"

He said, "Sam, the more business we do, the more (1761) money we lose." He said, "This is a very loose operation. There is so much expenses here, there is cashiers, and all." He said, "The more business we do the more money we are losing, and we are going in deeper in the rent all the time."

The Court: And you believed him.

The Witness: Believed him, absolutely, sir, because I have had businesses in my time—

The Court: All right. I can understand it. Primarily you believed him because you had faith in Mr. Hoffman.

The Witness: I had complete faith in Mr. Hoffman.

The Court: That's the primary reason. Next question.

By Mr. Grosman:

Q. Now, you were asked on cross examination why you didn't go back to Bill Miller's Riviera after September 14, 1948. Now, did you go back? A. I did not.

Q. Why not? A. Well, we had had a very—towards the end of it Mr. Miller became—when we were all signed up and all, Mr. Miller became quite abusive as to why I didn't accede, and give him his stocks, and so forth, and I used to have (1762) the courtesy of the 50 per cent tab there. In other words, my bill would be cut in half when I came there. He said, "From now on that 50 per cent tab is off. You are not welcome there any more."

The Court: When did he say this to you?

The Witness: Just at the end, when I was leaving, and he was still upset because I didn't give him his stock. He said, "Your 50 per cent tab is through. No more. You can keep away from the place."

So I said to him, "You're a pretty ungrateful slob." And we had a lot of words. And I said, "You can bet my word for it, much as I love the Riviera, and love the place, you will never see me in that place as long as you have any connection with it." So that's one of the reasons I never went back to the Riviera.

The Court: In other words, he made it clear to you that he didn't want to see you there.

The Witness: And I made it clear to him that I didn't want to see him, either.

The Court: You had no desire to.

The Witness: I had no desire to; yes, sir.

By Mr. Grosman:

Q. Now, Mr. Marcus, did you keep in touch with the status of the mortgage on the Riviera— A. Oh, yes.

(1763) Q. —on Milmar? A. Oh, yes; definitely.

Q. How did you do that?

The Court: He testified as to that several times.

A. I have a friend of mine—

Mr. Grosman: Wait a minute. What is your Honor's recollection of that?

The Court: That he said he did keep track of the mortgage.

Mr. Grosman: I want to show how he kept track of it—

The Court: All right.

Mr. Grosman: —after September 14.

A. It happens to be that the man who placed the mortgage, the man who replaced the mortgage is a member of my golf club, and he spoke to me even before placing the mortgage.

Mr. Brigadier: Would you identify him?

The Witness: Mr. Arthur Schlesinger. He is a member of my golf club. And when he was negotiating—

The Court: What is your golf club?

The Witness: Elmwood Country Club up near White Plains.

A. (continuing) And when he was placing this mortgage he spoke to me about it. I said, "It's a very good thing." (1764) I think he was getting a deal from Ben Marden, a

reduction, and what did I think of it? And I said, "It's a swell thing. Go right ahead with it."

Q. Will you tell us, please, what you were told about the payments on account of the mortgage? A. Yes, he told me he was going to take the mortgage over and reduce the amortization payments to Miller over there. And I said, "That's swell." I said, "That will make the operation easier for Miller to carry along. I think that's a swell idea."

Naturally, from week to week when I would see him I asked him how the mortgage payments were being paid. He said, "Everything is satisfactory. Paying up on the nose," and everything was okay.

The Court. This was after September 14, 1948?

The Witness: Yes, that's right. I would meet him every other week, practically, up at the golf club.

Q. You say you told Steinberger— A. Schlesinger, Mr. Arthur Schlesinger.

Q. —that it was a swell deal— A. Oh, yes.

Q. Wait a minute. A. Pardon me.

Q. Let me finish my question. Were you referring to the Riviera business or to the real estate? (1765) A. I was talking about the mortgage, the purchase of the mortgage.

Q. All right. A. He was discussing the purchase of the mortgage from Ben Marden, how safe and sound it would be.

Mr. Grosman: Yes. That is all.

Recross examination by Mr. Brigadier:

Q. You say he told you he purchased it at a reduction, Mr. Marcus? A. What's that?

Mr. Brigadier: Will you repeat the question, please?

(Question read.)

A. Yes, I believe he told—

Q. Just yes or no. A. Yes, he told me he bought it at a reduction.

Q. Did he tell you at what reduction he acquired the mortgage from Marden? A. No, I don't believe I entered into the exact figures—

Q. Yes or no. A. I don't believe I entered into the figures with him, no.

Q. Mr. Marcus, you recall the other day I questioned you about the use of the name Harry Samuels? (1766) A. Yes, sir.

Q. And I asked you to state in what connections you used it? A. Yes, sir.

Q. Did you tell me at that time that you also used it in connection with a Factory Surplus Merchandise, Inc.? A. I don't know whether I did or not.

Q. You don't recall your testimony? A. I told you I used it on several occasions.

Q. Then I questioned you as to what companies—what occasions— A. I couldn't recall exactly what companies.

Mr. Grosman: Will you wait until he finishes his question?

The Witness: I'm sorry.

Q. Do you recall telling me that you used it in connection with Peace Light because you didn't want a competitor to know you were connected with Peace Light? A. That's correct.

Q. Do you remember that you used it also in connection with Art Foto because you didn't want a— A. What photo?

Q. Sound Foto, I think it was.

Mr. Margulies: Associated.

(1767) Q. Associated foto. A. I did.

Q. And that you didn't want competitors—no, I'm sorry. That's not what you said—because at that time Mr. Anton was going off on a trip and he asked you to exercise the power of attorney, is that right? A. That's right.

Q. And then later you became associated with this company when it became incorporated, isn't that right? A. That's correct.

Q. Now, did you tell us at that time about this one, Factory Surplus? A. I don't recall whether I did or not.

Q. You know what this document is that I have in front of me? A. Yes.

Q. This is what you offered on redirect, right? A. That's correct.

Q. DM-41. Now, will you look at this document, Mr. Marcus? It purports to be an agreement, on the face of it, between whom? A. Between Factory Surplus and Louis Davis, isn't it?

Q. And Samuel Marcus' name doesn't appear in the first paragraph, does it? A. No, it doesn't.

(1768) Q. Or Harry Samuels? A. No, it doesn't.

Q. Now, I direct your attention to the signature that appears at the bottom of the third page. First, Factory Surplus Merchandise, Inc., by whom? A. Evan Anton.

Q. As president? A. That's right.

Q. Is this the same Evan Anton that you have been testifying before about? A. That's correct.

Q. Now, underneath it appears what name? A. Harry Samuels.

Q. Written by whom? A. By me.

Q. Harry Samuels does not appear in any way a party to this agreement, does he? A. Does he? I don't know.

Q. You look at it. You offered it in evidence. A. I didn't prepare the paper.

Mr. Grosman: Let him look at it. Take your time and look at it.

Samuel Marcus—Defendant—Recalled—Recross

The Witness: What is the question?

Q. I am referring to the agreement, pages 1, 2 and 3. (1769) A. What is your question.

Q. And I ask you whether you can find that Harry Samuels is mentioned therein anywhere as party thereto. A. I don't believe it is. It is strictly a corporation. It is not.

Q. Do you know why the signature of Harry Samuels appears there? A. I don't particularly know why I used that name at that time, no.

Q. Or why it appears altogether? A. No, I don't.

Q. Now, you will notice that this is the loan that you say you made, part of which you turned over to Bill Miller's Riviera, is that right? A. That's correct.

Q. Four thousand of which, as I recall. A. That's right.

Q. Now, the loan that was made here was for what amount, Mr. Marcus? A. I believe it was $6,000.

Q. And for that $6,000, what premium was there agreed should be paid? A. I paid—I think it's $6,850.

Q. So that the premium was $750. A. $850.

(1770) Q. Well, will you look at the agreement? Isn't it seven hundred and fifty plus an attorney's fee? A. Plus seventy-five, that's eighty fifty.

Q. Let's read it as it is in the agreement. I asked you about premiums first. Doesn't it say, "The corporation agrees to pay all charges in connection with this financing amounting to the sum of $750, plus the attorney's fees in the amount of $75," right? A. That's right.

Q. So that would make the total of eighty fifty which you are talking about, is that right? A. That's correct.

Q. It would only make eight twenty-five, wouldn't it; where do you get eight fifty? A. Seven fifty and seventy-five is eight twenty-five. That's right. I miscalculated.

Q. Then you turned over $4,000 of this money to Bill Miller's Riviera, right? A. Right.

Q. For which you charged them $750? A. That's right.

Samuel Marcus—Defendant—Recalled—Recross

Q. And you ended up by having the two thousand at a cost of $75 to yourself? A. That's right.

Q. Incidentally, as I understood, you were (1771) testifying at some length yesterday partly—well, wait a minute, take out that word "partly"—in answer to some inquiries that were put to you by both the Court and Judge Grosman about the various Shylock practices that others engaged in on you, isn't that right? A. Yes.

Q. Including Robert Schwartz.

Mr. Grosman: Just a moment, please. I did not use the word "Shylock."

Mr. Brigadier: No, I used it. I used it to shorten what he testified to. I will concede, and I will plead guilty. I will change the question.

Q. You testified yesterday at some length to the exorbitant interest rates that were exacted by others from you, isn't that right? A. That's correct.

Q. Including Robert Schwartz? A. That's right.

Q. And also to the extent to which he charged you per day instead of on the monthly or the annual basis, isn't that right? A. I testified to that.

Q. And the large sums that you paid out to others that loaned you money? A. That's right.

(1772) Q. Now, will you turn to the third page of this Exhibit, which you have produced and offered in evidence, and will you note that it begins—it begins really, at the bottom of this page—it's an acknowledgment, right? A. Yes.

Q. And the acknowledgment purports to be that of Sam Marcus? A. Frankly, I don't know what it is.

Q. Well, you can read it. A. All right, I will. It's the first time I looked at it.

Q. You offered this paper.

Mr. Grosman: You said that four times.

The Court: Four or five times.

A. What do you want to know about it?

Q. Does that refer to the Sam Marcus as president— A. It does.

Q. —of Factory Surplus? A. That's correct.

Q. But on the preceding page the person who signs it is not Sam Marcus, but is Evan Anton, right, as president? A. It's marked down there. Evidently the attorney that drew that made an error.

(1773) The Court: You sure deal with a lot of careless people.

The Witness: This is Mr. Davis' attorney.

Q. Now, on the next page appears a corporate resolution, right? A. That's what it says here.

Q. And the first line says "we" and there was typewriten "Sam Marcus," right? A. That's right.

Q. That's stricken out and over it is written "Evan Anton," right? A. That's right.

Q. And then appears "and Henry Samuels"—that's you? A. That's right.

Q. "President and secretary"? A. That's right.

Q. So now the Harry Samuels has become the secretary of this corporation, is that right? A. That's right.

Q. All right. Now, when it comes to the signature of this, it is signed "Evan Anton, president." A. That's right.

Q. But no—well, that's on the resolution, that's right. What is this signature here, individually? (1774) A. I don't know. I imagine that's supposed to be Harry Samuels.

Q. Is it your handwriting? A. It looks like my handwriting, yes.

Q. Then you have another acknowledgment now? A. Yes.

Q. And this time it is, "Evan Anton and Harry Samuels, being severally sworn, depose and say that Anton is president and Harry Samuels is secretary," is that right? A. Mr. Brigadier, by the way, this one isn't signed here. You showed me something here—this is just something evidently put in by error, it didn't belong in here.

Q. Mr. Marcus, I am merely questioning you about this document. A. This isn't even signed.

The Court: Why do you insist on talking when Mr Brigadier is talking?

The Witness: I'm sorry, sir.

Q. Now, annexed to this is a letter addressed to Louis Davis, right? A. That's right.

Q. And I direct your attention to Paragraph B of this. (1775) A. Yes.

Q. I'm sorry. It's Paragraph A of it. "I, Sam Marcus, represent that I am president and stockholder of Factory Surplus." A. That's right.

Q. Who was your lawyer in that transaction? A. I didn't have a lawyer. This is Mr. Davis' lawyer.

Q. You came there without a lawyer? A. I didn't have a lawyer. I have often borrowed—

Mr. Brigadier: Off the record.

(Discussion off the record.)

Q. Now, in this letter—did you give this letter to Mr. Davis; did you sign it? This doesn't purport to be a signed copy. A. I don't know what I did with Mr. Davis. Now all I know is he gave me $6,000 and I signed some papers for him.

Q. Did you notice Paragraph C-1 of this? A. I didn't notice any of the contents at all.

Q. Will you look at it now? A. Yes, sir; I will do that.

(Witness looks at document.)

The Witness: Yes. What do you want me to tell you about it, Mr. Brigadier?

Mr. Grosman: Just wait. He will tell you.

(1776) Mr. Brigadier: I'm sorry. Did you say something to me, Judge?

Mr. Grosman: No, I was talking to Mr. Marcus.

Q. Did you read that? A. Yes, I did.

Q. Does that refresh your recollection as to what you did in this transaction with respect to a chattel mortgage that you had on Mocambo? A. Yes, I think I gave him that as collateral for the loan—additional collateral for the loan, I believe.

Q. Did you agree to give him any collateral by way of a chattel mortgage on the liquor of Bill Miller's Riviera? A. I don't know what arrangement he had with Bill Miller's Riviera. I think he negotiated some arrangement—I think he wanted—if I'm not mistaken, I think he wanted additional collateral, something, of a mortgage from Bill Miller.

Q. Well, you knew you were borrowing four thousand of this six thousand for Bill Miller's Riviera, you say? A. That's right. He requested me to get it for him.

Q. And you ended up eventually with a mortgage for that four thousand, did you not? A. Mr. Davis insisted upon that.

Q. Did you give Mr. Davis that mortgage? (1777) A. No, I held that as security—against the security I gave to Mr. Davis.

Q. But nowhere in this letter attached to this Exhibit is there the slightest reference to Bill Miller's Riviera, is there? A. No, there is not.

Q. Nor to any chattel mortgage on Bill Miller's Riviera? A. No, there is not.

Q. Just for the record, Mr. Marcus, who was president and who was the secretary of Factory Surplus? A. I was president. I don't recall who was secretary at the time.

Samuel Marcus—Defendant—Recalled—Recross

Q. And were you president— A. No, at one time I think Mr. Anton was president. This is what particular time?

Q. I am talking of this particular date. A. At this particular date, if Mr. Anton signed as president, then evidently he was president, and I signed Harry Samuels as secretary. Just what the purpose was, at this moment I don't know. But there wasn't any purpose to defraud anybody.

Q. Mr. Marcus, before I question you on Exhibit DM-43, I would like to ask you this question. Do you have in your possession at this moment any evidence with (1778) respect to any loan to Milmar that you have not produced? A. I do not believe I have. I mean—although it is possible another check might come up. But I don't believe I have.

The Court: Don't go into possibilities. Do you have any now?

The Witness: None in my possession at this time, no.

The Court: That is all he asked you.

Q. Is there any in possession of your attorney that you know of that has not as yet been produced? A. None that I know of.

Mr. Brigadier: In other words, what I want to avoid is another recross, and recross, recross, and so on. I am trying to bring this to an end.

Mr. Grosman: Well, that's very nice of you.

The Court: We all agree with you on that.

Mr. Brigadier: I don't want you to come along after this and bring in some more evidence. I think there should be an end.

Mr. Grosman: If you are going to confuse the man, the way you did with this Exhibit DM-41, I am certainly going to ask the Court to permit me to straighten him out.

Mr. Brigadier: I am talking about—has he (1779) any other evidence, documentary, paper, books or anything else.

The Court: And he said no already, so why keep talking about it?

Mr. Grosman: Well, he wants to know about the evidence. We say the evidence is in the books, and they have the books.

Mr. Brigadier: I asked him about his possession.

Mr. Grosman: He asked the question and got an answer.

By Mr. Brigadier:

Q. Now, you have produced Exhibit DM-43, right? A. That's right.

Q. Which you say is in the handwriting of Mr. Hoffman? A. I believe it is.

Q. And was given to you when? A. That was given to me at the time we were beginning to have difficulties with Bill Miller and we wanted to dispossess him, and I demanded Mr. Hoffman to return to me the books of Milmar Estates—turn over to me the books of Milmar Estates?

Q. Now, would you fix the year? A. The year would be '47, early '47, in the spring.

(1780) Q. Early '47: A. In the spring of '47. March, April, May—one of those months.

Q. In other words, you did not receive this from Mr. Hoffman after September 14, is that right? A. Definitely not.

Q. Now, you said yesterday that this Exhibit contains a list of loans that were made by you to Milmar? A. I believe it does, yes.

Q. You believe it does? A. Yes.

Q. Or you say that it does? A. I say that it does.

Samuel Marcus—Defendant—Recalled—Recross

Q. Remember Judge Modarelli asking you whether there appeared anything on this Exhibit setting forth loans by Samuel Marcus? A. He did.

Q. And you said there was? A. Yes.

Q. Does the word "loans" appear anywhere on that Exhibit? A. This says—

Q. Answer my question. Does the word "loans" appear anywhere in that Exhibit? A. It does not.

Q. Now, on the lefthand side appears at the top (1781) what word? A. Receipts.

Q. And underneath it appears what? A. Total.

Q. For one column? A. Riviera.

Q. The next column? A. Sam Marcus.

Q. So that it merely refers to receipts from Sam Marcus, is that right? A. That's correct.

Q. Now, on the other side it reads what? A. Cash disbursements.

Q. Now, will you read the column headings. A. Total, amortization, interest, insurance, taxes, general.

Q. I see. And again there isn't any reference in this Exhibit anywhere to any repayment of loans, is there? A. There is not.

Q. You remember the Judge asking you that and you said there wasn't, right? A. That's right.

Q. Now, Mr. Marcus, I questioned you on cross originally—would you let him have the schedule that he (1782) has annexed to his complaint, the schedule of loans as you have set it up so he can work with me from the schedule. I think it will be quicker if he has it in front of him.

The Court: Attached to his answer and counterclaim.

The Clerk: Schedule B?

Mr. Brigadier: Yes.

(Document handed to the witness.)

Samuel Marcus—Defendant—Recalled—Recross

Q. You are now looking at your schedule of loans to Milmar as annexed to your answer and counterclaim, is that right? A. That's correct.

Q. Now, you will recall that I questioned you on cross examination as to the first item, July 16, 1946, $2,000. A. That's correct.

Q. And I asked you what proof you had, if any, at that time in Exhibit DM-24 as to this item; you examined the Exhibit and your answer was, "None," right? A. That's right.

Q. Now, on your redirect you were questioned about this item, right, Mr. Marcus? A. I believe I was.

Q. And did you point to this Exhibit, DM-43, (1783) item, two thousand, under heading of, "Receipts, S. Marcus," as the evidence of this item? A. I did.

Q. And this is what you rely upon as proof of a loan of $2,000? A. No, not only that. The books of Milmar. That's represented in the loan account of the books of Milmar.

Q. In the loan account of the books of Milmar? A. Yes, sir; it is.

Q. I show you the page, "loans payable, S. Marcus," will you point out to the Judge and myself where you find this $2,000 in the books of Milmar? A. No, I think that item was in that checkbook, if I'm not mistaken. Do you have that checkbook?

Q. Wait a minute. Let's get this straight. It is not here, is it? A. Wait. Let me see now. This bulks them together. $7,000 in one bulk here. Seven hundred, twelve thousand—

The Court: Don't go speculating. Do you find it in that?

The Witness: Two thousand here, as an individual item?

The Court: Yes.

The Witness: No, I don't, sir.

Q. What is the date of the item, Mr. Marcus? (1748) A. July 16.

Q. 1946? A. That's correct.

Q. Do you find any item that refers, anywhere— A. July 16, no, I do not.

Q. Anywhere near it, prior or subsequent, that would refer to the $2,000 item? A. No, it shows nothing here in July at all.

Mr. Brigadier: All right. I just want to make sure.

Mr. Grosman: Now, if your Honor please, may I interpose an objection at this time. Mr. Brigadier, probably unwittingly, said, "I show you the books of Milmar—" Now, what he showed him was a ledger, some ledger sheets.

Mr. Brigadier: No. I represent that these are the books of Milmar, consisting of the general ledger, journal and cash book, up to September 14, 1948, which was exhibited to you, and of which you have a photostat. It was exhibited to you pursuant to the order of this Court that they be permitted to examine it.

The Court: He is reading from the loan account.

Mr. Grosman: It looks pretty skimpy.

Mr. Brigadier: Judge, let's not get into a (1785) collateral discussion.

The Court: Please don't. I am not annoyed often, but this subject of books is getting to be pretty annoying. If that's their books, that's their books; if they kept lousy books, that's their books.

By Mr. Brigadier:

Q. The next item on your schedule, Mr. Marcus, annexed to your answer and counterclaim, is the item of September 30, 1946, $3,500, right? A. That's correct.

Samuel Marcus—Defendant—Recalled—Recross

Q. And you will recall being asked on the original cross examination as to whether you had any evidence in Exhibit DM-24 as to this item and your answer was you did not, right? A. That's right.

Q. Now, do you have any evidence in Exhibit DM-43 as to that item of $3,500? A. There is one item here is $7,000 in October, which *would take the September and* October items of thirty-five hundred apiece.

Q. So that you say that this combined item, which is under the heading of, "Receipts from Sam Marcus," $7,000 in the month of October— A. That's right.

Q. —that that is the item that is made up of— (1786) A. September, $3,500; October, $3,500.

Q. All right. Now, Mr. Marcus, it is pretty obvious that you couldn't have gotten the dates that you are referring to in your schedule from Exhibit DM-43, could you? A. No, I didn't.

Mr. Grosman: Just a moment. If your Honor please, may I object at this time? This is not, to my mind, proper recross examination. I think we covered all this thing on the direct examination and Mr. Brigadier's cross examination.

The Court: I thought we did, too.

Mr. Brigadier: Let me be heard. After I broke him down on this schedule and asked him to produce the proof on each of these items—and on about two-thirds of them he had none—he then on redirect offered two things as proof of these items, one, Exhibit DM-43, and the other thing was the Fort Lee checkbook with entries in the back. Don't I have a right now to find out and prove that those don't bear out what he says?

The Court: If that's the fact, you have the right.

Mr. Brigadier: That's what I am trying to do.

The Court: I can't possibly remember how many (1787) times he has been examined and cross examined.

Mr. Brigadier: You know, if I don't do this, what you are being asked to do here, sir? You are being asked to do the job that I am trying to do now. In other words, you would have to take this and try to find out—as you will see in a moment when I get to an item here of twelve thousand—what relation has that got to this schedule.

The Court: Proceed.

Mr. Brigadier: So I am doing the work you are really being asked to do here.

The Court: You lawyers are supposed to help me, naturally.

Mr. Grosman: My recollection of his testimony in regard to that statement that Mr. Brigadier is using now—which I believe is DM-43—was that was a statement given to him by Mr. Hoffman. That is all he said about that.

Now, of course, if your Honor wants him to go through this again, with all these histrionics, I have no objection. I have resigned myself to being here the rest of the year. But I don't think he ought to go through this thing again.

The Court: You heard what he said when you produced this as further proof—as he says, it is (1788) further proof. He wants to show that it is not proof at all.

Proceed.

By Mr. Brigadier:

Q. Now, the question, instead of having you read it. Where did you get the two dates that you have in your schedule—September 30, $3,500; October 30, $3,500—when the only item of proof that you have offered is the entry, "October, $7,000"?

Mr. Grosman: I object to that, your Honor. He says, "The only item of proof you have offered."

Samuel Marcus—Defendant—Recalled—Recross

Mr. Brigadier: I will strike out the word "only."
Mr. Grosman: All right.

Q. —when this Exhibit merely refers to "October, $7,000"? A. When Mr. Hoffman gave me this as representing my loans to Milmar, I took his word for it. I gave Mr. Hoffman various amounts, checks—

The Court: Don't make it a general answer.

Q. Let's see if we can't get it as specific as we can. You have produced no check for these two items, have you; you know that, from Exhibit DM-24, there is no check, no voucher for thirty-five hundred, September 30; for October 30, $3,500, right? (1789) A. That's correct.

Q. But you find an entry here of October, $7,000, is that right? A. That's correct.

Q. All I want to know, Mr. Marcus, is, where did you get these dates from? A. From the checkbook, the Fort Lee checkbook.

Q. From the Fort Lee checkbook, right? A. That's correct.

Mr. Brigadier: Will you let me have the Fort Lee checkbook?

(Document handed to counsel.)

Q. We will get along much faster if you just try to follow me. A. Here is the Fort Lee checkbook, "Sam Marcus, $2,000."

Q. This is now referring to what item? A. The first item.

Q. July 16, 1946? A. That's correct.

Q. Is there any date—

Mr. Grosman: Pardon me. May we have the Exhibit number?

Mr. Brigadier: Exhibit DM-44.

Q. Is there any date opposite that entry? A. No, there is not.

(1790) Q. Do you have any deposit slip, or any check, or anything showing the $2,000? A. I may have had a memorandum on that at the time when I—

The Court: Do you have it now?

The Witness: I don't have it now. No, sir; I do not.

Q. And you were not able to find it in the Milmar book? A. I may have a slip around somewhere, where I got it from. But I know I picked it up from the checkbook here. And I may have also had another memorandum showing the date.

Q. Let's take the next two items. A. Yes, sir.

Q. Incidentally, that stub doesn't show anything but the name "Sam Marcus" alongside it? A. That's right.

Q. The word "loan" doesn't appear there in any way? A. I didn't write it there.

Q. All right. A. Now, we have here $3,500.

Q. And it says, underneath that, what? A. "Note issued."

(1791) Q. Does that mean a note was given by yourself as president of the corporation to yourself individually? A. No, that note was given to me by Mr. Hoffman, Jack Hoffman signed as comptroller.

Q. To you? A. To me.

Q. Where is that note? A. I believe I turned it over to Mr. Grosman, together with the checks.

Q. You haven't offered it in evidence, have you? A. I believe I did. Wasn't it given in depositions, or so? I think I had that.

Q. Mr. Marcus, will you refer to Exhibit DM-24 and show me where you have anything by way of a note to support that item? A. I know I had a note of that kind. Whether Judge Grosman has it in his files or not, I don't know. I am sure I turned a note of that kind over.

Samuel Marcus—Defendant—Recalled—Recross

I don't see any note here amongst this Exhibit. It may be in Judge Grosman's file.

The Court: You don't see any in there.

The Witness: I do not.

Mr. Grosman: I think, Mr. Brigadier, there is another Exhibit with notes and checks that was introduced.

(1792) Mr. Brigadier: The other Exhibit is for loans of Riviera, which you have objected to my going into, because you said you just put those in to show a lot of money that was loaned. I am talking now of Milmar.

Q. Now, Mr. Marcus, the next item of that thirty-five hundred is the October 30 one, is that right? A. That's right.

Q. And again you are referring now to DM-44, checkbook, as the only evidence of that loan? A. Let's see now where we got that one from. October 30, I have a check on that. I have a canceled voucher—a canceled check on October 30.

Q. I'm sorry. You are right. You have a voucher for how much of it? A. For $3,500.

Q. Mr. Marcus, you have just turned to this second item, October 30, 1946, and you said—

Mr. Grosman: That's the third item.

Mr. Brigadier: The third item.

Q. —and you said that for that you did have, and you were correct, an item which you have put in evidence under Exhibit DM-24, and that's this check, right, drawn by Sam Marcus to Milmar Estate, Inc.? A. That's correct.

Q. Now, will you look at your entry that you are (1793) relying on in the checkbook? A. I didn't rely upon this entry in the checkbook. I relied on the date of my check.

Q. Didn't you point to this entry here? A. I told you this one we had a voucher on. I relied upon the date of the check on that.

Q. Will you show me where this turns up in your stub of your checkbook? A. This isn't my stub. These are Mr. Hoffman's stubs.

Q. Well, now, look, didn't you just tell us that you are relying on entries that appear in the stub of this checkbook to prove loans for which you otherwise have no vouchers, is that right? A. That's correct. I worked from this checkbook and my canceled vouchers.

The Court: Are we to assume that when you do have a voucher then you don't rely on entries in the checkbook?

The Witness: Which I do—well, it depends—

The Court: I asked you a simple question. Do you always have to double talk?

Read my question to him, please.

(The Court's question was read.)

The Witness: That's correct.

The Court: All right. That's all I wanted.

(1794) Mr. Grosman: Now, if your Honor please, I think the witness is confused now. He said he also relied on memorandums, on slips, on duplicate bank deposit slips in reconstructing this statement.

Mr. Brigadier: All right. Let me try to get it straightened out a bit.

The Court: Well, I am only addressing myself to the remark he made in connection with the checkbook. I know about the duplicate deposit slips. And I wish he had kept good records, so we wouldn't have to go all through this, the way they should be kept.

Mr. Brigadier: I think I can straighten it out in part, Judge. The witness jumped too fast. That's what caused the trouble.

Samuel Marcus—Defendant—Recalled—Recross

Q. When I asked you how you made up this entry, or what you support this entry of $7,000, October, 1946, by, on Exhibit DM-43, you said there are two items of thirty-five hundred, right?

Mr. Tepper: I must object to the form of the question. Counsel stated in the question, "You made an entry," speaking of this Exhibit.

The Court: He didn't make it, Jack Hoffman made it.

Mr. Brigadier: I didn't say he made an entry, I said he made reference to an entry.

(1795) Mr. Tepper: Well, the question doesn't state that at all, I am sure, if you read the question.

The Witness: May I correct myself?

Mr. Brigadier: Suppose you correct yourself when I get to it, will you?

May I proceed?

Mr. Tepper: Yes, sir.

Mr. Brigadier: I will go back.

By Mr. Brigadier:

Q. You were shown DM-43, right? A. That's right.

Q. And I asked you where you found, in DM-43, anything to support the items—September 30, $3,500; October 30, $3,500—and wasn't your answer, "Here is an entry, October, $7,000"? A. I didn't have this piece of paper when I made up this schedule.

Q. I am asking you about what your testimony is here.

The Court: Do you want him to say it again? He did say yes. I will say it for him. Now, go ahead.

Q. Then I asked you for the breakdown of the $7,000, and you said it would show in the Fort Lee checkbook, right; did you say that? A. The $7,000?

(1796) Q. Yes. A. I said it would—probably it would show in the Fort Lee checkbook. It would show in the books of Milmar.

Q. Did you say it would show in the Fort Lee checkbook? A. Or the books of Milmar?

Q. Will you show me in the Fort Lee checkbook where you have an entry of a receipt from you, or a loan from you, September 30, $3,500? A. September 30, I have a canceled voucher for that.

Q. I am asking you where you have it in this checkbook. A. It is not in this checkbook.

The Court: That's the answer.

Q. Now, you say you have a canceled voucher? A. That's right.

Q. I asked you to produce it. You haven't produced it to date. A. Wait a minute. I mean October 30 is a canceled voucher. I am sorry.

Q. I am not asking you about October 30. A. Can I examine the books of Milmar, please?

Q. You answer my question now. Where in the Fort Lee checkbook is there anything to support the September 30 item of thirty-five hundred? (1797) A. It is not there.

Q. Now do you say you are relying on the Milmar book for the entry? A. I relied on all the matter that I had to rely on, the checkbook, the Riviera books, whatever scraps of paper—deposit slips, and whatever papers I had in my possession of sums I had given to Mr. Hoffman, and I anticipated those items being on the books of the Riviera.

Q. Do you find this on "Loans payable, Samuel Marcus," the $3,500 item? A. Let's look at some other pages.

The Court: Do you want to go browsing through every page? Look at your loan account. A. There is an item, October 31, $7,000.

Mr. Tepper: The Exhibit number, for the record.

Samuel Marcus—Defendant—Recalled—Recross

Mr. Brigadier: You have marked it through the photostat. I will put it in evidence before we are through.

Q. So we are back again to an entry, October 31, $7,000, right? A. That's correct.

Q. But you will notice again, Mr. Marcus, that there is no entry for the two thousand preceding it. (1798) A. That's not my error.

Q. In other words, you want the book when you say the book supports what you say, but you reject the book when it doesn't show what you say as to the two thousand.

Mr. Tepper: That is purely argumentative and in addition—

The Court: Why do you get all excited?

Mr. Tepper: —it has not been identified.

The Court: Mr. Brigadier, isn't that natural? Are you surprised at that?

Mr. Brigadier: I am just trying to show you what the evidence is that is being offered.

The Court: But the comments you sometimes make are uncalled for. I make my deductions. You don't have to comment on it.

Q. Now, the next item on your schedule, Mr. Marcus, for which you produced no proof in DM-24 is the item of November 13, $700. I direct your attention to DM-43; do you find that item on DM-43? A. DM-43, I do not.

Q. Oh, yes, you do. A. Oh, yes, it's on here.

Q. You are not going to accuse me of misleading you again. It is on there, right? (1799) A. Yes, it's there.

The Court: I even remembered that it is on that.

Q. And again it is in this column—

Mr. Tepper: I know your Honor can, but your Honor must realize that this man, irrespective of ex-

perience in business, or anything else, is a layman. He sits there and he is subjected to a third degree, actually.

Mr. Brigadier: I object to that.

The Court: We have all told him not to answer so quickly.

Mr. Tepper: Your Honor is so correct.

The Court: If he will take his time he would do better.

And look at what is shown to you.

Mr. Tepper: It is very confusing to the witness.

The Court: It is on there, isn't it, Mr. Brigadier?

Mr. Brigadier: That's right.

The Witness: It is on this here one, yes.

Q. Now, do you have any other evidence besides that of the loan that you made, except the entry as it appears on DM-43? (1800) A. I do.

Q. And what is that? A. This is a personal piece of paper where I kept some memorandums on, which I—

Q. This is a new one. A. It is just a—

Mr. Grosman: It is not a new one.

The Witness: I brought it in with the other one, when I brought the memorandum of the checks, and all, to Judge Grosman.

Mr. Tepper: It was in Court the other day.

The Witness: I had it in Court the other day.

Mr. Brigadier: I never saw it, if your Honor please. That is why I asked the question to begin with, have you in your possession any other—

The Witness: I have that with me—

The Court: I know, but you would say this is a self-serving declaration.

Mr. Brigadier: I am going to.

The Court: This February 6, $700, personal, is that the item?

The Witness: Yes. See here—
The Court: Is that the item?
The Witness: That's the item right here, sir.
The Court: February 6, $700, personal.
(1801) The Witness: That would show in the Milmar bank book, or the Fort Lee bank book, I think it was.

Q. You have the Fort Lee in front of you. A. I think so. It would show in here, if he made a separate deposit.
Q. Maybe you have. I am just trying to find out, Mr. Marcus.

Mr. Grosman: Now, will you take your time and look, Mr. Marcus?

Q. February 6, 1946.

The Court: '47.
Mr. Brigadier: I am sorry.

Q. '47. A. This jumps from January, to April, to May. It doesn't show February here.
Q. I have much more important questions. I don't want to waste time with a $700 item. I would rather take the big ones. Let's take the next one. I direct your attention now to your schedule, November 27, $3,500; December 4, $3,500, and ask you do you find—you know that there is nothing in DM-24 to support those items, right? A. What is DM-24?
Q. That's the Exhibit with the checks, deposit slips, etcetera. (1802) A. I believe there is. Which ones did you ask me for? November 27?
Q. And December 4. A. December 4 you have. You have a check for December 4.
Q. Will you produce it?

(Documents handed to the witness.)

Samuel Marcus—Defendant—Recalled—Recross

A. Here is the note we were talking about. Now it pops up here. There is that note. I don't know where it came from all of a sudden.

The Clerk: It was there all the while, Mr. Marcus.

The Witness: I am just saying—maybe it was lost in the envelope there.

What are we looking for?

Q. We are looking for November 27 and December 4. And I think you said— A. November 27, I don't think I have. December 4 we should have. Here we are—no, this is '47. Here is a check here, $2,000 on December 3, two thousand, and the total should be—it should be fifteen hundred more. There was another item of fifteen hundred. I have it checked off here. But this is represented in the books of Milmar.

Q. Just answer the question, Mr. Marcus. Have (1803) you been able to produce— A. All I see here right now is $2,000. But I believe I should have the other one. Maybe we are mixed up a bit in these checks.

Q. Do you have in Exhibit DM-24 anything to support the item of December 4, $3,500; and you produce a check, December 3, $2,000, is that right? A. That's right.

Q. What about the other fifteen hundred, Mr. Marcus? A. That's reflected in the books of Milmar.

Q. I see. Now, what about November 27? A. November 27 is reflected in the books of Milmar.

Q. No voucher. A. I don't have a voucher right at this moment.

Mr. Brigadier: I would like to have a very brief conference with my colleagues as to whether I should go through each one of these items. Because this is what I have to do in order to go through it. Would you allow me, without a recess, to talk to them for just a few minutes to see whether I can let it go.

The Court: Yes.

Samuel Marcus—Defendant—Recalled—Recross

(Conference among counsel.)

Mr. Brigadier: If your Honor please, I am going to rest on this by letting the documents—I was (1804) trying to help you, frankly, by showing the relation—I have gone through a number of them, and the rest I will rely on is evidence, and then present it to you, as a matter of argument later, to show you just what this consists of, because it will speak for itself, and I can present it in the form of argument instead of questioning him on each item separately.

By Mr. Brigadier:

Q. Mr. Marcus, when did you first make up this schedule which you are referring to, that's annexed to your answer and counterclaim, of the loans, the amounts and the dates? A. You mean this paper here? (Indicating.)

Q. No, no. The schedule annexed to your counterclaim. A. I don't know when –when I advised—when I gave Judge Grosman a list of loans that was due me.

Q. Will you look at the schedule, please? A. Yes.

Q. You have it You notice that alongside the items there appears a letter, alongside a number of them, A, A, sometimes X. A. That's right.

Q. Would you tell us what that means? A. Yes. I identified those as those items which I had (1805) vouchers for, and the letters "A" are those items which were in Milmar books, and those with blanks are those items which I had nothing for, were not in Milmar books.

Q. Blanks. Where there is no letter means that you have no— A. I haven't located the voucher for it.

Q. And "A" means—

Mr. Brigadier: We would have saved ourselves a lot of work if I had known this.

Q. "A" means what? A. "A" means it is reflected in the books of Milmar.

Samuel Marcus—Defendant—Recalled—Recross

Q. And that is what you rely on, the books of Milmar for that, is that it? A. That's correct. The books and some personal records that I had of moneys given to them.

Q. Just to get this straightened out, the first item, the $2,000 item, was not in the books of Milmar, as you saw it, isn't that right, and you have the letter "A" after it? A. What's that? Yet—well, no—I considered the checkbook a book of Milmar, Mr. Brigadier.

Q. I see. So you were relying on the checkbook? A. On the combination of everything I could find.

The Court: In other words, "A" means anything in Milmar's records.

(1806) The Witness: Anything in Milmar's records, yes.

The Court: Any other letters?

Mr. Brigadier: "X" means voucher.

The Witness: "X" means we have the canceled voucher for it, or a cash deposit slip.

Q. Well, then, on the December 4 item, where you have an "X" by the thirty-five hundred, you should have been able to produce us some kind of a voucher? A. I did. I have a $2,000 check and probably something came apart. There may have been an additional deposit there of fifteen hundred in cash, or so. I will have to find the deposit slip of that and see if that won't answer for it. But I must have had it complete or I wouldn't have had it marked "X".

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The Court: Did you prepare that very carefully, Mr. Marcus?

The Witness: I did. When I turned things over to Judge Grosman I thought everything was just perfect, that there wouldn't be any difficulty. But it must have come apart some time during the transaction.

Samuel Marcus—Defendant—Recalled—Recross

Q. Mr. Marcus, let me just ask you this question. During your original cross I questioned you about 23 items on that schedule for which there was no supporting voucher in Exhibit DM-24. Have you searched since I questioned (1807) you for such vouchers? A. I didn't think there was any quantity of that 23. There were three or four, as I recall, and I thought I straightened them out.

Q. All right, the record will speak for itself. I am not going to go through that again. Have you searched for other vouchers since the time I questioned you on cross? A. I did.

Q. And the only thing that you have produced in support of these items that I questioned you about on cross is this DM-43— A. No.

Q. —and the Fort Lee checkbook, right? A. No.

Q. What else? A. The bank book that you have of Milmar Estates.

Q. And the bank book. That's in evidence, right?

The Court: Yes, it is.

A. And a letter here from the Modern Industrial Bank and some records—

Q. You haven't produced those.

Mr. Tepper: Let him answer, please. He has other documents he relied on.

Mr. Brigadier: I asked him whether he has (1808) produced those.

The Court: Don't start an argument again. Let him answer the question and ask him another one you want to.

What have you got there? Read the rest that you rely on, whether it is in evidence or not.

The Witness: I have a letter here from the Modern Industrial Bank.

The Court: All right. A letter from the Modern Industrial Bank. Dated March—

The Witness: March 3, 1952, where they list—Milmar borrowed $8,000 and they repaid—Judge Grosman, will you please give me those bank statements?

Mr. Grosman: Bank statement, yes.

The Court: This is not in evidence, this letter, is it?

The Witness: No.

The Court: And this is your own notation.

The Witness: This is my own notation. Here is what I did—give me the slip that went along with it.

The Court: Do you want to hear this explanation?

Mr. Brigadier: I just wanted to see if he had any other checks. That's what I tried to ask him.

Q. Have you got any other checks that you now (1809) want to produce? A. No, I do not.

Q. Any other notes that you want to now produce? A. I have not found any.

Q. Any other deposit slips you want to now produce? A. I believe there may be something amongst Judge Grosman's effects, either here or in his office, which I would like to search before I make that statement.

Mr. Tepper: I believe he should be permitted to finish his last answer.

The Court: Yes, what is he relying upon, whether it is in evidence or not.

Mr. Tepper: That was cut off by the next question.

The Court: He started to enumerate the things he was relying upon. Then Mr. Brigadier interrupted. Then he lost track of what he is relying upon.

The Witness: I have carefully taken the bank statements of the Public National Bank wherein I was the signer of checks for Milmar and I have accounted for —named every payee of every check that was issued

by Milmar. So every check of Milmar that isn't here is accounted for, the payee. And this will show exactly who was paid out of any funds that I ever signed for Milmar (1810) Estates.

The Court: That's number one. Now, what else did you use?

Mr. Grosman: Now, if your Honor please, these are not in evidence.

Mr. Brigadier: Will you put them in evidence?

Mr. Grosman: I will put them in evidence now.

The Court: This is going to be good for the printer. Go ahead, put it in.

Mr. Grosman: The printers have to live, too, your Honor.

Mr. Brigadier: All I asked was a very simple question, sir. Don't you think so? What is he offering in addition to what was originally offered to support these items? That's all.

The Court: I thought you said what did he rely upon, and he started to tell you.

Mr. Brigadier: I am willing to take the word "rely," which I didn't think I used, but it doesn't make any difference.

The Court: He started to enumerate what he relied on. Don't you want that answer, Mr. Brigadier, or do you want to know whether he wants to offer anything in (1811) substantiation?

Mr. Brigadier: I am willing to take that.

The Court: He told you he has nothing else to offer, unless, he says, he can find it in going through Judge Grosman's papers. And if he does, he will produce it. Is that right?

The Witness: Yes. I have something else.

Mr. Grosman: He has got something else.

Mr. Brigadier: Do you want to conduct my cross for me?

I think, sir, I have been extremely patient with interruptions. I don't interrupt, when they are conducting their cross, with all these side remarks that are constantly being made.

The Court: They shouldn't be made.

Mr. Brigadier: I think there is some minimum respect that is owed to an adversary.

The Court: Minimum respect? Maximum respect should be owed by one lawyer to another.

Mr. Brigadier: I am only asking for the minimum.

The Court: I didn't think I had to conduct a course in legal ethics and etiquette now.

The Clerk: DM-46, series of 20 bank statements, Milmar Estate, Inc.

(1812) (Received and marked Exhibit DM-46.)

By Mr. Brigadier:

Q. Mr. Marcus, you were questioned on redirect about Exhibit DM-2, Paragraph 2, which was read to support your contention that you had an understanding that five-year notes were to be executed to you for the moneys that were advanced, is that right? Remember looking at this Exhibit? A. That's correct.

Mr. Brigadier: This is my photostat. Would you let me have the one that is in evidence, DM-2?

(Document handed to counsel.)

Q. Now, you will notice, Mr. Marcus, that Milmar Estate, Inc., is not a party to this agreement, right? A. That's so.

Q. This is an agreement between you and William Miller, individually? A. That's correct.

Q. In your individual capacities. A. That's right.

Q. And you will note that in the second "whereas" clause it reads, "Whereas Miller has pledged his shares

of stock of Milmar Estate, Inc., with Marcus as security for the payment of the said note of $50,000," do you see that? (1813) A. Yes, sir.

Q. Did you know that was in it when you signed this agreement? A. Frankly, I don't recall whether I did or not.

Q. Isn't that why this agreement purports to be an agreement only between you and Miller and the corporation is not a party to it? A. I don't know what the purpose of this was at the time. All I remember, at the time we were both supposed to loan Milmar money to help carry it over its supposedly bad moments.

Q. Yes, but how were you two binding the corporation with an agreement which you made between yourselves, unless you two recognized each other as the owners of the stock of Milmar?

Mr. Tepper: I must object to that as being legal argument, asking this witness how the corporation is going to be legally bound by something. The document is there.

The Court: Don't enlarge on it. You said enough when you said the first part of it. Isn't that so?

Mr. Brigadier: That's so, except that he was permitted to interpret Paragraph 2 when Judge Grosman questioned him about it.

The Court: Whose interpretation counts here, (1814) his or mine?

Mr. Brigadier: Yours, sir.

Q. Now, Mr. Marcus, you will notice that Paragraph 2, which contains this provision, doesn't cover all the loans that you made, does it? A. I don't know whether it does or not.

Q. Well, what does it say? A. It says, "All money advanced by Miller and Marcus, for taxes, amortization and interest will be considered a loan to Milmar Estates."

Q. That's right. Now, the other thing I want you to note in that paragraph is that there was no interest to be paid on these loans, right? A. That's correct.

Q. For five years, without interest? A. That's correct.

Q. What about the loans that were made prior to the date of this agreement, of July 23, 1947? A. That was supposed to include all prior loans, no question about that.

Q. This agreement refers not only to loans to be made afterwards, but loans that were made in the past? A. That was my definite understanding, surely.

Q. Do you see anything in the agreement that says it? (1815) A. I don't see anything that doesn't say so.

Q. Mr. Marcus, will you look at DME-28, and will you notice the date of that? A. The date of what?

Q. Of that lease. A. July 23, 1947.

Q. Will you notice the date of DM-2? A. July 23, 1947.

Q. You notice that Paragraph 2 of this DM-2 speaks of, "in accordance with the terms of the lease." Which lease is referred to here? A. I don't know. There were several leases.

Q. But you have a lease that has the same date as this agreement; isn't that the lease referred to? A. I didn't prepare these papers. The lawyers prepared these papers. Judge Lieberman and Mr. Schwartz prepared these papers.

Q. And you don't know whether this refers to the lease bearing the same date or a year prior thereto, is that it? A. I wouldn't know what their interpretation of the lease is. All I know is my loans were to be paid.

Q. I show you Exhibit DM-38 and DM-37. Do you recognize what they are? A. Yes, I do.

(1816) Q. Did you testify that before you signed those that you called Judge Grosman? A. To the best of my recollections—

The Court: You did. I will refresh your memory.

A. I believe I did, yes.

Q. And you called Judge Grosman and told him that Mr. Schwartz refused to come to Newark to be interviewed unless you signed a release, is that right? A. That's my recollections. Now, as I said before, I am not too certain—I will have to verify that with Judge Grosman, whether I did speak with him or not. It is my recollections I called him. I haven't verified it yet with Judge Grosman.

The Court: You said it. Judge Grosman didn't say it.

The Witness: I said I thought I did. My recollections was I tried to call him.

Q. And didn't you testify that Judge Grosman said, "Sign anything"? A. I believe he—my recollections are that I called him and that he told me it was—whether or not—

The Court: You said that Judge Grosman told you to sign anything to get him over here.

The Witness: That's right. That's what I said. (1817) I said that—

The Court: I am getting sick and tired of these double answers and triple answers. And be quiet when I talk.

The Witness: I'm sorry.

The Court: Not only double answers, but now I am getting triple answers out of you.

Q. Do you now want to change that testimony? A. No, sir; I do not.

Q. You want to stick to it? A. Yes, sir. I said it.

Mr. Brigadier: I have no further questions.

The Court: Are you through with him, Judge Grosman?

Mr. Brigadier: Just a moment. My colleagues have something.

The Court: If you have got one question, Judge, we will hear it now and get him off the stand. He needs a rest, too, you know.

Mr. Grosman: Sure. I never object to a recess.

The Court: You said you have one question that you want to put to him.

Mr. Grosman: Well, I have got three or four here.

(1818) The Court: Well, we better recess for lunch then. Two o'clock.

(Noon recess.)

AFTERNOON SESSION

SAMUEL MARCUS, resumed the stand.

Redirect examination by Mr. Grosman:

Q. Mr. Marcus, have you shown us all of the evidence that you have with respect to these loans that have been talked about so much here? A. Yes, I brought in some papers here the other day, some of these papers I had made up in 1946, I believe—

Q. Have you done so or have you not? A. Yes, I have some papers here, which I believe I brought in the other day.

Q. Now, Mr. Brigadier asked you if you had anything else to substantiate your claims. A. I told him I did.

Q. Does this letter from Modern Industrial Bank (1819) substantiate any of the claims you are making for moneys against Milmar? A. Yes, it does.

Q. Which of the claims? A. This is a $2,000 check which is not available right now. This shows that I borrowed, with my guarantee, $8,000 from the bank. The statements I produced here, showing all the checks given out, show

that Milmar only repaid $2,000. Therefore, I repaid the balance of the $6,000.

Now, $4,000 is on the schedule, and a $2,000 check is missing, which I haven't been able to locate.

(Court examines document.)

The Court: That's certainly evidential.

Mr. Grosman: Did you see this, Mr. Brigadier?

Mr. Brigadier: No. May I see it?

(Document handed to counsel.)

Mr. Brigadier: I have no objection to it going in evidence.

Mr. Grosman: Mark this, please.

The Clerk: DM-47, letter dated March 3, 1952, Modern Industrial Bank, marked into evidence.

(Received and marked Exhibit DM-47.)

By Mr. Grosman:

Q. What else have you here? (1820) A. This was a sheet, a compilation I had made when Mr. Hoffman brought me over that accounting statement. Then I sat down and started collecting together all my various checks that I had, numerous different sources, and I attached this at the time to Mr. Hoffman's statement, but it says here, "Loans as per Hoffman schedule for 1946, $21,800." And then I went on from that schedule and picked out all the various sources of the deposits made to Milmar, and which ones are personal, and which ones are Riviera.

This sort of reflects in the deposit book that Mr. Brigadier produced. You will find mention on there, "personal, personal, personal," and this corroborates that deposit book. This was done together with the deposit book, and my deposit slips, and everything else. And this was done around April or May of—this was done in 1948 when I was making up the records.

Q. All right. A. With Mr. Schwartz and so forth.

Q. Now, as I understand it, this is a resume of your loans— A. Yes, sir; it is.

Q. —to Milmar. A. To Milmar.

Q. Predicated upon the deposit book that has been (1821) shown you here by Mr. Brigadier, which is DME-54? A. Yes, sir; it is. You will find—

Q. All right. I just asked you if that is the book. A. That's right.

Q. And the notations are in the book? A. That's right.

Mr. Brigadier: Without looking at it, are you offering it in evidence?

Mr. Grosman: Yes.

Mr. Brigadier: I object on the ground that it is a self-serving declaration.

Mr. Grosman: It is merely a resume, your Honor—which I think would be for the convenience of the Court—of these various items that he has testified to. He has testified to all this stuff, but it would be easier for the Court to go over this list than to try to pick it out of the testimony.

The Court: I see no harm in admitting it, Mr. Brigadier, if it is helpful at all.

Mr. Brigadier: I want to press my objection.

The Clerk: Will you identify it, please, Mr. Grosman?

Mr. Grosman: A resume of loans made by the witness to Milmar Estate, Inc.

(1822) The Clerk: It will be marked DM-48.

(Received and marked Exhibit DM-48.)

The Court: Is there anything in there about the Riviera?

The Witness: No, nothing Riviera.

The Court: Strictly Milmar.

The Witness: Strictly Milmar; yes, your Honor.

Samuel Marcus—Defendant—Recalled—Redirect

By Mr. Grosman:

Q. What were you going to say? A. On that sheet, it is not only my loans, but there is also deposits there. Some of those items are receipts from Riviera for rent. It shows deposits, which ones of mine are personal, and so forth.

Q. Now, where is the other paper you had on there? A. Which one was that? This isn't the one?

Q. This one marked for identification DM-34. A. Yes.

Q. What do you say this is? A. This is a compilation of every check that was issued by me on the account of Milmar Estates. This was taken from the actual canceled checks, or from the checkbooks, on or about—some time around October, 1948.

Q. By you? A. By me.

(1823) Mr. Grosman: It is marked DM-34 for identification. I now offer it in evidence.

The Court: Are those the names of the payee again there?

The Witness: The payees; yes, sir. And will account for every check that was issued.

The Clerk: DM-34, formerly marked for identification, now marked in evidence.

(Received and marked Exhibit DM-34.)

Mr. Brigadier: Judge Grosman, do I understand that you put this entire sheet into evidence?

Mr. Grosman: Well, the back of it has a lot of meaningless figures.

Mr. Brigadier: No, on the face of it. Did you put the whole face of it in evidence?

Mr. Grosman: Yes.

Mr. Brigadier: I know there are a great many things on the face of it that have nothing to do with what he just testified to.

Mr. Grosman: All right. If they haven't, the Court will disregard them.

Those are the checks, he says, issued by Milmar, with all the names of the payees.

The Witness: Those payees, by the way, check out 100 per cent accurately with the bank statements of (1824) money paid out.

Mr. Brigadier: I ask that that be stricken out as a conclusion.

Mr. Grosman: Well, it's a statement of fact.

The Court: That's what he says it is. It doesn't make it so.

The Witness: I have submitted the bank statements here.

By Mr. Grosman:

Q. Now, Mr. Marcus, I show you Exhibit DM-41, which is the agreement between Factory Surplus Merchandise, Inc., and Louis Davis. Now, you were examined and re-examined on it by Mr. Brigadier as to signatures and so on. Is this the agreement under which you borrowed the money which was loaned to Milmar—you borrowed what, $6,000? A. Not to Milmar, no.

Q. To whom? A. To Miller, the Riviera.

Q. The Riviera? A. That's correct.

Q. Well, you say, "Miller, Riviera," what do you mean? A. Well, if I say Miller it means the Riviera—the Riviera, Miller and the Riviera.

(1825) Q. Now, did you actually borrow this money? A. Yes, sir.

Q. That is, the Factory Surplus Merchandise, Inc., borrowed the money? A. That's correct.

Q. I think you told us on direct that your personal credit had been exhausted? A. That's right, the banks wouldn't lend me—

Q. Please. And that you used one of your corporations to borrow the money? A. That's correct. Mr. Miller knew I was borrowing it from this gentleman.

Samuel Marcus—Defendant—Recalled—Redirect

Q. How did he know it? A. He gave me a receipt, and the receipt says— Mr. Louis Davis is on the receipt.

Mr. Grosman: All right. I think the receipt is in evidence.

The Court: It is.

The Witness: The name is mentioned— "from Mr. Louis Davis" right on the receipt, your Honor.

Mr. Grosman: I would like to call the Court's attention to the fact that Mr. Marcus' name appears in this writing, which is another one of these very unusual agreements drawn in New York—with my apologies to my associate counsel. I don't want it to be said that I (1826) disparage the entire New York Bar.

The Court: No, I am sure they are not all that way.

Q. When did Mr. Jack Hoffman cease to be your accountant? A. I believe he was my accountant only during the year of '46, and I think in '47 I hired Mr. Dobkin, the gentleman who was here today.

Q. Now, at the time that he gave you Exhibit DM-43, which is a schedule of loans made by you to Milmar, was he your accountant then? A. I don't believe so. He was the accountant then for the Riviera and for Milmar. I don't believe he was my accountant at that time.

Mr. Grosman: Now, if your Honor please, with the exception of some contradictions that I wish to pick out of the depositions, and one witness that we expect to have here—he isn't here yet—I rest my case, with that reservation, if it meets with your approval.

Mr. Brigadier: I have one or two questions on what you just brought out.

Mr. Grosman: I have no objection.

Mr. Brigadier: Let me finish first before you do what you are going to do. I will go along with you, but let me finish first.

(1827) Mr. Grosman: All right.

Samuel Marcus—Defendant—Recalled—Recross

Recross examination by Mr. Brigadier:

Q. Mr. Marcus, DM-48, you say that you prepared that when? A. I prepared this at the time I was preparing all the papers with Bob Schwartz, some time about October 1, 1948, when I was trying to arrive at some basis of how much money did I have invested in Milmar and Riviera.

Q. And when did you discover it again? A. When did I discover it again? Just last weekend when I spent three days in my warehouse going through, on my hands and knees, picking every scrap of paper I could find.

Q. That is why we weren't furnished with a copy of this document before. A. That's correct.

Mr. Brigadier: Let me have DM-34 in evidence.

(Document handed to counsel.)

Q. When you made up this list, Mr. Marcus, you said you had the checkbooks of Milmar in front of you? A. When I made up this list I had the—

Q. Let me, for the record, show that I am referring to DM-34. A. I either had the checkbooks or the canceled checks, one of the two, working on this schedule.

Q. (1828) Q. Following the item of 7-5— A. Yes.

Q. What is that, July 5? A. That's right.

Q. Of what year? A. July 5, 1948, I believe.

Q. And the amount for that item? A. $791.67.

Q. What is the next item? A. $19,730.

Q. It is not a check, is it? A. No, sir; it is not.

Q. Now, will you look at the bottom, the last entries that you have at the bottom of this Exhibit? A. Yes.

Q. You have July 5, right?—7-5 is July 5, is that right? A. That's correct.

Q. Then follows June 17? A. That's right.

Q. Then July 2? A. That's right.

Q. What is the next date? A. The next date appears to be 8-9.

Samuel Marcus—Defendant—Recalled—Recross

Q. And that would be August 9? (1829) A. That's correct.

Q. And the next is? A. September 3.

Q. And what is the next? A. July something. July 1 or 2, or something or other.

Q. And the one after that? A. Is July 12.

Q. Why did you suddenly go back to July after you had given us a complete list of checks down to September 3? A. The checks might have been mixed up and not in proper order.

Q. I see. Then the last item here at the bottom here is July 21, sixteen ninety-six. A. July something, $1,696.

Q. Isn't that the 21st? A. It looks like 12.

Q. It is your handwriting? A. I don't recognize it.

Q. Tell me what it is. A. It may be the 12th—it looks like the 12th, or something. I don't recognize the exact date, your Honor.

Q. Then you have two other items on the righthand side at the bottom? A. That's right.

(1830) Q. They are July 20, $2,500— A. That's right.

Q. Cash exchange. A. Geffner.

Q. That's the Geffner— A. That's the Geffner cash exchange.

Q. Then you have what underneath that? A. That was a duplication of that five thousand—some mistake on the $5,000 return loan of July there. It must have been the 21st, I imagine. It was being duplicated—I must have picked it up again and put it on the side there.

Q. Where did you have July 21 on the other side? A. It is July something or here. And on here it was the 21st.

Q. Mr. Marcus, look at your paper. Isn't it plain as day that it is July 6? A. It's July 6 to the first, or something.

Mr. Brigadier: Would you let the Court see that entry?

Samuel Marcus—Defendant—Recalled—Recross

The Witness: The bank statement would show that.

Mr. Brigadier: Hold it a minute. This is the entry, sir.

(Document shown to the Court.)

(1831) The Court: 7-6, it looks like to me.

Mr. Brigadier: Does that look like 21?

The Court: No, 7-6.

The Witness: The bank statement will show exactly the correct date and the exact amount of payment on that.

Q. Mr. Marcus, where is this warehouse from which all these papers have been turning up? A. The warehouse was on 12 Duane Street. We are all completely moved out. The city has got it now. There may be some scraps there yet, if you want to go down and look at it.

Q. When did the city take over? A. The city took it over a year ago.

Q. Well, how is it you have been digging these things up in the last two weeks from this warehouse? A. The place was just moved. We made our final movement. We had to get out of here before the first of February, and we have been moving for five weeks. And during the course of the moving I told the moving men, and the boys, if they run across any files, any papers of records, any papers whatsoever, to lay them aside for me, and I would come down and look them over, and see if I would need them.

Q. And that is where these have turned up? (1832) A. And over the recess here I went down, put overalls on, spent three days going over all papers that they had laid aside for me to look at.

Mr. Brigadier: I think I am almost through. I just want to check one thing.

Samuel Marcus—Defendant—Recalled—Recross

Q. Mr. Marcus, I show you DME-57. Will you show me where the check for seven hundred—that's in your handwriting, isn't it, that $772.56? A. Yes, it is.

Q. Where does that appear on this list? A. It doesn't.

Q. Will you show me where the check for fifty-seven eleven twenty-one—is that in your handwriting? A. Yes.

Q. Where does that turn up on this list? A. I don't see it on here.

Q. Will you tell me whether the check for fifty-nine thirty is in your handwriting? A. Yes, they are all in my handwriting.

Q. Does that turn up on your list? A. I don't see it here.

Q. Now, Mr. Marcus, will you note the checks that are drawn in this book dated September 7— A. Yes.

Q. Is that the 3rd or the 7th? (1833) A. I don't know.

Q. It is your handwriting, isn't it? A. It should be. I wouldn't know the exact date on that.

Q. All right. This one is definitely the 7th? A. That's correct.

Q. On September 7 you drew a check to the Borough of Fort Lee, $59.30, to personal tax? A. Personal tax, no. That would be Milmar tax.

Q. That means personal property. A. I thought you said my personal—

Q. You have the word "personal" there. A. Meaning the type of tax, property tax for Milmar, surely.

Q. Then you drew a check on the same day, fifty-seven eleven twenty-one, to the Borough of Fort Lee? A. That's correct.

Q. For real estate tax, is that right? A. That's right.

Q. Then you drew a check the same day for the Borough of Fort Lee for interest on the real estate taxes, seven seventy-two sixty-six, is that right? A. That's correct.

Q. So that on September 7, Mr. Marcus, you actually had paid off all the tax liens on the property (1834) for

the year 1947, is that right? A. I believe—I don't know whether it is all, but whatever it shows here.

Q. It would appear to be that that is what you were doing. A. I was paying whatever was due at the time. When it was due we had to pay the bills. I wasn't making any specific effort to do anything particularly. We had bills to pay and I paid them.

Q. Listen to my question. These were for the year 1947, weren't they? A. I don't know what they were for. There were payments made and we made them. I don't know what they are.

Q. Don't you know that the year 1948 wasn't paid by September 14, 1948? A. I don't know what they were. They were bills presented to me from Milmar and I paid them.

Q. Mr. Marcus, you say you have a list of every check that was drawn in payment of everything that Milmar ever paid out by its checks; don't you know from that list that—now listen to my question—that the 1948 taxes were not paid, that these were the clearing up of the '47? A. I don't know nothing at all about what was paid. (1835) All I know is, whenever we had bills, we paid them.

Q. I see. That is your best answer. A. That is my best answer.

Q. Do you know why on this day you paid these particular taxes, on September 7? A. I must have had a cause to pay them. We had bills presented, maybe they had to be paid.

Q. Well, I suggest to you that you paid these up because they were for the year 1947 and you knew the deal you had made called for the buyer to assume the payment of the 1948 taxes. A. There is no fact to that whatsoever, Mr. Brigadier. Those bills were due and they had to be paid. As a matter of fact, I believe they were overdue.

Q. When you signed Exhibit DME-5, Mr. Marcus—

Mr. Brigadier: Does the record show that the book that I was checking was DME-57, the checkbook con-

cerning which I was questioning the witness? I would like the record to show that.

Q. Mr. Marcus, in Paragraph 7 of DME-5 is there reference to taxes? A. Well, it says here, "Buyer agrees to assume and perform the outstanding contract."

Q. That's right. It says, "and obligations consisting of first mortgage and taxes," isn't that right? (1836) A. According to here it says the buyer is supposed to pay the taxes, assume the taxes.

Q. That is exactly what I am asking you. A. That is what it says on here.

Q. Now, this was dated September 14, right? A. That's correct.

Q. So if the 1948 taxes were not paid by your checks, but those checks constituted the payment of '47 taxes, it would mean that the buyer assumed the 1948 taxes, isn't that right? A. I don't know what you are talking about.

Mr. Tepper: I object to that. The contract speaks for itself. There is no such statement in the contract. The contract merely provides that the buyer—being somebody other than Mr. Marcus, or Milmar, for that matter—shall assume the payment of certain taxes and other encumbrances.

Mr. Brigadier: I would like to be heard very briefly on it, because I think the instruments speak, in the main, for themselves.

What I am trying to call your Honor's attention to in this testimony is that on the 7th of September he pays off certain taxes. Here is an agreement, seven days later, which calls for the buyer to assume taxes. And I am simply trying to establish, since he said he kept a record (1837) of every check, that what he paid off were the '47 taxes; that he, therefore, must have known that he had some kind of a deal whereby

he wasn't going to have to pay off for '48. That's the only purpose for the inquiry.

(Discussion among counsel.)

Mr. Brigadier: Well, to save a lot of time, will you stipulate that those are the records of the Borough of Fort Lee?

Mr. Tepper: Sure.

Mr. Brigadier: Then I won't have to question him further.

I would like to offer in evidence receipted bills for the payment of taxes showing they were paid July 2, 1949.

Mr. Tepper: Does it show by whom?

Mr. Brigadier: Milmar Estates.

Mr. Tepper: Yes, sir.

Mr. Brigadier: Wait a minute. Maybe I didn't give you the correct date. $5,646 on July 2, 1949, and $757.67 on July 7, 1949. And they are the '48 taxes, according to the Exhibits themselves.

I have no further questions.

Mr. Tepper: I presume at this point you would also point out to the Court that under DME-5—the contract provides that, "The buyer shall pay all of the (1838) outstanding contracts and obligations consisting of interest, first mortgage, taxes and insurance," without indicating for what year.

Mr. Brigadier: That's right. No question about it. That's why I had to develop this testimony, to show what the status was.

Mr. Tepper: That Exhibit indicates a payment made by Milmar Estate, Inc., in 1949, notwithstanding that provision in that contract.

Samuel Marcus—Defendant—Recalled—Recross

By Mr. Brigadier:

Q. Mr. Marcus, did you draw a check in 1949—if I have to ask the question, I will ask it—did you draw any checks in 1949 on the Milmar account?

The Court: He answered that a long time ago.
Mr. Brigadier: That he did not.
The Witness: No, I did not.

Q. So you didn't pay these bills by your check, did you? A. 1949?

Q. Yes, July 2 and July 7, 1949. A. No, I did not.

Mr. Brigadier: All right. That's all.

The Clerk: DME-63, two paid tax bills of the Borough of Fort Lee.

(Received and marked Exhibit DME-63.)

(1839) Mr. Brigadier: Now, Judge Grosman, I didn't mean to interrupt, except to say that I wanted to finish my recross.

Mr. Grosman: That's all right. I have no fault to find.

Mr. Brigadier: You have a statement, I understand, that you want to make to the Court.

Mr. Grosman: If your Honor please, with the exception of reading into the record some parts of these depositions, and this one witness, who disappointed me so far, but I expect to have him here, we rest our case.

The Court: That may be done. Are you sure he isn't here? Some people are sitting out there.

Mr. Tepper: No. We want to be very truthful with the Court. We are having difficulty in having this particular witness come over. Whether or not we can still persuade him to do that which he had

committed himself to do, is something we cannot say at this time. We are hoping that when we resume we will be in a position to produce him. If not, of course, we will go forward without him.

Mr. Brigadier: I have agreed to that, if your Honor please, that they should have the right by next Thursday. But I do want to make it clear that if they don't have him by then, they are then to rest their case (1340) so that we can proceed.

The Court: They will be satisfied by that time that he has no intention of coming over, is that right?

Mr. Tepper : That is right. But I am almost certain that this Court, if, before the case is closed, a very material witness who, up to the present time, has not been too cooperative, decides to come over, we will at that time make whatever application is necessary to enable us to present to the Court that which may be informative for the Court.

The Court: Is everybody through with Mr. Marcus?

(Witness excused.)

The Court: What do we do now?

Mr. Brigadier: Well, I can't go on, because, you remember, yesterday the understanding was that I was to call my next witness next Thursday.

The Court: Yes, I remember that understanding very well. Then we will adjourn now.

Mr. Brigadier: Could I ask Mr. Tepper—I think it is a very good suggestion—that if you know your man is coming in by Thursday, could you let me know at least by Wednesday, because it means if you are going to take time I don't want to bring people in here.

(1841) Mr. Tepper: Inasmuch as we are very uncertain about it, I would be very glad to assume that responsibility.

Colloquy

The Court: You mean you will be happy to inform him that he is coming.

Mr. Tepper: We will be very happy to inform them that we have him.

The Court: All right. We will adjourn now, as was suggested, until next Thursday morning at 10:15 o'clock.

(Discussion off the record.)

The Clerk: Mr. Grosman is stipulating that certain Exhibits may be photostated by the clerk.

(Whereupon, the hearing was adjourned to be resumed Thursday, February 24, 1955, at 10:15 a.m.)

(1842) Newark, N. J.,
Thursday, February 24, 1955

(Hearing resumed pursuant to adjournment.)

(Appearances as previously noted.)

Mr. Brigadier: If your Honor please, I would like to get permission to reserve the right to move to dismiss, which I would normally make at the end of their case, so that I don't delay with receipt of Mr. Schwartz' testimony. I will then make a motion later.

The Court: Just a minute. I haven't heard Judge Grosman announce that he has rested yet. I understood that he was going to have more witnesses.

Mr. Brigadier: I understood that they were to let me know. You recall that that was what the arrangement was. I received no communication that they were having any other witnesses.

The Court: Let's see what Judge Grosman and Mr. Tepper have to say.

Mr. Grosman: You're right, but it slipped my mind about notifying you, I was glad to get a respite. As I remember, the last thing that happened, we had finished with Mr. Marcus and we thought we would have another witness. We didn't know whether we could (1843) get him or not. And we want to reserve the right to read into the record so much of the depositions as we think applicable.

Now, we also arranged, with your Honor's permission, to go over and examine whatever records were available over at Mr. Kevelson's place, and I think we were supposed to let you know the results of our investigation.

The Court: That's right.

Mr. Grosman: We had a man over there for two days and I think we ought to be permitted to let your Honor know what we found over there.

Now, after he testifies, and we put in whatever portion of the depositions we think is applicable, we will rest the case, unless this other witness that we are trying—he hasn't shown up yet—should be available before we conclude this case.

Now, we have no objection—

Mr. Brigadier: I purposely asked for this arrangement, because, you recall, I did not want Mr. Schwartz hanging around court. He is tied up. If you have no objection, since we have him here, let me put in Mr. Schwartz' testimony.

Mr. Grosman: We have no objection.

Mr. Brigadier: Then it will be understood that you have not rested and that you can go back to your (1844) case, so that I don't keep him banging around here.

Mr. Grosman: It is perfectly all right.

Mr. Brigadier: I did rely on that arrangement.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Direct

The Court: There is no objection to extending that courtesy to busy professional men.

ROBERT J. SCHWARTZ, called and sworn for the defendant Milmar Estate, in rebuttal, testified as follows:

The Clerk: May we have your full name and address?

The Witness: Robert J. Schwartz, S-c-h-w-a-r-t-z, 710 Park Avenue, New York City.

Direct examination by Mr. Brigadier:

Q. Mr. Schwartz, you are a member of the Bar of the State of New York? A. I am.

Q. And when were you admitted? A. 1937.

Q. And except for, I assume, a military service interruption, you have practiced law ever since that date in New York City? A. That's correct.

Q. In August, 1948, were you the attorney for Samuel Marcus? A. You mean the exclusive attorney?

(1845) Q. No, had you been an attorney for Mr. Marcus? A. I had been, yes.

Q. And had you been an attorney for him for any period prior thereto? A. From the time I got out of the Navy, until about 1948, yes.

Q. And what would that be, that date, when you got out of the Navy, approximately? A. Well, about '45, I guess.

Q. Now, in August, 1948, were you a stockholder of Milmar Estate, Inc.? A. I was.

Q. And you were the owner of how many shares of stock? A. A hundred and twenty-five.

Q. When had you acquired those shares of stock? A. When the corporation was formed.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Direct

Q. Some time in '46? A. Yes, I believe it was '46.

Q. The record shows that it was organized in April of 1946. A. That could be.

Q. What did you pay for your shares of stock? A. $11,250.

Q. Were you also an officer of Milmar Estate, (1846) Inc., in August, 1948? A. Secretary, yes.

Q. And you had acted in the capacity of secretary, is that right? A. Well, actually, I had done nothing. I was theoretically secretary, but I had done nothing at all.

Q. I see. At whose suggestion or request did you become a stockholder in Milmar, Mr. Schwartz? A. We were out at the office of—

Q. Who is "we"?

The Court: Who is "we"?

Mr. Brigadier: Sorry. I anticipated your Honor's question.

The Court: Names are very important here, Mr. Schwartz.

The Witness: "We" is Samuel Marcus, Bill Miller, Lieberman, myself, Mr. Hoffman—were out at the office of Walter Winne in—I guess it's Hackensack—

The Court: Hackensack.

The Witness (continuing): —and he had incorporated the corporations out there, Jersey corporations, and Mr. Marcus asked me to act as secretary, and issue the stock, which I did.

Q. Yes, but how did you become a stockholder; was it at anybody's request that you made the investment? (1847) I just wanted to get a brief statement as to how you came to make the investment. A. Yes. Some time after Mr. Marcus bought his interest—that's not phrased right. I will withdraw that. Some time after Mr. Marcus and Mr. Miller

got into this Riviera deal Marcus said to me, "Would you like to become a part owner in this deal?"

And I said, well, I didn't know, but I thought I might, I thought it was rather speculative. And he says he would guarantee me that I wouldn't lose my money. He says, "If you lose anything, I will make it good."

And I thought, on that basis, I would take a chance. And I bought a unit of 125 shares, which worked out to $11,250. It was supposed to work out at about ten thousand, or eleven thousand, even, but the way it worked out, it was $11,250.

Q. Now, I want to direct your attention to the month of August, 1948. During the month of August, 1948, did you receive any communication from Mr. Marcus with respect to the sale of the Riviera? A. Well, as I recall, during that summer, on and off, I went back and forth to Guatemala and Mexico City about three times. But some times during that month of August I would speak to him when I got back, either he would (1848) call me or I would call him, and there were any number of conversations.

Q. Go ahead, finish your answer. A. I can't remember them exactly, but there were any number.

Q. Do you recall any of the conversations about the sales of the Riviera at all? A. Oh, sure, because during that summer period—

> The Court: May I make one suggestion, that we not confuse Riviera and Milmar continually. They are two separate corporations.
>
> Mr. Brigadier: I am going to point out something in a moment, sir, that they usually speak of the Riviera in that connection. That is why I have been using that term.

Q. But the Court is absolutely right. Let's talk about Milmar property, the property owned by Milmar. The real

estate is what I am talking about. A. Yes.

Q. You say that there were several conversations during that summer about sales of— A. Any number of them.

Q. —of the property owned by Milmar— A. Yes.

Q. —with Mr. Marcus? (1849) A. Yes.

Q. Were these in person or by telephone? A. All ways.

Q. And what would be the nature of them?

The Court: Always what?

The Witness: All different ways, I mean. Sometimes I would meet him, sometimes he would call me. Sometimes he would ask me to come over. Sometimes he would say, "Are you doing anything? Can I drop over?" Any different way at all.

Q. Do you recall any of these conversations, as to what these sales, proposed sales were? A. Well, there were several abortive attempts to sell the property, because, as I recall, the real estate property was losing money, there were taxes to pay, and amortization, and Sam Marcus was very short of cash, and he was anxious to do something about the property, and he used to keep after me to try and see if we couldn't sell the deal, or dispose of it in some way.

And his favorite thing was that I associated with a lot of very rich people and surely somebody amongst them would buy the property. I said, "But they don't buy that kind of property. They buy apartment houses, or office buildings. They won't run a nightclub."

He says, "I know, but it is so attractive as a (1850) piece of property." That used to be his favorite theme every time he saw me, to try and get somebody to buy it. But I knew that the kind of people I knew weren't interested in that type of an operation. And I didn't get very far with it.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Direct

Q. Do you recall, Mr. Schwartz, whether Mr. Marcus ever spoke to you about a proposed offer he had from a Mr. Loew? A. I don't remember it by name, but there were propositions coming in very frequently.

Q. Do you recall his ever telling you that he had an offer to sell the property for $250,000?

Mr. Grosman: I object to that as leading.

The Court: Yes, it is leading, Mr. Brigadier. Well, now you have heard it. Did he ever speak to you about one?

The Witness: I mean, I don't recall it as such.

Mr. Brigadier: I thought the objection of leading was not going to be made.

The Court: Well, I think that is a very vital factor in this case. After all, we are dealing with a lawyer.

Mr. Brigadier: I didn't interpose it once, not on any witness they called, including the accountant.

(1851) The Court: Well, he has answered no recollection of a quarter of a million dollar offer.

The Witness: No specific recollection. There were offers coming in from the day the place was bought—well, I shouldn't say that, from about—when the place opened, thereafter there was always something going on, there was always a chance to sell, or this fellow was interested in the property, or that fellow was getting interested. It was continuous.

By Mr. Brigadier:

Q. Now, coming back to August, 1948, when was the first conversation you had with Mr. Marcus with respect to the sale in question involved in this litigation? A. That's very hard to answer, and I hope you will bear with me on this, because there was one previous deal, some time in August, and, frankly, I can't do better than this, because I just don't recall it. It's a long time ago.

But some time in August Miller and Marcus had negotiated some kind of a deal of their own, you know, with their own memorandums. But that blew up. So if you want to consider part of that as part of the final deal, it's hard for me to answer it.

Now, if you want to separate that from it, I can pretty well tell you.

(1852) Q. Let's get whatever your recollection is of that. A. Well, as I recall, I was in—I think I mentioned this to you—I was in Guatemala, oh, at the rate of two or three days every week during that summer, and when I came back Sam Marcus either called me, or met me, or I met him, and he told me about it.

He says, "I think I got a deal with Bill Miller and his crowd to get me out of this property," paraphrasing his words, of course. I just don't remember what he said.

And I said, "Is it going to be a deal?" He says, "Well, it's a little short of the price I would like, but I can't afford to raise the money to meet the amortization that is due."

So I said to him, "Well, before you make a deal, why don't you go up to the mortgagee and see if you can't get a lower amortization, or get it spread out, or something, during the early years so that you can meet it."

He says, "Well, I think it's hopeless, but I will try it."

And that's part of the ultimate deal, because later on, in September, the deal was consummated.

Q. Yes, but I want first to come back to the thing (1853) that you say blew up. Was there a meeting between you and others at this occasion that you say blew up? A. I don't think I was present. But from what I was told—and again I certainly make no attempt to say that I recall it exactly—I think there was—

Mr. Grosman: Now, if your Honor please—

The Court: You will have to tell us who told you.

The Witness: Mr. Marcus told me.
The Court: Mr. Marcus.
The Witness: That was my source of information.

A. (continuing) He said that he had met with Bill Miller and Al Bierman and had almost worked out a deal, but it had blown up at the last minute. He said because, frankly, he had jumped the price and they wouldn't pay the price, and he didn't want to sell it at the lower price.

Q. Now, when did you first receive word from Mr. Marcus as to the deal that finally did go through? A. About the end of August or the very first of September of that year.

Q. And how did you receive that word? A. Well, this I have a very distinct recollection on, because it was a telephone call.

Q. From Mr. Marcus? (1854) A. Yes. I think I had just gotten back from one of those jaunts back and forth. And he called me and he said—again paraphrasing it— "How would you like to get out of the—" I have to use this expression, Judge, even though you don't like it, because, as I recall, Marcus always called it the Riviera. He said, "How would you like to get out of the Riviera—" no, he said, "What would you say if I told you we had a buyer for the Riviera?" I think that is the way he phrased it. He was very happy about it.

And I recall answering, "Well, of course, like any other deal, it depends on the price." I says, "Just getting out doesn't mean anything. What's the price?"

And that was when the first news came to me that a real deal was in the making.

Q. And did he give you the price? A. At that particular conversation?

Q. Yes. A. I can't recall.

Q. Was there anything said in that particular conversation as to the percentage that you and he would receive on

this price? A. Well, it came about like this, much longer in the conversation, because I was saying—I was urging him to take his time about it, because, as I recall, the (1855) season was pretty near coming to an end, and I suggested waiting and seeing what happened to business conditions the following spring. I may be wrong on this, but I think gasoline rationing hadn't quite finished. I could be wrong on this, because I remember talking about that, and cars were scarce, and the problem was—most of their customers came from New York, and the problem was getting from New York out to the Riviera. If rationing had ended, it had just ended, and cars were still not plentiful.

It was hard to get an automobile. You remember that it was very tough to get one at the beginning. And the big thing was how you were going to get out to the Riviera. And they had instituted a limousine service, but it hadn't caught on too well.

And that was the gist of the conversation about— Why not wait until the spring?

Q. Yes, but was there anything said—and you haven't answered my question yet, Mr. Schwartz. A. I'm sorry.

Q. —as to what percentage you and he were going to receive of your investments in this offer that he had? A. Oh, yes. That's right. I'm sorry, I got off.

He said to me, "Do you want to go along with the deal?" And I said, "Sam, I haven't any right to say (1856) anything, because you own much more than I do, or a majority interest," or something like that, "and I own a little piece in this thing. Whatever you do will be all right with me."

He said to me, "I can't afford to carry the property over the winter, because there is no income, and there is an awful lot of amortization to meet."

Q. Mr. Schwartz, was there anything said about the percentage? A. Yes. Well, wait. I know. Be patient, because—

Q. All right. A. —this is a conversation I have to put together.

And he said, "Shall we go along on this deal?" And I said, "Well, what is in it for us, and what are we going to get out of it?" Something to that effect.

He said, "We are getting back 70 cents on the dollar." And he said, "Of course, you will get your proportionate share."

I said, "Well, I have got about eleven thousand in that. I will get approximately $7,700 back, approximately." And he said, "Yes."

So I said, "Well, I stand to lose comparatively little. You stand to lose much more. So if you are willing to take it, it is all right with me."

Q. What was the next word that you received from (1857) him about this transaction? A. I don't know whether it was the same day, or a day later, but an appointment was arranged at Sam Marcus' office on 42nd Street, East 42nd Street.

Q. As the result of the conversation you had with Mr. Marcus? A. I don't know whether it was the result of it, but there was an appointment arranged.

Q. Did Mr. Marcus tell you anything at that time about any deposit he had received? A. Yes, he said he had taken a $10,000 deposit.

Q. I see. And then you did meet at Mr. Marcus' office? A. Yes.

Q. With whom? A. Bill Miller, Abe Lieberman, Sam Marcus and myself.

Q. And will you place the late of that meeting? A. Well, I'd say the end of August or early—the first couple of days of September of that year.

Q. Mr. Schwartz, you testified at a deposition in this matter, did you not? A. For days.

Q. And that deposition, you were questioned consider-

ably about conferences that allegedly you might have had with me, is that right? (1858) A. With you? Yes.

Q. Yes. Now, prior to the giving of your deposition in this case, had you met with me? A. Yes.

Q. And where had you met with me? A. As I recall, it was in the lobby of the Hotel Paramount on 46th Street in New York City.

Q. And do you recall approximately when it was, the year? A. A couple of years ago.

Q. And did you meet with me as a result of a telephone call you received from me? A. That's right.

Q. Will you tell us what happened at this telephone call? A. At the telephone call?

Q. Yes, what the conversation was. A. You mean during the telephone call.

Q. That's right. I am trying to avoid leading questions and I get into very archaic expressions as a result of it.

Mr. Grosman: I don't know what you are trying to avoid, but this, of course, is certainly not binding on Mr. Marcus, convention that he had with Mr. Schwartz in the lobby of a hotel. But I suppose you want to dispel (1859) any doubt about your integrity.

Mr. Brigadier: I am asking for personal privilege to let this come out.

Mr. Grosman: All right. I will not object. You go ahead. A. You introduced yourself over the telephone. And you asked me to meet with you. And I said I didn't think it was proper because you were on the other side. And you said, "Well, before you make up your mind, will you at least meet with me and talk with me?"

And I said, "What about?" This may be the wrong sequence, I don't know. But, I mean, it is about the sum of the conversation.

You said, "I would like to tell you something about what is going on in the case." I said, "But even so, you represent the other side and some of the conversation may be privileged." And I said, "I suggest you arrange an appointment with Mr. Marcus' attorney, yourself, and I would be glad to meet with you in that event."

He said—not "he"—you said, "Will you please meet with me? What I want to discuss with you is not privileged." I said, "I don't like to refuse you over the telephone. I will meet with you. But, frankly, I am not going to tell you anything about the case, except what isn't part of the litigation."

(1860) You said, "Well, please do me the courtesy of meeting." And I said, "I will be glad to meet with you next week." And you said, "No, it has to be tomorrow." And I said, "Why?" You said, "I will explain it to you when I see you." And I said, "All right. But there is only one problem. My entire day tomorrow is going to be spent at the Hotel Paramount, because we are having a Board of Directors meeting, and it goes on and off during the day. It runs for an hour, and then we break for an hour to clear something up. Then we go on and then we break for lunch. And then we go on for an hour and we break."

Q. So did we meet at the Paramount Hotel, Mr. Schwartz? A. We did.

Q. I want to make this short, and I just want to get— A. Well, you asked me for the conversation. I am trying to repeat it.

Q. Judge Grosman was very kind in allowing me to get, as a matter of personal privilege, on the record what actually happened, but I would like to get it as short as

we can. Did we meet at the Paramount Hotel? A. We did.

Q. Did I ask you to tell me your version of what (1861) happened at this transaction? A. You did.

Q. Did you? A. No.

Q. Would you tell me anything about the case? A. Well, when you say anything—I said that I knew that the litigation was pending, and so on.

Q. Would you discuss any part of the case with me? A. Any facts in the case?

Q. That's right. A. No.

Q. Didn't I urge upon you that the sale by you of your own stock was not privileged and you ought to discuss that with me? A. Yes. You spent about 15 minutes discussing with me the fact that the material you wanted to ask me was not privileged in any possible way. And I said I didn't care to even discuss it, because I would have to make the decision as to whether it was privileged, and I didn't even want to do that.

Q. Didn't you tell me that you wouldn't answer anything in any way connected with this transaction until the Court had ruled that you were required to? A. Not in those words, but pretty nearly the substance (1862) of it.

Q. Did you exhibit any documents, papers of any kind to me? A. Not a thing.

Q. Mr. Schwartz, when was the first time, other than your answering my questions at depositions, that you ever sat down with me and discussed this transaction? A. Well, actually, at some stage of the examination before trial there may have been a moment when you and I were sitting alone and talking. I don't know. I don't recall particularly.

Q. You mean where you told me about the transaction? A. Well, I am just saying that this past summer—

Q. Well, you know. You testified in the deposition. Did you discuss with me in the deposition, or during the taking of the deposition, this transaction? A. Yes, but your question was a little more general. You said, "Did you ever sit down with me?" I thought you were referring to that particular phase.

Q. No, I am discussing now the discussion of this transaction. Did you ever tell me what these various documents stood for, during the taking of the deposition, other than in answer to the questions? A. No, not during the deposition.

(1863) Q. When was the first time that you did this? A. Yesterday morning at 10:30 in the morning.

Q. Who else was present? A. Your associate, Mr. Margulies, and Mr. Kesselhaut.

Q. So that in all this period of time, even though you testified at the deposition a substantial time backward, you actually did not discuss this matter with me until yesterday, isn't that right? A. That's about right. I mean, it may be subject to some little conversations we may have had. Wait a second. There is one other exception. The day I was subpoenaed to come here, which was about a month ago, I guess.

Q. January 20? A. Well, it seems like longer than that, but I guess it was the right day.

Q. I guess it does to all of us. A. As I recall, after the recess for lunch, not knowing whether or not you were going to put me on as the second witness, you asked me to remain, and I had lunch with you and Judge Lieberman and several other people at that time. So if you want to include that—

Q. Oh, yes. You are right. A. I think that should be included.

Q. You had lunch with Judge Lieberman and myself, (1864) actually; the three of us had lunch together. A.

Yes, but in answer, I may say that about two-thirds of the conversation consisted of Judge Lieberman telling us about how much he hated to come back from Florida, from his vacation.

Q. Yes, but a third of the conversation dealt with my asking you about this mortgage, isn't that right, about the mortgage transaction? A. I'm sorry. You'll have to repeat that.

Q. I said, the remaining one-third of the conversation dealt with my asking you and Judge Lieberman both to explain the mortgage transaction, isn't that right? A. Well, I wouldn't say one-third. There were some questions about it.

Q. Well, that was the only other thing we talked about in connection with this case. A. No, that is not so.

Q. What else did we talk about in connection with this case? A. Oh, about whether or not I could get out of here and come back later on.

Q. Now, Mr. Schwartz, you know what I am trying to ask you. A. Well, you asked if we talked about anything about (1865) the case and I am giving you the answer.

Q. I am talking about whether we discussed this transaction. A. You didn't say the facts in the case, you said we talked about the case.

Q. I forgot, you are a lawyer. I apologize.

The Court: You always have that problem of semantics when lawyers are being questioned.

Q. At this luncheon discussion the only thing that we discussed pertaining to the transaction involved in this litigation was my questioning you and Judge Lieberman about what the nature of that mortgage transaction was, wasn't it? A. I think that's right.

Q. Was there anything else about the transaction? A. No.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Direct

Q. That was the morning that Judge Lieberman was testifying about the mortgage transaction. A. That's right.

Mr. Brigadier: Thank you, Judge Grosman, for allowing me this privilege.

Mr. Grosman: I could have told you that I don't make any charges of any kind against you.

Mr. Brigadier: Well, there was so much devoted in the deposition I wanted your Honor to know (1866) what had actually happened in this matter. This man, in my opinion, was more than circumspect. I think he leaned back the other way when I don't think he should have.

Q. I direct your attention, Mr. Schwartz, to Exhibit DME-1 and ask you whether that was shown to you, that or a copy of it, by Mr. Marcus at this meeting which you placed early in September? A. Yes, I am sure it was.

Mr. Grosman: What was his answer?

The Witness: Yes.

Q. Did Mr. Marcus have any conversation with you about whether that money had been received? A. I don't have any specific recollection on that.

Q. I show you Exhibit DME-3, dated August 18, 1948, and ask you whether that was executed to you by anyone at this meeting early in September? A. I don't think so. I don't recall it.

Q. You don't recall it? A. No.

Q. I show you Exhibit DME-2, and ask you whether that was shown to you by anyone at this meeting early in September? A. Yes, it was, but, as I recall, this was part of a two-page document. And there is only one page here.

(1867) Q. And by whom was it shown to you? A. Mr. Marcus.

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Q. Did he hand it to you? A. He may have sent it over by messenger. He often did.

Q. But you recall receiving such a document, but it had another page added to it? A. Yes, it was a two-page agreement.

Q. I see. Now, did you ever have— A. As I recall, the second page was not a full page, you know, it was about a half.

Q. Do you recall anything that was on that second page? A. I do not.

Q. Mr. Schwartz, did you ever have in your possession a copy of that? You say it was sent to you by Mr. Marcus— A. Yes.

Q. —or it may have been delivered to you. A. Yes, the files had a—

Q. Did you retain a copy of it? A. The files had a complete copy.

Q It was in your files. And, as far as you know, what happened to it? A. To the files?

(1868) Q. Yes, to the document that was in your files. A. It was placed in the file and the file was picked up by Mr. Marcus and Mr. Roth.

Q. And, as far as you know, that document was in that file at the time? A. As far as I know, yes.

Q. Have you made a search in your office to see whether you have any other papers in this matter? A. I have done that on several occasions and I haven't been able to turn up a thing.

Q. I see. Now, I want you to look closely at Exhibit DME-2, Mr. Schwartz, and tell me, did you type that Exhibit? A. No, it was handed to me. It was given to me, I mean.

Q. You are positive that you, yourself, didn't type it? A. No. I mean by that, yes, I am positive, no.

Q. All right. Did you dictate that Exhibit? A. No.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Direct

Q. Are you positive about that? A. Very.

Q. Mr. Schwartz, there has been some testimony here that you employed, on occasions, a typewriter in Mr. Marcus' office. Is that a fact? (1869) A. I have done that on occasions, yes.

Q. You can type? A. Well, not well, you know—

Q. And the suggestion has been made that you might have typed that in Mr. Marcus' office on the elite typewriter in his office. A. No, I couldn't type that well, I am sure. This is a much better job than any typing of mine. And do you know how I know that? Because there are very few errors in it, and if I typed it, there would be lots of spacings, you know, because when I type a letter it jumps a space, and so on.

Q. I see. Now, Mr. Schwartz, will you tell us what occurred at this meeting between Mr. Marcus, Judge Lieberman, Mr. Miller and yourself, which, as I understand it, you fixed early in September—did you fix a date for that?

The Court: Late August or early September.

Q. —or early September. A. Yes. Well, it was a very noisy session, as any conversation with Bill Miller is apt to be, and there were a lot of arguments between Miller and Marcus, and Miller and Lieberman and Marcus. In fact, I was the only one who didn't get into fights with anybody, as I recall.

(1870) And we discussed, in general, the deal to be worked out.

Q. And was any agreement arrived at? A. Well, you mean any terms?

Q. Any agreement orally arrived at? A. Yes, we more or less understood each other and discussed all the terms of the agreement.

Q. Will you tell us what agreement was orally arrived at? A. That's awfully hard to say.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Direct

Q. As best you can, Mr. Schwartz. A. Well—

Q. Well, let me start this way. Let's see if we can get it piece by piece, then. Were there a number of different plans suggested? A. Oh, well, the deal kept changing every 15 minutes.

Q. Let's get some of those plans. A. Originally it was going to be a real estate deal. The thing—

Q. Tell us about the real estate deal.

Mr. Tepper: Let him finish the answer, please.

Mr. Brigadier: I am letting him.

The Court: You have been cutting him off all the time, Mr. Brigadier. You probably don't realize (1871) it. Before he is through with the answer, you cut.

Mr. Brigadier: I thought I was expediting it, and I am sorry if your Honor feels that I have not done so.

The Court: It is a hard thing to do, too, with a lawyer on the stand. Lawyers like to narrate, especially when they are talking about things that happened many years before in a busy practice.

The Witness: Would you rather I—

The Court: I don't "rather" anything. I just want Mr. Brigadier to let you finish your answer before he puts another question.

Mr. Brigadier: I would prefer to let him alone. But you are going to get angry with me, if I do.

Q. Well, you tell us just what happened, the various plans that were discussed, and what the conversations were, and what the decisions were that were arrived at as to these various plans. A. Well, there were so many different deals that I can hardly remember them all, but I can remember that the deal switched from a real estate deal to a stock deal, then back to a real estate deal, and then ended up ultimately as a stock deal.

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But the real estate deal was the one I had, more or less, frankly, urged, because I thought it would offer (1872) more protection. And Miller and Marcus weren't as taken with the idea as I was and we ultimately ended up with a stock deal.

Q. Now, taking the real estate deal first, just what did the deal consist of, the deal that was contemplated as a real estate deal? A. Well, you forgive me if I go off on this, because I can't remember the exact figure, but it was the equivalent of about 35—thirty cash and ninety-five, I guess it must have been, of a purchase money mortgage.

Q. Then when you say there was to be a real estate deal, did it provide or contemplate a conveyance of the property? A. Yes.

Q. By Milmar Estates to whom?

Mr. Tepper: I object to that as being definitely leading.

The Court: Wait a minute. We have got to find out who it was going to be conveyed to. Who else would convey, if it was going to be a real estate deal?

Mr. Tepper: That's exactly the point. This was from time to time discussed. It began to be a chowder right from the beginning.

The Court: Well, I am getting that. Now, if you let me get the full picture, it will help me an awful (1873) lot in deciding the issue in this case.

Mr. Tepper: I withdraw the objection.

A. It was to be conveyed to some corporation to be owned by Miller and Kevelson, I presume, was going to be the other stockholder. But the more I urged the real estate deal, the more Miller and Marcus were in favor of a stock deal. And when I said, "Why?" they both said they had their own private reason, or reasons, or there were things I didn't know about that didn't make it advisable.

But I kept urging on Marcus the idea of security in the sense that a foreclosure would be available, that the real estate couldn't disappear, and the stock certificates could be negotiated, and so forth. And even after we swung over to a stock deal, I again got Marcus back onto a real estate deal in preference to a stock deal. But we ended up with a stock deal.

Q. All right. I still want to deal with the real estate deal first. Will you please try to answer my question, Mr. Schwartz. You say the real estate deal contemplated a conveyance of the real estate by Milmar to a corporation to be organized by the purchasers, is that it? A. Well, either organized or they had some corporation.

Q. All right. And that the seller, Milmar, was (1874) to receive what? A. Well,—

Q. What was the purchase price? A. $125,000.

Q. All right. How much in cash? A. Well, thirty, just like I said.

Q. And ninety-five thousand was to be a mortgage? A. Yes. I may be wrong by five, or so, but it was about thirty and ninety-five.

Q. How many mortgages were to be given? A. A real estate and a chattel mortgage on the—

Q. That's what I am trying to find out, what this arrangement was. A. Well, if you ask me—

Q. Now, how was the mortgage to be paid off? A. A certain sum each month while the place was open.

Q. And what about the period during which it was closed? A. I think it was either some lesser sum, or something, some substantial drop in price. The principal income was to come when the place was open for business.

Q. You say that that transaction, the transaction of a real estate deal, was ultimately dropped at this meeting, is that right? A. Yes, at that meeting it died. It never got past (1875) there.

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Q. And instead they agreed on a stock transaction? A. Correct.

Q. Now, what was the stock transaction that they agreed upon? A. Well, you will have to narrow it. I don't even know where to begin on that thing. The idea was that the stock was going to be sold. Marcus and I were going to get out of the deal, once and for all, on the payment of the money called for in the deal.

Q. And did you receive instructions, you and Judge Lieberman, at that meeting, for the preparation of papers? A. Yes.

Q. And did the instructions provide as to what was being sold? A. Yes.

Q. And was there anything said about how much stock the agreement was to provide for? A. Well, the idea was that Marcus and I were getting out, once and for all.

Q. Now, at this meeting was there a definite instruction received by you from Mr. Marcus for agreements and papers to be drawn? (1876) A. This session or afterwards?

Q. At this session. A. Well, I couldn't remember. It was either at that, or after they left Marcus and I sat around and talked about the thing, and whether it was a wise thing to do, and whether or not we shouldn't wait until the spring. And Sam Marcus said that it was impossible, because he couldn't afford to wait any longer, he couldn't meet the amortization payment that winter, he was very short of cash.

Q. You say "after they left," meaning who left? A. Lieberman and Miller.

Q. You remained behind with Mr. Marcus? A. I think so.

Q. And then you have this discussion? A. Yes.

Q. And did you receive any instructions as to what you were to do? A. We discussed the entire situation generally.

Q. Did you receive any instructions to draw any papers?

A. Yes, he said, "Get going on this thing and let's sell the stock and get out of here. I can use the cash," or something to that effect.

Q. What did you next do with respect to the (1877) preparation of the papers; did you meet with Judge Lieberman? A. Yes, that's right.

Q. How long after this meeting that took place in Marcus' office? A. Well, from the examination before trial, and having seen a lot of papers dated September 3, I guess we met just about around that time, either that day, or a day before, or something of the sort.

Mr. Tepper: I move that that be stricken. The witness says, based upon something that he had been told. It is hearsay, purely hearsay.

The Witness: No.

The Court: Based on the dates on the instruments, he said.

Mr. Tepper: No, reading of the depositions is what he said.

Mr. Brigadier: He said since the reading of the deposition he has looked at the Exhibits.

The Court: He is giving us his best recollection of something that happened almost seven years ago, and he is allowed a certain amount of latitude, because everybody else has had plenty of latitude.

Q. You say you did meet with Judge Lieberman? A. Yes.

(1878) Q. Where did you meet? A. Where?

Q. Yes. A. My office.

Q. And is that where the papers were drawn? A. It's possible that Judge Lieberman came with a couple of pages —couple of papers, so that it is conceivable that one or two or three papers were drawn in Lieberman's office and brought to my office. But the majority of them were dic-

tated in my office by either Leiberman, myself or both of us.

Q. Then when did the next meeting take place, either with you and Judge Lieberman, or with you with Mr. Marcus and the others? Was there another meeting with Lieberman again? A. No, just the closing.

Q. The date? A. September 14, I think it is.

The Court: Am I to understand then, that on this date, that you place as September 3, in your office, when Judge Lieberman came over from Jersey, that all of the instruments were drafted?

The Witness: Not all of them. Some were drafted on September 14.

The Court: Oh, some were.

(1879) The Witness: We did as many as we could in one afternoon. We didn't dictate too much, because we spent a good part of the afternoon trying to figure out which papers we should have, and then on September 14 whatever we were lacking we dictated on the 14th.

The Court: All right.

Mr. Brigadier: I propose to take him through those in a few moments to show which were drawn on which day.

Q. But there was no other meeting between September 3 and September 14 with Judge Lieberman, is that right? A. As I recall, the reason there wasn't, and couldn't have been any, is that I was out of the country at that time.

Q. Is that why there was this delay from the third to the 14th? A. Probably that's the reason, because I wasn't around.

Q. Now, when you got back, were you in communication with Mr. Marcus at all? A. Oh, yes.

Q. In relation to the 14th, when were you in communica-

tion with him? A. Well, I don't know what day I got back, and I haven't any way of telling now, but I got back a couple of days (1880) before the 14th. And I spoke to Mr. Marcus the day I got back, the afternoon of the day I got back, or the morning of that day, and we spoke about the deal, and I wanted to know if it was still on, and if everything was in order, and he said yes.

And I said, "Well, I am going to go over these—I can't do it today, but tomorrow I am going to be going over these papers."

Q. Did you tell him that the papers had already been drawn? A. Oh, yes.

Q. When did you tell him that? A. When I spoke to him on the phone.

Q. On this particular occasion, which you place as a day or two before the 14th, is that right? A. Well, taking a good rough guess, I would say, if it didn't work out on a Sunday, for example, something like that, I'd say probably two days before the 14th.

Q. Did he come to your office in that interval, from the day that you came back to the 14th, before the date of the closing; was he at your office at all? A. I can only say I have no specific recollection on that.

Q. But you do have a recollection of conversations with him? (1881) A. Oh, yes. I spoke to him, because I know I wanted to know if the deal was still on.

Q. I see. Now, then how was the arrangement made for the 14th, by whom and with whom? A. Well, I think I said to Mr. Marcus that—whatever day the 14th turned out to be—that that would be a good day to make it. I said, "I will be free," or something of the sort. I think I couldn't make it the following day, and I wanted to go over some of the papers the following day, the 13th—when I say "following" it may have been two or three days, I don't know—and would the 14th be all right, in the morning. And he said it would be.

And I said, "Well, if it's all right with you, I am going to call Lieberman and see if it's okay with him. And if it is, I will call you back."

Q. And did you check with Lieberman? A. Yes. I called Lieberman, asked him if the 14th was all right for him. And he said it would be, but he wasn't sure that Miller would be willing to come in at 10:30 in the morning. And I said, "Well, tell him 10:30, and we will get started, and when he comes in we will be ready for him."

Q. I see. Now, did the meeting take place on the 14th? (1882) A. It did.

Q. When did you meet? A. Well, about 10:30 in the morning.

Q. And who arrived first at your office? A. Me.

Q. Then who came next? A. Lieberman was second.

Q. Who was third? A. Marcus, and then Miller.

Q. Are you sure that Marcus arrived before Miller did? A. Yes, I am positive of that. The reason I am so positive of it was that Miller arrived substantially afterwards, you know—I mean, a good half hour or more afterwards.

Q. After Marcus had? A. Yes.

Q. Now, I show you, Mr. Schwartz, DME-21, the stock book of Milmar Estate, Inc., and I direct your attention to the word "cancelled" in handwriting that appears on the stub of certificates No. 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16, and ask you in whose handwriting the word "canceled" appears on that stub? I don't know whether you noticed, I have omitted two in going through that list. (1883) A. Which two?

Mr. Grosman: Now, please.

Mr. Brigadier: I omitted Nos. 4 and 5.

Mr. Grosman: Now, I don't want to interrupt Mr. Brigadier, but I don't think he should have done that.

The Witness: It wasn't necessary, because it is obvious that four and five are not in my handwriting; the others are.

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Mr. Brigadier: Again, if your Honor please, if I am erring at all, I am trying to telescope the question instead of taking one step at a time. That is why I did it.

Q. The others are in your handwriting? A. Positively.

Q. When did you place that word "canceled" upon these other stubs that are in your handwriting? A. On September 14.

Q. Was Mr. Marcus present when you did it? A. He was.

Q. Who else was present? A. They were all present.

Q. All, meaning Lieberman, Miller, Marcus and yourself, of course? A. Correct.

(1884) Q. Will you tell us how you came to put that on that certificate— A. Oh, well—

Q. —on the stubs? A. Not all of the stock certificates were available. Marcus claimed that he couldn't find some or all of the shares. I don't recall exactly whether we discovered this before or at the meeting of September 14, but Marcus suggested that the stock could be canceled. And Marcus and Miller urged us to not waste any time and to cancel the stock certificates and to issue fresh stock certificates.

So I suggested at that time that the only way we could be sure of not having any argument about them in the future—little knowing this was coming—was to issue all of the shares in the name of Sam Marcus. And we canceled all the outstanding shares on the books.

Q. Were any of the shares that were canceled delivered by Samuel Marcus to Judge Lieberman while you were present? A. I wish I knew the answer to that, but I don't recall.

Q. Well, would you have issued certificates for 1,250 shares if any of those certificates were delivered? A. I don't think so.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Direct

(1885) Q. Now, when you issued the new certificates, upon the cancellation in these stubs,—Exhibits 19A and B, 20A and B—were these signed by Samuel Marcus in your presence? A. They were. I only see the top ones. I want to look at the rest of them.

Q. Well, look at them.

(Witness looks at documents.)

A. Yes.

Q. And are these the certificates for the 1,250 new shares that you are referring to? A. Correct.

Q. And are the signatures of Samuel Marcus that appear on those attested by you as secretary, or countersigned by you as secretary? A. Correct.

Q. That is your signature. And the matter that appears in handwriting on the certificate, other than the signatures, is that matter in your handwriting? A. Wherever there is handwriting, the rest of it is mine.

Q. And this was all done in the presence of Samuel Marcus? A. It was.

Q. Was it explained to Samuel Marcus by you? (1886) A. Yes, it was.

Q. What did you tell Samuel Marcus you were doing? A. Canceling all the old certificates, because there were some—or all of them missing. I can't remember which, whether it was all or some—and that to protect the situation we were canceling the old stock certificates and issuing a fresh batch of 1,250.

Q. Now, what about your stock, Mr. Schwartz; you had a certificate for 125 shares, is that right? A. Yes.

Q. And you canceled that in the stub book—of the certificate book, is that right? A. That's correct.

Q. Was your 125 included then in this 1,250? A. In the deal you mean?

Q. Yes. A. Yes.

Q. So that when you issued the new 1,250, that included

all the stock that was then to be issued out—standing, including whatever stock was coming to you? A. That's correct.

Q. Did you have an understanding with Mr. Marcus that that was the transaction that you were engaged in? A. Yes.

(1887) Q. And what understanding did you have with him at that time as to the purchase price to be received? A. That I would get—he told me he was getting back 70 cents on the dollar and that I was to get 70 per cent—

The Court: Of the original investment by you.

The Witness: Of the investment, yes.

A. (continuing) As a matter of fact, since I was going away so much over the summer, back and forth to Mexico and Guatemala, and since it was always possible that a deal might be made hastily, I had given him my certificate previously. He had my certificate months before, so that, if necessary, if a deal came up, as it usually did, three o'clock on a Saturday morning, or something of the sort, he would be able to make a spot deal for it.

The Court: You mean at the Riviera, after they had a couple of Scotches, cook up a deal.

The Witness: That's it. Most of the deals were made well after midnight. Nothing was ever done before that.

The Court: Gentlemen, I think we will have to take a ten-minute recess now.

(Short recess.)

(1888) *By Mr. Brigadier*:

Q. Mr. Schwartz, I show you Exhibit DME-5. You saw that signed on September 14? A. I did.

Q. By Sam Marcus? A. Yes.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Direct

Q. By William Miller, individually, and as attorney for Al Bierman? A. Right.

Q. And you attested—that is your signature—as secretary? A. Correct.

Q. Now, did you draw this document? A. Well—

Mr. Grosman: What is the Exhibit number?

Mr. Brigadier: DME-5.

A. Either I drew it, or Judge Lieberman and I drew it, one or the other.

Q. Was it done at your office? A. Yes.

Q. And on what date was it drawn? A. Either September 3 or 14.

Q. You are not sure which date? A. No.

Q. Now, I call your attention to the various (1889) handwritten insertions that appear—well, first, in the first paragraph, and ask you whether that is your handwriting? A. That's right.

Q. And in the seventh paragraph, is that your handwriting? A. Yes, that's right.

Q. And in the eighth paragraph, is that your handwriting? A. Yes, that's right.

Q. And in the twelfth paragraph, is that your handwriting? A. Yes.

Q. Now, I direct your attention to the handwritten insertions in the fifth paragraph and in the tenth paragraph, and ask you whether those are in your handwriting? A. No.

Q. At the time that Exhibit DME-5 was executed and delivered, were the insertions that appear in handwriting, in the fifth paragraph, "up to 50 per cent," and that which appears in the tenth paragraph, "at least 50 per cent," on that document at the time that it was executed? A. No.

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(1890) Q. Subsequent to the execution of this document—well, I will come to that later. I call your attention to the initialing that appears in the margin alongside the various alterations, strikings, throughout this agreement where appear the letters, "R.S.," and ask you whether those are your initials? A. Well, starting from the top, on the lefthand side, the first one looks like mine. The second one may be mine, but I am not sure. I am not quite sure whether that is mine.

Mr. Brigadier: Do you have the one you produced, Judge Grosman? I think it's in evidence. What's that number?

The Clerk: Twenty-two.

(Document handed to counsel.)

Q. I show you the one that has been offered in evidence on behalf of Mr. Marcus, DM-22. You will examine these two and you will note that the only differences are the fifth and the tenth paragraph where appear the insertions in DME-5, which you say are not in your handwriting. Now, I direct your attention to the initials "R.J.S." as they appear in the margin of DM-22, and I ask you whether they are in your handwriting?

(Witness looks at document.)

A. Those are.

(1891) Q. And were all those initials placed thereon before the execution and delivery of this Exhibit, DM-22? A. Yes, I think so.

Q. Now, were the alterations that were made in the various paragraphs, including the striking out, except that in Paragraph 5 and 10, made in Mr. Marcus' presence? A. Yes, they were.

Q. Were there any discussions with Mr. Marcus with respect to them? A. Yes, there were.

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Q. Now, I direct your attention to the agreement and ask you if that agreement was read by Mr. Marcus while you were present? A. It was.

Q. And did he read it in its entirety, paragraph by paragraph, or in what manner did he read it? A. He read everything in it, word by word.

Q. Did he raise any questions about any of the contents of the agreement? A. Yes, he did.

Q. Do you recall any of the questions that he raised? A. No, I don't think so. He just, you know—every paragraph here would raise a question, then the next one wouldn't, the next one would, the next one wouldn't, you (1892) know.

Q. I see. Now, I direct your attention to the first "whereas" clause, which reads, "Whereas the corporation is duly organized in the State of New Jersey and has an authorized and issued stock consisting of 1,250 shares of common stock," did Mr. Marcus read that paragraph? A. Well, he read every paragraph.

Q. Mr. Marcus wears glasses, does he not, Mr. Schwartz? A. Yes.

Q. Does he use one pair of glasses? A. No, he is always going like this (indicating). He is always changing glasses back and forth.

Q. And was he doing that on this particular day? A. Steadily.

Q. While he was reading this document? A. I always asked him why does he keep changing glasses.

Q. Well, you didn't answer my question, or did you? Maybe you did. A. Yes, he was.

Q. He was doing that this day? A. Yes.

(1893) The Court: Did he ever tell you why he does it?

The Witness: No, I could never figure it out, because he used them both for reading. He would go from one to the other, you know, like this (indicating).

Q. You mean they are both reading pairs that he uses? A. He uses them when he is reading, goes like this all the time (indicating). He is always changing one pair. I don't mean to exaggerate. He would go like this (indicating), put it down and pick up the other pair, then he would go like this (indicating), and pick up the other pair.

Q. Now, this paragraph I directed your attention to originally had a blank alongside of the word "shares," did it not, when it was drafted? A. Yes, it did.

Q. The number 1,250 was filled in by handwriting by you? A. Correct.

Q. At what point was that filled in? A. On September 14.

Q. Was there any discussion before you inserted that figure in there? A. The only thing was we wanted to double check if any (1894) shares—when I say "we" I mean Lieberman and I wanted to double check between Marcus and Miller as to whether any additional shares had been issued without our knowledge above 1,250, so we held up until the last minute inserting it.

Q. Then it was agreed that there were 1,250 shares as the total shares? A. That's correct.

Q. And Mr. Marcus was present and agreed to that figure? A. Yes. As a matter of fact, we turned to him for the information. We turned to Miller, too.

Q. I see. Now, I direct your attention to the first paragraph—bearing No. 1, rather, on this page, which reads, "The seller hereby sells to the buyer and the buyer hereby purchases from the seller all the issued and outstanding shares of the corporation." Was that paragraph read by Mr. Marcus?

Mr. Tepper: I must object. The witness said—

The Court: That he read every paragraph.

Mr. Tepper: —every word of it. Now, what Mr.

Brigadier is attempting to do now is to take sentence by sentence and go into it.

The Court: Unless there is some special reason, I see no need for it at all. This man has made (1895) it abundantly clear that, in his opinion, Mr. Marcus ready every paragraph before he signed it, even discussed some paragraphs.

Mr. Grosman: With two pairs of glasses.

The Court: Two pairs of glasses.

Mr. Brigadier: Yes, sir; but since this is a crucial part of the case I want to ask him point-blank as to this one paragraph—I am not taking him through every paragraph—whether there was any discussion at any time by Mr. Marcus that this was not accurate, or that this was not so.

The Court: What, the 1,250?

Mr. Brigadier: That he was selling all the issued and outstanding shares of the corporation.

The Court: Hasn't he made that abundantly clear already, that Mr. Marcus suggested it was 1,250 himself.

Mr. Brigadier: All right.

The Court: Isn't that right?

The Witness: That's correct.

The Court: And you and Judge Lieberman were worried that there may have been shares that you didn't know about?

The Witness: That's correct.

The Court: And Mr. Marcus clarified that for (1896) you.

The Witness: When we were getting this up, a day or so before, we said, "Well, how do we know that they didn't issue some other shares?" So we said, "Let's wait until tomorrow." And the next day, when Miller and Marcus were both present, we said, "By the

way," or something to that effect, "did you issue any more shares?" And they said, "No." So we inserted the 1,250.

Mr. Brigadier: Yes, but I think your Honor is missing my point, if I may say so. When I referred to the 1,250, that was simply a recital in the "whereas" clause, whereas there are 1,250 issued and outstanding.

I now want to question him as to whether or not Marcus knew that this first paragraph thereafter expressly provided that all of those shares were being sold.

The Court: Well, how would Schwartz know that, except for the fact that Mr. Marcus, he says, read them, read the paragraph?

Mr. Brigadier: Well, I want to find out if there was any discussion about it?

The Court: Why don't you ask him directly, then.

By Mr. Brigadier:

Q. Was there any discussion between you and Mr. (1897) Marcus as to the number of shares that were being sold by Mr. Marcus under this agreement? A. Yes, there was.

Q. And what was that discussion? A. That we were selling all of the shares.

Q. And they all consisted of how many? A. Twelve hundred and fifty.

Q. Now, I direct your attention to the first paragraph, which you will see has been stricken out, and in Exhibit DM-22 your initial appears alongside the striking out, is that right? A. That's correct.

Q. Was that done before execution? A. Yes.

Mr. Tepper: This has all been gone into.

The Court: Let him ask him.

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Q. Will you tell us the circumstances under which the paragraph was stricken out, by whom, and at whose suggestion, and why? A. Are you talking about No. 3 exclusively?

Q. That's right. A. Well, it seems that—I will start over again. Mr. Lieberman and I had relied on that memorandum we had. I don't remember the number.

Q. August 26. (1898) A. That one-page thing that you have, which originally was two pages.

The Court: DME-2.
The Witness: Yes.

Q. DME-2. A. Yes. And Miller and Marcus—although it says Al Bierman, but actually it was Miller and Marcus—had gotten this up, as far as I know, between themselves. We used this as a guide, and we copied out from that August 26 memorandum, which is marked DME 2, "You are authorized to pay all outstanding loans, obligations, taxes, etcetera, of the corporation," etcetera and so on, and we copied that into here—"the seller is authorized to pay all of the outstanding obligations of whatsoever kind which may be contained," and so on—and then with that business about any surplus remaining, and turn over any surplus at the time of transfer—we copied that in there.

And then when we got to the closing on September 14, this became a point of contention between Marcus and Miller. I think Miller's argument was that this would more or less place him in a bad position with his creditors, of whom he had a large number, and his position was that if they found out about this they would say, "You are instructed to pay off the debts, so pay them off."

(1899) And his position was that he didn't even want any wording like this floating around, because he had it in mind that he would either compromise, or settle, or pay off in long-drawn-out installments these obligations. So

he said, "Take that out of there." And Marcus said, "I think he is right, so let's go along with that." And I said —to me it didn't make too much sense, because who was going to see this agreement, but the two people involved, or the three people involved— Bierman was supposed to be there, and Kevelson was interested. And they wouldn't hand it out.

So Miller said, "Well, how do I know that you"—meaning myself—"or Marcus won't show it to another party?" So I said, "It doesn't make any difference to us if it's that important. Marcus has already said he thinks it's logical." So we crossed it out.

We had only picked it up from this memorandum.

The Court: I see it is almost identical language.

The Witness: Yes, the same words.

Q. I direct your attention, Mr. Schwartz to the seventh paragraph— A. Of which?

Q. Of the agreement. Either one. They are both the same on the seventh paragraph. (1900) A. You don't mean this, do you?

Q. No, the seventh paragraph of either DME-5 or DM-22. Now, you will observe that there are lines crossed out and inserts in handwriting in this paragraph. Will you tell us what your best recollection is as to how this came to be done, or why it was done, or what the discussion was. A. Well, I think this was raised by Lieberman. He said it was so general that it would create a situation whereby the buyer would have to pay off practically everything under the sun, and he wanted to limit it to the mortgage, the taxes and the insurance.

You will have to give me a minute or two on this. I think I will need the Exhibits to work on.

Q. You mean all the documents that were exhibited on— A. Yes, because this ties in with one of the other things,

and it is kind of hard to remember an abstract clause of this thing.

Mr. Brigadier: Now, here are the Exhibits that were signed on the 14th.

The Court: Do you have to go over each one?

Mr. Brigadier: Well, I was going to take him through each one of these, if I have to.

The Witness: Well, I mean, I have got to (1901) figure this out. This is from the Year One.

Mr. Brigadier: I think if I lead the examination I can shorten the time it will take.

The Witness: Why don't you see if we don't cover it some place, and then if you don't, I will sit down with these papers—

Q. I direct your attention to Paragraph 7. As you observe, as it was originally drawn, it called for the payment—for the buyers to assume and perform all the outstanding contracts, and all the obligations, claims, demands, liabilities now existing and arising or that may thereafter arise in connection with such debts, liabilities, contracts, obligations whatsoever, i that right? A. That's right.

Q. Now, did somebody object to this? As I understand, Judge Lieberman objected to it, is that right, that it was too broad? A. That's right. He said there was no limit to it and they would never stop being worried about the problem.

Q. Now, then, certain words were stricken out and alterations were made, right? A. Right.

Q. Was that done pursuant to agreement between the parties? (1902) A. Oh, sure.

Q. Did Marcus participate in this agreement? A. Yes. In fact—this was one of the blow-up points between Miller and Marcus, of which we had, I don't know, two dozen, and they had some lovely argument, to the point where some-

body from my firm came in and said, "Is anybody dying in here?" very politely, and then closed the door.

The Court: The voices were raised so high!

The Witness: Well, you know, Bill Miller, when he talks in a normal voice, sounds like a bull moose calling to a female during mating season, in his normal voice. And when he hollers, the building vibrates.

The Court: So apparently Miller was hollering a little bit.

The Witness: Yes. You know, when the pictures start shaking, that's when they start wondering if something has gone wrong.

By Mr. Brigadier:

Q. Now, Mr. Schwartz, the alterations limited these obligations to the first mortgage, taxes and insurance, is that right? A. Yes, that's the way it ended up.

Q. And eliminated every other kind of claim? (1903) A. It eliminated—

Mr. Tepper: I must object to counsel relating this, that it eliminated every other kind of claim. This is direct examination. The witness has testified that this paper writing was read, every word, every sentence, by Mr. Marcus before execution. Counsel wanted to help the Court by expediting it and going through it, but what counsel is actually doing is testifying for the witness. And I don't think it ought to be done.

The Court: Put it in question form, will you?

Mr. Tepper: The Exhibit is there.

Mr. Brigadier: It is what the Exhibit says. Is there any doubt about it?

The Court: Then Mr. Tepper's point is, why repeat it, if the Exhibit says it?

Mr. Brigadier: But I want to bring out what the parties agreed upon orally and to see whether that was

carried out in the agreement. That is all that I am doing.

The Court: Well, there was a reason why they put these words of limitation there, "consisting of first mortgage, taxes and insurance," is that right?

The Witness: That's right.

The Court: They wanted it limited to those (1904) three items.

The Witness: They said they wanted to know just how far they were going to have to go, they didn't want to buy a cat in a bag, that there might be a law suit or something else coming up.

By Mr. Brigadier:

Q Now, the purchase price that is set forth in this agreement, DM-22, of $125,000, is that the price that was agreed upon for the sale of the stock? A. Yes, it was.

Q. Before Mr. Marcus signed that Exhibit was there any discussion about a change in the purchase price, an increase in the purchase price? A. Well, actually there was, but I only found out about it since this case has been pending.

Q. At the time that the agreement was executed was there anything said to you that the price in that agreement was to change from a hundred and twenty-five to any other figure?

Mr. Tepper: I object to that. The witness has already testified that that was the figure. He knew of no other figure until after this case was started.

Mr. Brigadier: That's what I am trying to find out.

Mr. Tepper: Therefore, I object to the question.

(1905) The Court: That is the only obvious inference to be drawn—

Mr. Brigadier: That's right.

The Court: —from his answer, that he didn't know until this suit that there was anything more.

Mr. Brigadier: That's exactly what I am trying to establish.

The Court: Well, it is established, according to him.

Q. Before the execution of that agreement was there anything said about any additional sum of money?

Mr. Tepper: I object to it, on the same ground.

Mr. Brigadier: I didn't say anything about purchase price. He is going to testify what it was for.

The Court: All right.

Q. Was there anything said about any additional sum of money? A. Well—

Q. Mr. Schwartz, you went over these documents with me yesterday, didn't you? A. Yes.

The Court: Don't get impatient.

Q. Did you see Exhibit DM-2?

Mr. Tepper: I object to the witness being (1906) shown any other Exhibit which might suggest an answer to that question.

Mr. Brigadier: DME-17.

The Court: I see no objection to that, if it brings out the truth of the situation, if it does.

Q. Did you see a photostatic copy of DME-17? A. When are you referring to, at the closing of September 14, or yesterday?

Q. You saw it yesterday, didn't you? A. Yes, I saw that yesterday.

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Q. You also saw it during the taking of the depositions, didn't you? A. That's correct.

Q. All right. Now, was this paper signed, DME-17, before the execution of the main contract, DM-22? A. Well, if not before, it was part of the series. I don't remember whether it was before or after.

Q. Was it drawn before DM-22 was signed, Mr. Schwartz?

Mr. Tepper: The witness has already answered he doesn't know. It was either before or after.

The Witness: No, no.

Mr. Brigadier: No, I am asking "drawn."

A. It was drawn before it was signed, but I can't say (1907) that one paper preceded another in execution. I don't recall.

Q. That is not what I am asking you. I am asking, was it drawn before the papers— A. I said yes.

Q. —were executed? A. Positively.

Q. Before any were executed? A. Correct.

Q. Will you tell us the circumstances under which it came to be drawn? A. Well, some time during the session on September 14—and I couldn't say whether eleven, twelve, one or two o'clock in the day—Miller and Marcus got into a big huddle about something, and a big argument—No. 17, let's say—and they disappeared, and they asked us for another room. And I put them in another room. And Lieberman and I continued with what we were doing.

After a period of time, which I couldn't recall—let's say, for the sake of argument, 15 minutes—they came in and they asked me to draw a note for $15,000, with these terms in them, you know, $200 a week, commencing May 15, and $200 thereafter, and I asked Mr. Marcus what this was about. He said, "It's a private obligation of Bill Miller's

to me, individually." And I said, "For (1908) God's sake, don't tell me you have loaned him any more money than is in the deal."

And so he said, "Yes." He says, "I will tell you about it some other time." But he never did. And that was the paper that was drawn up at that time.

Q. Did Mr. Marcus tell you at that time that the purchase price had been increased from a hundred and twenty-five to $140,000?

Mr. Tepper: That is objected to. The witness answered that question.

The Court: He certainly answered that.

Mr. Tepper: And the Court sustained the objection.

Mr. Brigadier: I think I ought to be permitted to get a point-blank answer because of the testimony that Mr. Marcus has already given in this matter.

Mr. Tepper: What counsel is trying to do is get an answer that he likes better than the answer which the witness has given him.

The Court: As a matter of fact, I think the answer which this witness has given is quite adequate for my purposes.

Mr. Tepper: That's what I thought.

The Court: Quite adequate.

Q. When did you first learn that Mr. Marcus (1909) contended that the purchase price was a hundred and forty thousand and not a hundred and twenty-five? A. Since I got involved in the depositions, you know, and the hearings that took place afterwards.

Q. When you received your share from Mr. Marcus, was it based on a hundred and forty thousand or a hundred and twenty-five thousand? A. A hundred and twenty-five.

Q. So that if Marcus actually received a hundred and forty thousand for the stock instead of a hundred and

twenty-five, you did not receive all that you were entitled to receive under your arrangement with him, is that right? A. Well, to put it accurately--and in the vernacular—he gypped me.

The Court: If what he says is so, the price was a hundred and forty thousand.

The Witness: Well, this was not a loan. I mean, I know now it is not a loan.

The Court: But at that time Mr. Marcus said to you that this was a private obligation running from Miller to him?

The Witness: Yes. He said it had nothing to do with the deal, and that Bill Miller owed him $15,000 personally, it had nothing to do with the deal.

(1910) The Court: All right.

Q. Now, I direct your attention, Mr. Schwartz, to Exhibit DME-9. Do you know on what day this was drawn? A. Well, I have to give an answer like this, since it has a date at the top of September 14, I will have to say it was drawn on September 14, because if it was drawn on September 3, it would either have that date or be blank. So I believe it was drawn September 14.

Q. You will notice that from the papers that have been offered in evidence, the Exhibits that were executed on September 14, that some of them bear the typewritten date, September 14, others bear September 3, stricken out, with the word "fourteen" over it, and still others are September blank, with the 14 figure put in. A. Yes. I noticed that during the deposition.

Q. I see. And you are assuming, as I understand, that those that are blank or have the third in were drawn on a prior date? A. Some prior date. I wouldn't say, necessarily, the third, but most likely.

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Q. Now, I direct your attention to DME-9 and ask you whether— A. Wait a second. Is that this? Yes.

Q. —whether you saw Samuel Marcus sign it? (1911) A. I did.

Q. And you, as secretary, attested that, is that right? A. That's correct.

Q. That is your signature. Will you state the circumstances under which this Exhibit was drafted and executed and delivered? A. Oh, I know this one, yes. This is the one—this was Lieberman's idea. He wanted to be sure that all of the corporation's obligations for legal fees, and so on, and for loans, would be cleared up by Sam Marcus; in other words, that Sam Marcus would get rid of his deal, you know, his end of it.

You see, originally, this was a—we were thinking in the terms of a real estate deal on this thing, and it was a situation where the seller was making sure that he—I mean, the buyer was making sure that the seller would pay off the obligations on the stock, or on the corporation.

Q. And what about this reference to the fact of loans to Samuel Marcus personally; who was to take care of those loans? A. Sam Marcus was to see—

Mr. Tepper: I object to that. The interpretation, the legal construction of that document is for the (1912) Court.

Now, if counsel is referring to any conversation prior to the making of this document, that is one thing, but the construction of the document is for the Court, not for this witness.

Mr. Brigadier: All right.

Q. What was this conversation that led to the making of this document, what was the understanding and agreement between the parties for which this document was then drawn? A. This was Lieberman wanted this to

be sure that Sam Marcus would not make any claim against Bierman and the purchasers of the stock for any personal loans or any loans to the corporation. That was the main thing.

And also, for example, that I wouldn't bill the corporation for the legal services directly, you know, to them, rather than to Sam Marcus.

Q. Now, you look at Exhibit DME-9, Mr. Schwartz, and you will find that it purports to be executed by Milmar Estates by Samuel Marcus, president, isn't that right? A. Yes, that's right.

Q. And purports to be directed to and given to Al Bierman, care of Bill Miller's Riviera, Inc., is that right? (1913) A. That's correct.

Q. Yet you say that it was intended to cover an agreement that Mr. Marcus was personally agreeing to wipe out any of his loans, is that right? A. That's right.

Q. Why was it put in that form? A. Well, this came up at the depositions, and my recollection was the same as it is now. There are a couple of possibilities.

One is that the stenographer typed "Milmar Estates by" without thinking about it, and it should have been signed by Marcus individually, which is one possibility.

And the second is that we may have dictated it without thinking, because, as far as we were concerned, Milmar and Sam Marcus were the same entity, you know, for all practical purposes.

Now, I can't tell you now, from 1948 to 1955, what was exactly involved in this thing. This may have been dictated wrong, or the girl—the stenographer may have inserted it, assuming it was a corporate paper, and then once it had the corporation, when we had the stack, we may have pushed them under his nose and signed them.

Q. Now, will looking at Paragraph 7 of the agreement, DM-22, serve in any way to refresh your recollection as

to this Exhibit, DME-9? (1914) A. Well, I think that they tie together, because it is part of the situation whereby Marcus had his obligation to clean up his loans, and any bills, or anything involving the stock, and the purchasers were only going to assume the mortgage, and the taxes, and insurance as their obligation.

Q. Mr. Schwartz, will you look at Exhibit DME-12 and 13? Those are the two mortgages. A. I think you better show them to me, because I don't know which is which.

Q. Twelve. A. That's 12 here.

Q. And this is 13.

Mr. Tepper: Is that a mortgage, Mr. Brigadier?

Mr. Brigadier: Twelve is the real estate mortgage and 13 is the chattel mortgage.

The Witness: I am looking at them.

Q. Were these two Exhibits executed on September 14? A. Yes.

Q. Well, I correct that. I may have misled you. Will you look at the date of that, the acknowledgment. A. Fourteenth. They were signed on the 14th.

Q. Except that you will find that the acknowledgment on DME-12, Mr. Bierman was taken down in Norfolk, and taken at a later date, October 4; do you see (1915) that? A. Yes, that's true.

Q. Will you explain how these two Exhibits, DM-12 and 13, came to be executed?

The Court: As you know, we will have to adjourn at 12:30.

Mr. Brigadier: I would rather, if you have no objection, stop right now, because this is a new line of inquiry.

The Court: Yes, sir. We will adjourn now until 2 o'clock.

(Noon recess.)

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(1916) Afternoon Session

Robert J. Schwartz, resumed the stand.

Direct examination by Mr. Brigadier (continued):

Q. Mr. Schwartz, I omitted to ask you a question about Exhibits 19A, 19B, 20A, and 20B, which are the twelve hundred and 80 shares. Will you look at the back of the shares and tell us whose endorsement appears on the back?

Mr. Grosman: Twelve hundred and what shares?

Mr. Brigadier: Twelve hundred and fifty. I am sorry.

A. It looks like Mr. Marcus' signature.

Q. Well, was that signed while you were there? A. I think so, but I don't have any distinct recollection on that. I have a definite recollection of executing the front of them, but the endorsements, I can't honestly say.

Q. Do you have any recollection as to why they should have been endorsed on the back? A. To make them negotiable, I presume.

Q. Well, what was actually done with these certificates, Mr. Schwartz, on September 14? A. These were the ones that were put up in escrow, weren't they?

Q. Well, were all put in escrow? You have (1917) 1,250 there. A. Well, 625 were put in escrow.

Q. Then 625 of those that are in front of you were put in escrow? A. Yes.

Q. In other words, those 625 of those shares were delivered to be held by Judge Lieberman in the escrow agreement. A. I don't know which ones, because I would have to see the receipt.

Q. All right. Now, what was to happen with the other 625? What did happen—not what was to happen—what did happen to the other 625? A. Those go to Mr. Miller.

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Q. And they were delivered in your presence to Mr. Miller? A. Yes.

Q. And in Mr. Marcus' presence? A. Oh, yes. We were all present at the same time.

Q. And Mr. Marcus agreed to their delivery to Mr. Miller? A. Yes.

Q. Now, I direct your attention to Exhibits DME-12 and DME-13. DME-12 is the real estate mortgage, is it not, Mr. Schwartz? (1918) A. Yes, it is.

Q. Now look at the Exhibit and will you note who appears as the mortgagors and who appears as the mortgagee?

Mr. Tepper: I am going to object to that. The document speaks for itself. It is in evidence. I see no reason why we should go into the document. It is there. It is in evidence.

Mr. Bridagier: I don't think you have listened to what I said. I haven't asked the question. I said, "You will note who appears therein as mortgagors and who appears therein as mortgagee."

Q. Have you so noted? A. I have.

Q. Can you tell us why or how this instrument came to be executed and delivered on September 14?

Mr. Tepper: I object to that. There has been no testimony that it was delivered to anyone.

The Court: Was it delivered?

The Witness: It was.

Q. Was it executed? A. It was.

Q. And it was delivered. Now, will you tell us what conversations took place with respect to the execution and delivery of Exhibit DME-12 and, while we (1919) are at it, the chattel mortgage, DME-13. A. Well, the same thing for both. Originally this was a—

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Q. Will you talk a little louder? We are having trouble. A. It is hard for me to talk on account of my throat.

Q. I'm sorry. A. At the very earliest stage of this deal it was a real estate deal, and I outlined to Mr. Marcus the advantages for a real estate deal. And I said, "The benefit is that you have a mortgage in your hands, a chattel mortgage and a real estate mortgage, and the stuff is on record, and the property isn't going to disappear, and the records can't disappear, and you get away with an awful lot of chance of anything going wrong, or of a falling out between the parties."

He says, "We can't have a real estate deal." And I said, "What is the reason?" He said, "It doesn't concern you." I says, "Well, it does. Tell me why you don't want a real estate deal." He says, "Because I don't want it on record."

And I don't know how much further I pursued that point, but Miller didn't want it on record, either. They just didn't want to show that this was a real estate deal on record. They preferred the stock deal, both of them.

(1920) Lieberman, as I recall, also was in favor—although not as much as I was, but I urged the real estate deal, and they said no.

Finally, when we got to doing—when we got around to drawing up the papers, Marcus said, "Don't forget about getting the mortgage—the real estate mortgage and the chattel mortgage."

I says, "It doesn't apply now." He said, "Get it, anyhow." I said, "Why?" He says, "It is of some value." I said, "It is of no legal value." He says, "It's good, because I can always tell them I have a mortgage."

Well, Lieberman and I discussed that when we got together, and we thought it does have a certain equitable value, I mean, there is an equitable mortgage of sorts which you would have to enforce.

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But that wasn't the primary thing. The primary thing was the 625 shares being placed in escrow. And this was just something we threw in because we felt, "Okay. It's nonsensical. Marcus wants it. Does it pay to argue? So it's a useless paper, or it may be enforceable equitably—in a Court of Equity. But what of it? That's all."

And when we came to execute these papers, that is what we did. We knew it wasn't a perfect deal. We knew (1921) it was nonsensical. We knew that they didn't have title to it. It was apparent to anybody who had gotten past the first week of law school that it just wasn't what it looked like. But it did have some value, and you could always go into a courtroom and say, "Here is a mortgage you signed; you knew what you were doing," and all that kind of stuff, and enforce it equitably. And we felt that for that reason it had some value. And it didn't do anybody any harm. So we let him sign it. It wasn't recorded, anyhow.

The Court: Neither of the mortgages were recorded?

The Witness: No, just a hunk of paper for what it was worth. Marcus said, "Get the mortgage, get the mortgage." So we got it.

Mr. Tepper: Obviously the maker of the mortgage didn't have title to the property. How could the mortgage be recorded?

The Court: I noticed that before, but now this does somewhat clarify why it was done, if this is believable testimony.

The Witness: The point is, Judge—

The Court: Because to me it seemed utterly silly to do what you did.

The Witness: Of course it's silly, but nobody (1922) was hurt by it. It didn't make any difference.

The Court: It stopped a lot of argument, I suppose, and discussion.

The Witness: You couldn't argue with Sam Marcus. He is of the opinion that he knows more law than any lawyer or any judge. And he says, "I want it." And he would practically go into a tantrum if you didn't want it. The glasses would start going like this (indicating), and he would be jumping up and screaming. So, okay, we did it. That's all. There was no intention of recording it, because it would have been a foolish thing to record. We never did bother about it. We knew it was no good.

By Mr. Brigadier:

Q. Mr. Schwartz, would you turn to the second page of DME-12? That's the real estate mortgage. A. May I say that I have probably an Exhibit I am not supposed to have, because it has got an insert.

Q. That was put in evidence for the Court's benefit. A. I presume this is not for me.

Q. I didn't know it was there. That is that blowup of the line. It's all right. It's been before the Court and has been translated to the Court.

Do you have the writing that we had written out of (1923) this?

Mr. Margulies: I don't have it handy.

Q. Well, just let me ask you this question. A. Are you talking about the second or third page?

Q. The second page. Do you have any recollection at all of the contents of the three lines, three and a fraction lines that were stricken out? A. I can read it even without the blowup. It says, "This is a purchase money mortgage given to secure part of the purchase price"—I can even read it right here—"purchase price of a"—this part is pretty hard to read—"certain described property—" It is the usual standard purchase money mortgage clause, I presume.

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Q. Then there was a reference to a deed, was there not? A. Yes.

Q. To be recorded simultaneously herewith? A. Yes, that's right.

Q. Is that why that line was stricken out, because no such deed was given? A. That was too ridiculous, so we crossed that out, because it didn't even make sense at all.

Q. That, I assume, was originally put in when it was contemplated that a deed was going to be given, is that right? (1924) A. It's hard to say. You know, it was all part of that same time. I want to be honest with you. I don't recall exactly whether it was or wasn't.

Mr. Brigadier: We will leave that in there, because we did it at your Honor's suggestion, the blowup, and I think in the record I read the words that were stricken out.

Q. I direct your attention, Mr. Schwartz, to Exhibit DME-6. A. I don't have it.

Mr. Brigadier: Will you give him six and seven, both, please?

(Documents handed to the witness.)

Q. Does that bear your initials "R. J. S." on it? A. Which one, six?

Q. DME-6. A. Six, yes, that has my initials on the righthand side.

Q. And alongside of it the initials of Al Lieberman? A. Yes, that's right.

Q. I assume that that was to initial the insertion that appears in handwriting on it, is that right? A. That's to cover the correction of "and 50 per cent of Bill Miller's Riviera, Inc."

Q. Now, was that drawn on September 14? (1925) A. Yes, it was. But again I say it is because it has a date of September 14, with no correction on it.

Q. I see. And was that signed in your presence? A. Yes, it was.

Q. And in the presence of William Miller? A. Well, he signed it.

Q. I'm sorry. In the presence of Samuel Marcus is what I meant. A. Yes. He was there.

Q. What discussion, if any, took place between the parties which led to the preparation and execution of Exhibit DME-6? A. Six, back to the same one. Well, this was one of those negotiated deals where one thing was traded for another, you know. It was part of the conversation, and Miller and Marcus disappeared, and came back, and they said, "Okay. Half of the stock of 625 shares is going to be put up."

Q. Well, now, the contract as originally drafted by you provided that all of the shares were to be placed in escrow, is that not so? A. Yes, that is the way I drafted it originally.

Q. That's the way you drafted it. And the insertions—the "up to 50 per cent" insertion, you testified is not in your handwriting, it was not made by (1926) you, is that right? The "up to 50 per cent" insertion that appeared in the two paragraphs, five and ten— A. That's right.

Q. —were not in your handwriting? A. In that particular one, yes.

Q. Now, before the agreement was executed, did a discussion arise between the parties as to how much should be put up in escrow? A. Yes.

Q. Was there any objection to the draft as you had proposed it? A. There was a very strong objection on Miller's part, and he didn't want to put up all his stock. And he said there wasn't any reason for it, and for all practical purposes he was going to be a half owner, and, you know, he was a half owner, and that Marcus was a half owner, and that he was buying Marcus' half interest in the stock, therefore, he only wanted to put up half.

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And I argued for the whole thing, because I felt we would have a little more control of the situation. And Miller and Marcus went out of the room for the 18th or 19th time, and when they came back Sam Marcus said to me, "It's okay. Six hundred and twenty-five shares are going to be put up in escrow." So that's when the insertions were made, as I recall.

(1927) Q. Well, they weren't made in the agreement itself at that time, were they?

Mr. Grosman: He said that they were.

The Witness: Which agreement?

Mr. Tepper: That's when the insertions were made. That is what the witness testified.

Mr. Brigadier: That is what I am trying to find out.

A. In some of the agreements that didn't conform, we inserted the—

Q. Well, the insertion of "up to 50 per cent" was never made by you. A. I don't mean that. No, of course not.

The Court: He is talking about DME-6.

Mr. Brigadier: That's what I thought he was talking about.

The Witness: You can't switch Exhibits on me. You are talking about DME-6, aren't you?

Mr. Brigadier: I'm sorry. I understood you correctly, Mr. Schwartz.

The Court: So did I.

Mr. Brigadier: Mr. Tepper thought you were referring to something else.

Q. Now, was it then that this DME-6 was prepared, which provided for the 50 per cent—at least 50 per cent? (1928) A. Around that time, yes.

Q. Now, will you look at DME-7, in front of you; was that escrow receipt prepared by you? A. Well, either by me, or in conjunction with Mr. Lieberman.

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Q. But at least typed in your office, is that it? A. Yes, it was typed in the office, that's right.

Q. And when was it originally drawn? A. Well, it has a date of September 3 on it crossed out, and the 14th put on top of it, so I am going to assume that it was typed on the 13th, or drawn on the 13th, anyhow.

Q. The 13th or third? A. Third. I'm sorry. Beg pardon.

Q. Now, as you originally drew it, the paragraph numbered two had—blank shares of Milmar Estate, Inc., being all the shares of the said corporation authorized and outstanding—isn't that right? A. That's correct.

Q. And that was drawn at the same time that you had drafted DM-22, which, in its original form, and DME-5, which, in its original form, called for all the stock to be placed in escrow, isn't that right? A. That's right.

Q. Now, at the closing you say this change took (1929) place, is that right, where it was changed from "all" to 625? A. Correct.

Q. Is that when the change was then made on the escrow receipt, Paragraph 2, at the same time? A. That's right. You see, the reason no number was inserted there was the same thing as I told you this morning. Lieberman and I were not sure whether or not more than 1,250 shares had been inserted—I am sorry—had been issued by the corporation. So we decided to wait until Miller and Marcus were present to ask them.

Then when we were together this variation on the deal came up where Miller and Marcus agreed on 625 shares. So instead of having 1,250 shares being all of the shares, we have 625 shares being placed in escrow.

Q. And the rest was then stricken out, is that right? A. That's correct.

Q. Now, Mr. Schwartz, at any time prior to the time that the parties left the room on September 14 did the deal change from a sale of all of the stock to a sale of only

625 shares? A. That's a lot of nonsense. It was always the whole business.

Q. From beginning to end on that day. (1930) A. Absolutely.

Q. It never changed at any point on September 14. A. I haven't the slightest doubt about it.

Mr. Brigadier: Will you hand him Exhibit DME-23 and 24, please?

(Documents handed to the witness.)

Q. I would like to ask you one further question about DME-7, and that is whether or not Mr. Marcus, in your presence, read the Exhibit before it was executed?

Mr. Tepper: What is the number?

Q. (Continuing) Or at the time it was executed.

Mr. Brigadier: That's the escrow receipt, DME-7.

A. He certainly did.

Q. He read it himself? A. Yes, he did.

Q. Now, will you look at Exhibit DME-23 and 24. Were these two Exhibits prepared in your office? A. They were.

Q. By you? A. Well, as I say, again it is hard for me to say whether Mr. Lieberman or I dictated them, or we jointly dictated them, because we sort of divided up the work, and we had two stenographers, and one was dictating, and another was dictating.

(1931) Q. Now, on what day would you say that they had been drafted? A. Well, the 14th is inserted here, so I think it was prepared around the third.

Q. Now, were they executed on the 14th? A. On the 14th.

Q. Did you see Samuel Marcus sign Exhibit DME-23? A. I did.

Q. Do you know whether he read it before he signed it? A. He did.

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Q. Did you explain to him why it was being executed? A. You don't mean that, do you?

Q. Yes. A. Why it was being executed?

Q. Yes, why this document was drafted. A. I thought you said why he was being executed.

Q. No. A. Yes, I did.

Q. Did you explain to him why the document was being prepared and why it was being presented for execution? A. Yes.

Q. What did you tell him? (1932) A. I told him that if they paid off their obligations they would be entitled to the outright control of the corporation and the resignations of the officers.

Q. And did you call his attention to the fact that these were to be held in escrow? A. Oh, yes.

Q. And what about the one, DME-24, did you sign that? A. I did.

Q. And were both of these delivered to Mr. Lieberman to be held in escrow? A. Yes.

Q. In Mr. Marcus' presence? A. In his presence, yes.

Mr. Brigadier: Now, I think I can shorten some of this by telescoping a number of these.

Q. I show you DME-26, 27—

Mr. Brigadier: No, I better get the originals. I am sorry.

Let me have DME-22, DME-10 and 11.

The Witness: Do you mind if I suggest something? Give me a couple at a time.

Mr. Brigadier: I am going to make it very short, because all I want to find out is whether these were all executed in your presence on September 14, 1948.

(1933) The Witness: Well, you want them all as a batch, you mean?

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Q. Yes, I am lumping them together, because I want to make this as short as I can, since it is just a question of whether these were executed in your presence on September 14, by the parties signed thereon. A. The answer is yes.

Q. Did Mr. Marcus examine each one of these Exhibits on that day? A. Without exception.

Q. Every one of them? A. Every one of every paper that was signed that day was examined by him.

Q. Could you see whether or not he was reading them? A. He was (indicating).

Q. Was there any conversations between you and him about them? A. Loads of them. I don't remember particular conversations about particular papers, but he went over everything with me—"Why this one; why that one; and why this one?"

Q. I show you Exhibits DME-14 and 15 and ask you whether those Exhibits were signed on September 14 and delivered on September 14 in your presence? (1934) A. Yes, sir.

Q. By the parties whose signatures appear thereon? A. That's correct.

Q. And did Samuel Marcus examine these Exhibits on that occasion? A. Yes.

Q. And did he read them? A. He did.

Q. And did he discuss them with you? A. Yes.

Q. Now, I direct your attention to Exhibit DME-15, on which there appears an insertion on each side, in handwriting of Paragraph 2; did that take place on September 14? A. Yes, it did.

Q. Was there any discussion with Samuel Marcus with respect to that? A. Oh, yes. This 37½ per cent one was a big deal.

The Court: Big deal?

The Witness: Yes, this is the one that took a lot of time.

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Mr. Brigadier: That's what I want to bring out now. Will you wait till I ask my question.

The Witness: Sure.

Q. Will you tell us what conversations took place (1935) between the parties which led to the drafting and the execution of this document? A. Yes. I don't know at what stage this came up, but it was something like this. Miller suddenly said, "What's going to happen here if Mr. Kevelson doesn't come across with any more money?" He was an investor in the deal and they needed a lot more money.

So Marcus said, "Well, what do you lose?" And Miller says, "Well, don't you think I ought to be credited"—I am paraphrasing this, you know—"don't you think I ought to be credited with any money that's paid on account?"

So Marcus and Miller—oh, Marcus said, "If I credit you for the whole business, where do I come off?" He says, "You got all the benefit out of this stuff that's been paid and I haven't got any benefit." He says, "I'll credit you with 25 per cent of what you paid."

So Miller let loose a few blasts. And then it was raised to another per cent, and another per cent, and ultimately it ended up, as I see here, 37½ per cent credit for all payments made.

To be very frank, Judge, the argument was along this line. They didn't know how deep Kevelson would go into this deal—

The Court: That's Miller and Marcus didn't.

(1936) The Witness: Miller and Marcus didn't.

A. (Continuing) —and he was putting in some money on this deal, but maybe he would stop short, maybe he would say, "The hell with this—" excuse me.

The Court: Yes.

A. (Continuing) "Maybe he will walk away from the deal and then we will be back where we were." And Miller

says, "Frankly, I don't know if Al Kevelson will go further than this first amount of money, because I told him it wouldn't take a lot to swing it, but it's going to take more."

So that's when Sam Marcus said, "Where do I come off on this thing?" And he convinced Miller to allow him to make something on the deal in the sense that if all of it was paid he would only be credited with a portion of it.

That's how this thing worked out. This is told to you briefly, but it took about a half hour or so. This was a big blowup.

Q. Now, I direct your attention to Paragraphs 3 and 4 of the same DME-15, with respect to the $50,000 note. Will you tell us what conversations took place and what agreements, if any, were arrived at with respect to that note? A. Give me a minute to read this, so I can find out. Three and four?

(1937) Q. Three and four of the same Exhibit, DME-15. A. Okay.

(Witness examines document.)

A. Well, this was just a negotiated thing between Sam Marcus and Bill Miller in case of a default and provided for certain installments, as you can read here.

Q. Was this what the agreement was, as recited in the third and fourth paragraphs, as to what was to happen? A. They told us what it was that Lieberman and I got it up in accordance with that.

Q. And, as I say, as it is recited in these two paragraphs is what they agreed on? A. Yes.

Q. I see. Did Mr. Marcus at any time on September 14, before he left that office, tell you that he had entered into an arrangement with Mr. Miller whereby he wiped out the note in all events and Miller gave up an option to purchase 480 shares of stock from Marcus?

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Mr. Grosman: I object to that as leading. We might just as well have Mr. Brigadier get up there and testify.

Mr. Brigadier: I am not testifying. Mr. Marcus is the one who testified.

The Court: Did Marcus say that?

(1938) Mr. Brigadier: Yes. Mr. Marcus has testified, on his story, that after he signed the contract he discovered that Miller was not going to give him cash. He thought he was going to get a hundred and twenty-five, or, as he says, a hundred and forty and $50,000 in cash for the note. He then discovered that Miller had no intention of giving him any cash. They went out of the room; they came back, and there was a new deal. The new deal was that he was selling only 625 shares for a hundred and forty thousand and that he was wiping out with Miller the former transaction with respect to the 480 shares. Miller was to get back his note for $50,000 and Marcus was to retain the 480 shares, and the option to purchase, which he calls an option, was completely wiped out.

I am not asking this witness to testify. This is what Marcus has testified.

The Court: That's all I asked, did Marcus say that.

Mr. Brigadier: Right.

The Court: Well, that's not a leading question.

Mr. Grosman: It's a leading question the way he puts it.

The Witness: Well, anyhow—

The Court: Just a minute. Wait till I rule. The objection is overruled. Answer the question. Do you (1939) want it repeated?

The Witness: I know what the question is.

A. The deal was exactly the way it reads here in three and four.

Q. And it was not what I put to you in the question. A. That's right.

Q. Now, Mr. Schwartz, will you describe for the Court just the procedures that were followed in the execution of all of these papers on September 14, what was done, the physical, actual actions that took place? A. You mean how they were signed?

Q. Yes. Were all the papers first prepared? A. Yes. Nothing was signed until they were all prepared.

Q. Until everything was prepared? A. Yes.

Q. Now, will you then tell us what was done with the papers and with the parties? A. Well, it's seven years ago, but I recollect we had a pile of them. Lieberman and I were sitting together. Marcus was sitting on Lieberman's left, and Miller was sitting on Marcus' left, which was my right, you know, in a sort of a circle. My desk was in the middle. And, as I recall it, we had a stack, you know, about a couple inches high, and Lieberman and I would look them over, and (1940) we had a check list, and we checked off each paper to see that it was executed, and each paper to see that each person had a copy of it. And we went right through the whole business and finished up that way.

Q. Did Mr. Marcus do any checking of his own that day? A. We went over every word with him. He doesn't believe in anything or anybody. He reads every word himself.

Q. What I meant by that, did he have any check list of his own that he was maintaining at that point? A. He was keeping records. He likes to write on yellow pads. And he keeps notes all the time. And he was writing off all the things that he wanted in there, and he would say, "Where is—" I remember one thing that I thought was, you know, not very important. One of the big things he had to have was a letter forgiving the checks that had been charged to him the first summer of the operation of Bill Miller's Riviera.

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Q. The tabs? A. The tabs, yes. He had gone out there with groups of people occasionally and signed his name to them, and he wanted those forgiven. He had that on his list. In fact, it was No. 1 on his list.

Q. Now, after all these documents had been signed, (1941) they were then delivered, is that it? A. Yes.

Q. Some of them in escrow, according to the escrow receipt. A. We created an escrow pile for Lieberman. And then we divvied up the other papers.

Q. Then how did the meeting break up, in what manner? A. You mean the spirit of it, or something like that?

Q. Well, I would like both the spirit and also the order in which the parties then left. A. Well, all I know is Sam Marcus remained behind for a short while.

Q. He was the last to leave? A. Yes, he stayed with me for a little while. He wanted to talk to me, and he stayed behind; not for long, he stayed about—just—I don't know, ten minutes, 15 minutes, 20 minutes.

Q. Can you recall if you had any conversation with him at that point? A. Oh, yes, I had a conversation with him.

Q. What was the conversation? A. About the deal.

Q. Yes. A. He was—in a way, he said, he was sorry to sell it (1942) that cheap, but in a second way he was happy, because, if not, he could never have met the payments when they came due during the winter.

Q. Now, Mr. Schwartz, you knew at this point that whatever stock you had, had been included in that sale, is that right? A. That's correct.

Q. Did you have any conversation at that point with Mr. Marcus as to how and when you were to receive your share of the purchase price? A. No specific recollection on that.

Q. Did you ever have any conversation with him thereafter? A. Oh, yes, thereafter.

Q. Will you tell us when, and where, and how? A. Well, about the end of that month, or the first of the month that followed, I said to Mr. Marcus I thought I ought to have

some kind of a memorandum just in case something happened to either of us. And I wrote out something in handwriting—I don't remember where we were at the time—indicating that I had an interest in the proceeds of the deal.

Mr. Brigadier: Just hold it a minute until I find the Exhibits.

I'm sorry, if your Honor please. I put one in (1943) evidence and Judge Grosman put the other one in. The originals are in Robert Schwartz' possession. He produced them at the time of the taking of the deposition. We sent them back to him and forgot to have him bring the originals. But these have been accepted in the place of the originals.

Q. And I would appreciate, Mr. Schwartz, if you would mail us the originals, or mail them to the clerk, and we could substitute the originals in place of these photostats. A. I sure hope I got them.

Q. We returned them to you from the deposition. A. I know, you told me that. I don't know if I have got them.

Mr. Brigadier: We will have to use the photostats, which have been used in evidence.

Q. I direct your attention to DM-32. A. This one?

Q. Yes. A. Two two eight, it says here.

Q. No. You just let me state the number. That's the deposition number. In whose handwriting is DM-32, Mr Schwartz? A. That's mine.

Q. And who signed it? (1944) A. Mr. Marcus.

Q. And when was it signed? A. October 1, '48.

Q. Will you tell us the conversation, if any, that took place between you and Mr. Marcus with respect to this Exhibit? A. Just what I told you. I told him I thought I ought to have some kind of a receipt, just in case—just to

have some record, you know. So he said, "You are right." And he said—I don't remember where we were, but we were in some place where we just had a piece of yellow paper, you know, yellow ruled—he always has these with him, and I just wrote it on a pad.

Q. Now, will you look at this Exhibit and will you note its contents? A. Okay.

Q. You will note that it refers to a mortgage on the Riviera, is that right? A. That's right.

Q. Can you tell us what conversation, if any, that led to your employing the phrase, "mortgage on the Riviera"? A. Nothing. It's just loose language, just a memorandum —it was just between Sam and myself, that was all.

Q. Will you tell us if your relations with him (1945) were friendly at this time? A. They were very friendly up until I found out what he said in his depositions.

Q. You mean not until after he testified at the depositions was there any change in your relationship? A. There was no change in our relationship until after I learned what he testified, not when he testified, because I didn't know about it.

Q. All right. We will come to that a little later. Now, will you look at Exhibit DME-52, Mr. Schwartz; who drew that Exhibit? A. I typed it.

Q. Where was this done? A. In Mr. Marcus' office.

Q. And is it signed by Mr. Marcus? A. It is.

Q. It bears date May 13, 1948, does it not? A. It does.

Q. Was this actually typed or executed on that day? A. No, it was typed on May 13, 1949.

Q. When did you discover that it read "1948" instead of "49"? A. During the course of these depositions.

Q. Was that when you first produced what is now Exhibit DME-52, in the taking of your deposition? (1946) A. That's correct.

Q. And it was at that time that you pointed out that that was in error, is that right? A. That's correct.

Q. Now, are you positive that the date of May 13 is the correct date? A. I couldn't be surer.

Q. You couldn't be? A. Could not.

Q. Is it possible that this was executed in November of 1948? A. Impossible.

Q. I didn't— A. Absolutely impossible.

Q. Is it possible that this was executed in May, 1948, as it purports to bear date? A. That's twice as impossible, because it was before we had any deal.

Q. Now, will you tell us what conversation, if any, led to the execution of this Exhibit, DME-52, between you and Mr. Marcus? A. If you'll give it back to me I will tell you.

Q. I thought you had it. A. Mr. Tepper took it.

Q. I'm sorry. I wasn't aware that you didn't (1947) have it in front of you.

(Document handed to the witness.)

A. Oh, yes.

Q. Do you have the other one in front of you? A. Well, I don't have to, I know—

Q. No, I want you to have both. A. I don't need it. I remember what happened.

Q. There is a reason. I have a right to say that I want both in front of you. A. I won't look at it.

Q. Don't be stubborn. A. Here is what this was all about. When I got this memorandum, we weren't in either Sam Marcus' office, or my office, and I said, "By the way, Sam," when we were getting up this memorandum—

Q. Which one are you pointing to now? A. The first one, of October 1, 1948.

Q. DM-32? A. Thirty-two. I said, "How much do I have in that Bill Miller's Riviera deal?" We said Riviera, but Bill Miller's Riviera. And he says, "Something like $11,000."

So I said, "Well, 70 per cent of $11,000 is $7,700." So we draw up the memorandum like that. Fine. Subsequent-

ly, when we were getting up a more formal thing, so I would have it in case of a Tax Department check, I looked it up (1948) and found out it was $11,250.

So I went over to Marcus, and I said, "By the way, it wasn't eleven thousand, it was eleven thousand two hundred and fifty, and 70 per cent of that is $7,875, or $175 more than the $7,700 called for in the old one." So we corrected it to the exact amount, because otherwise it wouldn't be accurate. That's all.

Q. And was the $7,875 paid by Mr. Marcus to you? A. Yes, it was.

Q. Together with interest at 4 per cent? A. Correct.

Q. Now, from what date did the 4 per cent run? A. It ran from the first of January, as I recall. But, you know, it's hard to say now.

Q. Well, you knew that Mr. Marcus was receiving 4 per cent interest under the terms of the principal agreement from September 14, 1948, was he not? A. Well, maybe the interest ran from the date of the contract. I can't recall now. I don't know. He said he was very, very short of cash. I knew this for a fact, that he was in desperate straits, and he said that he needed the thirty thousand. He said, "Can you do without your share for a couple of months, and I will pay you a thousand dollars a month," you know, as it says here, commencing May 1.

(1949) So when we came to the first payment, in May, that's when I looked it up to see when it was due, and discovered it was eleven thousand two hundred and fifty, and we made the corrections.

Q. Now, Mr. Schwartz, you testified today that you actually participated in the sale of the stock that was made on September 14, is that right? A. You mean I was selling my stock?

Q. That's right, that your stock was included. A. No question about it.

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Q. That you had an understanding with Mr. Marcus that you were participating in the purchase price? A. No, there was no question about that.

Q. And you had that understanding with him even prior to September 14, isn't that right? A. It went back to the time that we finally came to the conclusion at the end of August or early September.

Q. That's right. Now, I direct your attention to Exhibit DME-52. Will you note the first paragraph reads, "I hereby agree to purchase your interest in Milmar Estate, Inc." A. I see it.

Q. And you say that this was drawn not on May 13, 1948, which is the date it bears, but you say it was drawn May 13, 1949, is that right? (1950) A. Positively. Sure.

Q. Will you explain to us why you employed the language, "I hereby agree to purchase your interest," if, as you have testified, your stock was already sold in the sale of September 14 and you were participating in the purchase price that was being received? A. This was just a memorandum between Sam Marcus and myself so that we would have a written record of the amount, and the obligation, that's all.

Q. Did you deliver any stock to Samuel Marcus after September 14, 1948? A. I gave him the stock before the summer of '48, because he knew—I had told him that I was going to be bouncing back and forth between Mexico City, Cuernavaca and Guatemala City. I had those three stops to make and I never knew when I would have to leave from day to day. It was a mahogany deal and they were jumping the price on us every day, and every time they accepted we used to fly down, buy some of the stuff, and return.

So I said to Mr. Marcus, "Maybe a deal will come up and you will want to sell it. I may be delayed down there. It's very easy to get sick down there. If I get anything I will be down there for a couple of weeks and you won't

have the stock. I will leave it with you." So I left it with him about the fourth of July, or possibly the week (1951) before that.

Q. And you never received it back from him? A. He said he could never find it.

Q. And you never delivered it to him again after September 14, 1948? A. Oh, no, never. No question about that.

Q. Now, Mr. Schwartz, how long after September 14, 1948, did you continue to act as Mr. Marcus' attorney? A. Gosh, I really don't recall. I'd say not too long.

Q. Well, that isn't enough for me. Can you give us, roughly, a year, two years? A. I will take a fast guess and say one year. But, you know, it's not worth much.

The Court: Now we will take a five-minute recess.

(Short recess.)

By Mr. Brigadier:

Q. Mr. Schwartz, I omitted to ask some questions about these insertions that I want to go back to for a moment. As I understand your testimony, when DM-5 was executed and delivered, it did not have the insertions "up to 50 per cent" and "at least 50 per cent" that appear in Paragraphs 5 and 10; that's right, isn't it? A. That's right.

Q. And they were delivered without any such (1952) insertions in them? A. Correct.

Q. Now, after they were delivered did you receive a telephone call from Judge Lieberman? A. Yes, I did.

Q. Let me ask you this first. You were asked this at the depositions. I show you DME-8, which purports to be a copy of a letter sent by Lieberman to you, and ask you if you have any recollection of having received this letter? A. No specific recollection of the letter.

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Q. Do you have any recollection of any telephone conversation, however, referred to in that letter? A. Yes, I do.

Q. Will you tell us when and from whom the conversation was received? A. Well, it's kind of hard to remember exactly how long afterwards. I will say within about a week or two after, say, ten days after.

Q. After September 14? A. After September 14. In other words, towards the end of the month Lieberman called me up and he says, "Have you got your file?" I said, "If you wait a minute I will get it." And he said to pull out this particular agreement—I don't know now how he described it, but I (1953) knew which one he was talking about.

And he called my attention to the fact that we had not inserted "up to 50 per cent" or "at least 50 per cent" in two places. He says, "I am right, because—" and he recited his reasons why he was right. And I said, "I agree with you." He says, "Will you insert it?" So I said, "I will, but I am going to call up Sam Marcus and ask him if it's okay. If you don't hear from me, it's okay."

So I inserted it in my copy—one copy of it, anyhow—and I had a handful of copies, but I inserted it in one copy on the telephone, and after I hung up I called Mr. Marcus and recited this to him. And he said, "What do you think?" I said, "I think he is right." And I said, "Is it okay?" And he said, "It sounds okay to me," or, "it sounds all right to me."

So I said, "Fine." And that was the end of the conversation.

Q. You say you made such an insert on a copy that was in the file? A. Yes, I did.

Q. And where is that copy? A. I don't have it. I don't have any papers at all. The whole file was turned over to Mr. Marcus.

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Q. Was that in that file when you turned it over to Mr. Marcus? (1954) A. One conformed copy was in the file.

Q. With the insert that you had put in. A. With the insert I had put in, yes.

Q. Now, I questioned you just before the recess as to how long after September 14 you continued to be Mr. Marcus' lawyer, and you said you thought approximately at least a year? A. But it's a rough guess.

Q. I show you Exhibits DME-36, 37 and 38, all of which purport to be letters sent by you; DME-38 is directed to Bill Miller's Riviera, DME-37 to William Miller, DME-36 to William Miller; and I ask whether you sent those letters?

(Witness examines documents.)

A. Yes.

Q. At whose direction did you send those letters? A. Mr. Marcus in each case.

Q. And you will notice the dates that appear on these letters; one is marked March 7, 1949; one is June 7, 1949, and the other is June 8, 1949.

Now, on these occasions were you still representing Mr. Marcus as his attorney? A. I guess so. Apparently so.

Q. Now, up to this time— A. Excuse me, before I go any further, Mr. Brigadier. (1955) I may say that Mr. Marcus at all times had about three or four different lawyers, so that when you say "representing him" I was not representing him exclusively at any time.

Q. I never said "exclusively." A. No.

Q. I merely wanted to know whether there was still a relationship of attorney and client between you. A. Correct, yes.

Q. Now, the relationship, you say, finally did come to an end? A. Yes, it did.

Q. And did you then turn over all your files to him, when it came to an end? A. No, he picked up one or two. And

then later on he picked up another one or two, and subsequently picked up the litigation files, you know, where things were pending. And then later he picked up some dead files. And it just stretched out over a period of years.

Q. Now, when the relation came to an end, did it come to an end with any quarrel between you and Mr. Marcus? A. No quarrel, he just was cutting the bills, and the office just wouldn't put up with it any longer. And I told him if it happened again there wouldn't be any (1956) further business between us. And he said, "You are charging too much," or "Your bills are too high," or "I can't afford it," something like that. And it just stopped, that's all.

Q. This office that you are referring to, I take it, is Alfange & Friedman, is that right? A. That's right.

Q. With which you are connected? A. That's right.

Q. So they would bill him for services rendered by you? A. Correct.

Q. Now, Mr. Schwartz, when did you learn that an interpleader suit had been brought in New Jersey, the present suit, in which Mr. Marcus had been named as a defendant? A. I am not quite sure about that, because it goes back a couple of years, and I can't remember exactly how it came to my attention.

Q. Well, did Mr. Marcus come to your office when he had been served with the summons and complaint? A. He called me on the phone, and he said—to paraphrase, of course, because I certainly don't recall what he said—he said, "Bob, I don't think I got a square deal from Bill Miller." He didn't mention anything about (1957) litigation pending. He said, "I don't think I got a square deal."

I said, "I know, you said that before, but what about it?" He said, "I don't think he treated me honestly." And I said, "In what respect?" He said, "I think he was taking money off the top." That's an expression that all the money that is collected in a given place appears on the books.

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I said, "Well, can you prove it?" He says, "No." I says, "What's the use of talking about it?" He said, "But I know it." I said, "If you can't prove it, there is nothing to talk about." He said, "Well, I've decided I am going to sue Bill Miller."

So I think at that particular moment—in that conversation, I mean—he mentioned the fact that they had served an interpleader suit, although he didn't use those words. He said, "Papers have been served on me."

Now, it may have been at that conversation, or a day later, but he said to me, "Do you know a good attorney in New Jersey?" And I said, "Well, I have had very satisfactory dealings with Hannoch & Lasser." And I said, "If you want to do anything, although I don't know where your case lies," I said, "go over and talk to Hannoch."

He said, "Well, you make an appointment for me. I don't like to go out by myself." So I said, "Well, who are (1958) you going with?" He says, "I am going"—I think —"with Mr. Roth." So I said, "Fine. Go with some attorney, because I think you should."

Q. Was Mr. Roth the attorney to whom you had, on prior occasions, turned over a number of other matters that you were handling for Mr. Marcus? A. I don't recall exactly, but I think so. I don't recall.

Q. Did Mr. Roth come to see you with Mr. Marcus before going to Newark, do you know? A. Before? Well, around the time. I don't know whether it was exactly before or after, but, you know, some time in that period of time.

Q. Well, were you questioned about this transaction of September 14 at that time? A. By whom?

Q. By Roth and Marcus. A. No. They just asked me to make an appointment for them with Hannoch & Lasser, which I did. And I called up Hannoch and I told him about the case. And he said, "On what basis are you going to sue?" And I said, "On the—"—Marcus says—

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Mr. Grosman: If your Honor please, I must object.

The Witness: All right.

(1959) The Court: Yes, I will sustain it.

Mr. Grosman: What Hannoch said to him or he said to Hannoch—

The Witness: Correct.

The Court: As the result of that, what happened?

The Witness: As a result of that appointment I made I know that Marcus and Roth went to see Hannoch, because Hannoch called me.

Q. You can't tell us what Hannoch told you. A. No, no. I mean, he called me and he said they were out there, but he had not come to any conclusion with them.

Q. Now, when did they pick up the file from you? A. Hard to say.

Q. I mean, in relation to that date. A. I really don't know. Maybe if you have a memorandum, you know, a receipt for it, I may be able to tie it together. But outside of that—

Q. I don't have a receipt. A. I don't have a receipt for it. As a matter of fact, he needed the file in this case in such a hurry that although I was on trial at the time, he left word at my office that he had to speak to me. So during a recess in court I called him at his place of business and he said he (1960) had to have the papers immediately.

So I called my office and authorized them to turn over the file to him. And I didn't get a chance to go through the file because he claimed he needed it urgently.

Q. Now, after the file was turned over to him, did you receive any calls from Mr. Marcus? A. Yes.

Q. In the first place, did he ever come to see you in person? A. Yes, he came up one day. I don't know whether or not we went downstairs for a cup of coffee, or something like that. It was about 4 o'clock in the afternoon. I can

remember it wasn't just in one place. You know how you can't pin these things down, but I sort of recollect—

Q. Was this before or after you received these calls from him? A. After.

Q. Then tell us about the calls first. What happened about the calls? A. Well, you heard about the one call. And then the call for the file. First there was a call to make an appointment—to recommend an attorney. Then I called him back to tell him the appointment had been made. Then there was a third call in which he wanted to see me, and he came up to see me.

(1961) I see. What happened when he came to see you? A. Well, as I say, I am not absolutely sure whether or not we stayed in the office or went downstairs. He stayed about a half hour. And he was telling me about his conversation with Mr. Hannoch. He said he was very favorably impressed with him, he liked him a lot, but he had wanted to charge him too much, and he didn't want to pay that much for the case.

I said, "That's your privilege." And then he discussed with me whether I knew anything that would help him prove that Bill Miller had taken any money off the top; in other words, represented that the receipts were less than they were.

I said I didn't know anything of it until he had mentioned it. You know, I had no particular knowledge of that. And I still don't know whether it is false or not.

Q. Now, did you then receive any further telephone calls from Mr. Marcus? You know that in the taking of the depositions you were questioned about certain monitored telephone calls. A. Oh, yes. There were about two or three phone calls after that and—

Q. Were these, incidentally, after or before you went to see Judge Grosman, do you recall? (1962) A. Not offhand, no. About, you know, within the year or so.

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Q. But you don't know whether they were before or after? A. I think afterwards.

Q. Then let me take the visit to Judge Grosman first. Did you receive a request from Mr. Marcus to go to Judge Grosman's office? A. Yes, I did.

Q. And how did you receive that, by telephone or in person? A. By telephone.

Q. And did you arrange with Mr. Marcus to go over there? A. I think I told him I couldn't make it then, I'd make it a week later, or something of the sort.

Q. I show you Exhibits DM-37 and DM-38 and ask you whether the originals of these were prepared by you, or dictated by you? A. Yes, they were.

Q. At your office or where? A. At my office.

Q. Were these signed, the originals signed, by Samuel Marcus? A. Yes.

(1963) Q. And delivered to you? A. That's right.

Q. Now, those are the ones— A. I gave them to you before. You asked for them.

Q. I show you now the originals of these Exhibits, dated March 3, 1952. Those were signed by Samuel Marcus? A. That's correct.

Mr. Brigadier: I wish to offer the originals in evidence.

The Court: In place of the copies?

Mr. Grosman: No objection.

Mr. Brigadier: They could replace the copies, if there is no objection.

Mr. Grosman: I have no objection.

Mr. Brigadier: The copies do not have any signature on them. They are the ones Samuel Marcus produced. It might be better to mark them as separate Exhibits, sir.

I will offer them as our Exhibits for that reason.

The Clerk: DME-64 in evidence, letter dated March

3, 1952; DME-65 in evidence, letter dated March 3, 1952.

(Received and marked Exhibits DME-64 and 65.)

Q. Mr. Schwartz, were DME-64 and 65 prepared by you before you went to see Judge Grosman? (1964) A. No.

Q. Were they signed by Samuel Marcus before you went to see Judge Grosman? A. No, afterwards.

Q. Well, will you tell us about this request that Mr. Marcus made to you, and what you did about going to see Judge Grosman? A. Well, he asked me if I would come out, and I said I didn't want to mix in the case, I didn't want to have any part of it, I knew I was going to get involved in it, and didn't want to get involved in any hearings and examinations. Little did I know.

And he said, "You have got to do it. You owe it to me as a favor and as a friend." And I said I would. We made an appointment. And he claims he was supposed to meet me at Penn Station and I said he was supposed to pick me up at the office. And he didn't show up, so I went about my business.

And about an hour or two later I received a telephone call from Sam Marcus saying, "Where are you? I am out here in Jersey." And I said, "You were supposed to pick me up." And he said, "Well, it's a misunderstanding. Can you come out next week?" And I said I could. And we went out to Judge Grosman's office at about—well, I would say about 2:30—I don't know—in the afternoon.

(1965) Q. Now, Mr. Schwartz, before you went to Judge Grosman's office, had Marcus told you anything about whether he had been giving any testimony in any depositions? A. There was some conversation about depositions, but I don't recall exactly when it occurred. And he sent me up a copy of his deposition.

Q. Did he tell you why he wanted you to come to Judge Grosman's office and what you were going there for? A.

He said, "My lawyer in New Jersey wants to know what this case is all about, and you can help me." You know, paraphrased.

Q. Now, when you got to Judge Grosman's office, was Judge Grosman there? A. He was.

Q. Did you go there this time with Mr. Marcus? A. Yes, Mr. Marcus met me and we went out directly to Penn Station—from Penn Station.

Q. Who else was in Judge Grosman's office besides you, Mr. Marcus and Judge Grosman? A. Another person whom I thought at the time looked like Mr. Tepper, but I understand is not Mr. Tepper, so somebody else.

Q. You don't know who that person is? A. I can't place who he is.

(1966) Q. Where did that person sit in relation to you and the others in the room? A. Mr. Marcus and I sat on one side of the desk, Mr. Grosman sat behind the desk, and this fourth person sat somewhat to the rear and to the left of Mr. Grosman.

Q. Now, will you tell us what occurred in Judge Grosman's room? A. Well, he asked me to tell him the whole story about what occurred. And I told him, more or less, what I have told you now, although in different words.

Q. Did he question you about the number of shares of stock that had been sold that day? A. No, not at the beginning. He was mostly concerned about what I knew about the case that could contribute to it. I know he said, "What could you tell us?" or "How can you help us in this case?" And I was glad to tell what I knew about the circumstances of putting this stock up in escrow. But we didn't particularly discuss the number of shares until later on, after I finished my version of what had occurred.

Q. You say you told him what had occurred, which, you say, was substantially what you testified today? A. Yes.

Q. And then what happened? A. Then Mr. Grosman said

to me, "Would you be willing to (1967) sign an affidavit for us?" I said, "I suppose so. What's it about?"

He said, "Would you sign an affidavit that it occurred something like this?" And he said that it was a very confusing meeting, and that maybe I didn't understand what had occurred at the deal, you know, at the closing on September 14—

The Court: That you, as a lawyer, didn't understand?

The Witness: Yes.

A. (Continuing) And I said, "That's not so. I understood perfectly that we were getting out of the deal." He said, "Now, couldn't it have happened this way?" mentioning another possibility which I can't recall.

I said, "No, it didn't happen like that, this is the way it happened," and I recited it all over again. And he said to me, "Well, now, couldn't it have happened this way?" So I said, "No, it didn't happen that way, either. It happened this way."

And this kept up—of course, I don't mean to overexaggerate this. There was about an hour of narrative story, you know, with questions and answers, and then about a half hour of this questioning back and forth in which I refused to sign an affidavit which didn't conform with the fact.

(1968) Q. Now, what was happening to Mr. Marcus throughout this discussion? A. Well, you mean, what did he say?

Q. Yes. A. Not very much. I don't recall anything he said, particularly, that would be worthy—

Q. Were any parts of Mr. Marcus' deposition read to you by Judge Grosman? A. No.

Q. Were you told by Judge Grosman that Mr. Marcus had testified to any set of facts in the deposition? A. Any set of facts.

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Q. Any set of facts. A. What he had said, you mean?

Q. Yes. A. No, I don't think so. I think most of the—most of the questions were directed—did I know this, and did I know that, and could I help him?

Q. Did you leave that room in a friendly manner? A. I was not very pleased about the whole thing, no.

Q. Did you have any words—or exchange any words with either Judge Grosman or Mr. Marcus? A. No, except I was very emphatic that it did not occur in the way it was suggested to me in the last part of the conversation. I emphasized that what had occurred was the (1969) way I had told it to them the first hour. Of course, I don't remember whether it was 45 minutes or so—you know, during the first part of the conversation.

Q. Then what happened, you left the place? A. I left the place, and I sort of walked out and left Mr. Marcus behind. He grabbed his hat and coat and followed me. He met me at the elevator landing, and I was sort of sizzling a little bit, I guess, and he tried to calm me down.

Then he joined me on the ride back to the city. We got to Penn Station and he said, "I will drop you off at your office." And we got into a taxi, and we went back to my office.

Instead of continuing, he followed me upstairs and he said, "Now, calm down, Bob," or—you know, this sort of thing, "Take it easy," moving his hand back and forth. And I said, "I am very much annoyed about this whole thing. You are making claims that I misunderstood you, or deliberately misunderstood you."

He said, "I didn't say that." I said, "I know, but from the way the questions were phrased to me at the meeting the implication was that you must have told it, or otherwise how would I be asked about it?"

He said, "Take it easy; take it easy." I said, "I am not going to take it easy. I am not going to do another (1970) thing for you unless you give me a letter saying

that you are not claiming that I did anything wrong, because I don't want to have any arguments whatsoever with the office."

So he went upstairs in the elevator with me to my floor, and we called in a stenographer, dictated, he signed these letters, and then he patted me and says, "Now, take it easy; take it easy." And he left. I gave him a copy of the letters to take with him.

Q. Do you know whether he called Judge Grosman before he signed those letters? A. In my presence, you mean?

O. Yes. A. No.

Q. Well, he was with you from the time that you dictated the letters, and they were drawn and signed. A. Positively did not.

Q. Did he during any part of that time call Judge Grosman? A. That is not so. He did not.

Q. Now, I understood it was after you had been to see Judge Grosman that the monitored conversations—what you since learned were monitored conversations took place by telephone? A. I didn't since learn. Sam Marcus has a great habit of (1971) making a record of every telephone conversation that he thinks is of the least importance. He always has somebody make a record of it. It is nothing new. In fact, if you will look at my depositions, you will see that every time I speak to Sam Marcus I say, "Okay, make a record of this, Sam," or something to that effect.

Q. Had he told you on prior occasions that he monitors conversations? A. He had told me and I knew about it.

Q. Has he told you what methods he uses to monitor conversations? A. At one time he was experimenting with tape recording, he was very interested in tape recordings. But I don't know why he got off those. And then at one time somebody would listen in on the phone and the stenographer would write it down. And I don't know whether I have any recollection of these plastic type of records,

or not, but I recollect the tape. He used tape a couple of times. He told me about that.

Q. Now, how soon after you had been to Judge Grossman's did you receive the first of these calls? A. Well, afterwards.

Q. A matter of months? A. I don't know.

Q. You don't recall? (1972) A. No.

Q. Do you recall what the conversation was, what he said to you and what you said to him? A. "Why don't you —why are you so elusive? Why don't you help me?"

Q. Is that what he said? A. Well, something like—you know.

Q. We have got to know. We don't know—"Why so elusive?"—who is saying what? A. Oh, I'm sorry. Mr. Marcus would say, "Why can't I get in contact with you?" or "Why don't you help me?" or "Why are you brushing me off?" And I would tell him I am not brushing him off, all he has got to do is come down to the office.

His idea was that I was to drop everything, and spend time with him on this. And the office wouldn't put up with it. Because I have to put in a sheet where I go every day and what I am doing. And they were getting pretty fed up, you know, with wasted time, as they are now.

> The Court: I was going to say, I guess they are not very happy now, are they?
>
> The Witness: Well, I wouldn't say I was the most popular person in my office this week.

Q. As a matter of fact, your relationship with Mr. Marcus was terminated, was it not, on the insistence (1973) of your office? A. Well, it was mostly on the grounds of the bills, I think that's what brought this thing to a head, because we would do something, and we would mail out a bill, let's say, at random—I don't recall a particular bill—let's say $250. It would come back crossed out, a line

would be drawn through the two hundred and fifty, it would be a hundred and fifty or a hundred and sixty, and there would be a check for $160. No letter. So the office would call me—you know, the man who took care of it would call and say, "Is this on account or is this in full? What is the idea? And who said you should adjust a bill without taking it up?"

So after this had occurred about four or five times within a period of two or three months, the office said to me, "If that's going to be the regular procedure, let's forget about him. We don't need it. Let's drop it."

And Sam Marcus knows that. There is nothing novel about it. I told him to cut out the cutting of bills or there wouldn't be any further relations.

Q. I would like to get back to the monitored conversations. I digressed somewhat from it. Will you tell us just what did take place; did you say anything to him about your knowing that it was being monitored?

Mr. Grosman: He said so.

(1974) A. I did.

Q. What else was said in the conversation; anything else you recall? A. There were a lot of things said. He said to me, "Why don't you do something or another and help me out," or something like that. And then he started—he said something that was so untypical of Sam Marcus that it made me really burst out laughing, it was really hilarious.

He said, "I want you to know that justice will triumph, and that some day, in some court, somewheres," you know, and that sort of stuff. And I said, "That's a wonderful speech, Sam," or something to that effect, "but you don't have to worry, we are not writing it down at this end."

That is something he would never say in a million years, unless he was instructed to do it, and he wasn't reading from a piece of paper. Because never in his life did he ever say, "Justice will triumph," or the equivalent of that.

It's just ridiculous. It's even older than the stuff you see on television. It goes back to the silent movies.

Mr. Brigadier: If your Honor please, may I ask that we recess at this point? I have to teach at 4:30 and will just about make it. We only have about another two minutes, but I would like to have the advantage (1975) of those two minutes.

The Court: All right. Now, how long do you think you will have Mr. Schwartz?

Mr. Brigadier: I don't think any more than about ten minutes.

The Court: Is that all?

Mr. Brigadier: Yes, I think I will be through in about ten minutes.

The Court: All right. We will adjourn till tomorrow morning at 10:15 o'clock. You had better make it 10:30, I have got a weekly call tomorrow.

(Whereupon, the hearing was adjourned to be resumed Friday, February 25, 1955, at 10:30 A. M.)

(1976) Newark, N. J., Friday, February 25, 1955.

(Hearing resumed pursuant to adjournment.)

(Appearances as previously noted.)

Mr. Brigadier: I have but one question I want to ask Mr. Schwartz; or, rather, two.

ROBERT J. SCHWARTZ, resumed the stand.

Direct examination by Mr. Brigadier (continued):

Q. Mr. Schwartz, at the closing, on September 14, there was paid over the sum of $10,000 in cash, was there not? A. I was so informed, yes.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Direct

Q. Did Mr. Marcus make any objection at that time to the tender of cash?

Mr. Tepper: I must object to that. The witness says, "I was so informed." I didn't want to object to hearsay, but now the next question is: Did Mr. Marcus object to the tendering of cash?

The Court: Do you know of your own knowledge that he got ten thousand in cash?

The Witness: He told me he did.

The Court: Oh, he told you.

The Witness: Yes, he told me he got $10,000 (1977) in cash.

The Court: You should have said, "I was so informed by Mr. Marcus."

The Witness: I was so informed, I said.

The Court: Mr. Tepper would have saved his breath.

Mr. Brigadier: He could still answer my other question, and that is, simply, whether or not Mr. Marcus at any time at the closing on September 14 made any objection to a tender of cash. A. No, not to me.

Q. Was there anything said by him to you that he didn't want to take any cash? A. No, he always dealt in cash. There was nothing unusual about that.

Q. Was there any conversation by you to him that he was required to take cash because cash was legal tender? A. No.

Q. No such conversation? A. No such conversation.

Mr. Brigadier: That is all, Mr. Schwartz.

The Court: Before you start, Judge Grosman, I want to compliment Mr. Brigadier. He really only asked two more questions.

(1978) Mr. Grosman: He kept his word. He is a man of his word.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

Cross examination by Mr. Grosman:

Q. Now, Mr Schwartz, how long have you been practicing law? A. Since 1937.

Q. You have been actively engaged in the practice of law? A. Well, I was in the Navy for several years during the war.

Q. When did you come out of the Navy? A. About the tail end of '44 or early '45.

Q. And since that time have you been actively engaged in the practice of law? A. That's right.

Q. And you have had considerable experience in the commercial law, have you? A. About average, I suppose.

Q. You know something about corporate organization and management, transfer of securities? A. About the same as any other lawyer.

Q. Well, some know a little more than others about that subject. Now, are you and Mr. Marcus on friendly terms now? A. Not now.

(1979) Q. When did you cease being friendly? A. When I found out what he had told you, and what he had testified to in his depositions in this case.

Q. You ceased being friendly with him then? A. That's right.

Q. Prior to your having heard him testify on the depositions— A. Not heard. I didn't hear him testify.

Q. Well, how did you learn of it? A. Well, I learned from a visit to your office, and I learned from a copy of the depositions, which Mr. Marcus supplied to me.

Q. You have read the depositions supplied to you by Mr. Marcus? A. Yes, I read part—I read them over. I can't recall exactly when that was. I don't know which came first, the meeting with you or the depositions, but it was all part of, you know, the same general area.

Q. Well, now, is it your recollection that at the time that you came to my office the depositions had already commenced? A. I don't know.

Robert J. Schwartz—for Intendant Milmar Estate—
Recattal—Cross

Q. You don't know? A. I don't recall. I wouldn't have any way of knowing.

Q. Now, let me ask you this. You were only to my (1980) office once? A. That's correct.

Q. And that was with Mr. Marcus? A. That's right.

Q. Now, do you recall when that was? A. A couple of years ago.

Q. Is that the nearest you can place it? A. Well, I can place it more exactly, if you will give me the memorandum which Mr. Marcus signed, and which was introduced in evidence—the originals were introduced yesterday—because when we returned from your office Mr. Marcus followed me back to my office, because he saw I was—

> The Court: Don't go through all that again. You have the memorandum, if that will help you fix the time.
>
> The Witness: That will do it exactly, because it had to be that day.
>
> The Court: That's all Judge Grosman wants to know.
>
> The Witness: It will have to be that day. And having these in front of me, with the date of March 3, 1952, that is the day I was at your office.

Q. Is that the only way that you can fix that time? (1981) A. Surely.

Q. No other way? A. I don't see how, no.

Q. Well, I thought you told us yesterday that you keep work sheets which you turn in to your office. A. That's correct.

Q. Wouldn't they show the date on which you came over to my office? A. There are two reasons why it wouldn't. In the first place, this is not a matter in the office, so I wouldn't put it on the work sheet, in any event; and, secondly, the work sheets wouldn't be retained at the present time, not now.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

Q. How long do you retain work sheets? A. Until they are transferred onto a card file system the office has on each particular case.

Q. Wouldn't some record in the office show when you came to my office? A. Yes, if I had written it down, but this was not a matter in the office, for which we were collecting a fee, and therefore it didn't belong on the sheets. However, I had to put it down to explain where I was that particular afternoon.

Q. Well, did you make a notation on some record in your office where you had been that afternoon? (1982) A. Yes.

Q. So there is some way other than by reference to these letters whereby you can fix the time. A. No.

The Court: He said he doesn't have it any more, so he can't now.

Mr. Grosman: He transferred these things, your Honor, to a card.

The Court: Not to the cards. He said only to explain where he was that afternoon, since it is not a matter of the office, for which they were being compensated.

The Witness: It does not get transferred to any card, it just gets disregarded. But at least the head of the office knows where I was. If he was curious where I was at 3 o'clock on March 3, 1952, he at least knows that I was out visiting some lawyer on a certain old matter of the office, and he wouldn't think I went to the movies.

Q. Any particular reason why you shouldn't have charged Mr. Samuel Marcus for the time consumed to come from New York to my office at his request? A. I just don't do things like that. Sam Marcus said to me, "Please come out. I will pay you—"

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

The Court: Let's just stop a minute. Are (1983) we going to waste a lot of time about something that is not going to help here at all to determine the issues in this case? What do I care why he didn't charge; how will it help to solve—

Mr. Grosman: It goes to the credibility. I don't know why a lawyer shouldn't be requested—shouldn't charge for a half day's service in coming out from New York to New Jersey to talk to me about a case at the request of a client.

The Court: You wouldn't understand from what their relationship had been prior thereto why he came to your office without charging?

Mr. Grosman: No, your Honor. Because I understand the relationship was not pleasant at that time. He had ceased to represent Mr. Marcus, there had been some differences between them over that 32nd Street transaction.

Th Court: I heard all of it. Are you interested to know why he didn't charge?

Mr. Grosman: Well, it's not too important.

The Witness: I will be glad to answer you, if you want me to.

Q. Now, Mr. Schwartz, tell me this, you made two appointments with Marcus to come to my office, did you not? A. That's correct.

(1984) Q. And the first time you failed, for some reason, to connect and you didn't get to my office. A. Sam Marcus told me he would pick me up at my office and he didn't. He went to Penn Station and then went straight out to you. I didn't even know your address, so obviously I couldn't go. When he didn't show up, I went about—and did whatever I could to make up for that lost time.

Then he called me up from your office, or from the railroad station, and said, "Where are you?"

Q. Well, never mind that. You didn't contact Marcus and you didn't come to my office the first time? A. That's correct.

Q. Now, Marcus called you up from my office on that day and asked you what had happened? A. I don't know where he was, but he called up some half hour or hour later and said, "Where are you? I am out here some place in Jersey," or something of that sort.

Q. So a second appointment was made to come to my office? A. That's correct.

Q. Now, on that second occasion you did come to my office with Sam Marcus? A. Right.

(1985) Q. Now, who do you say was present at my office on the occasion when you came there? A. Sam Marcus, myself, you and some other gentleman from your office.

Q. Another gentleman from my office? A. Yes.

Q. Do you recall being asked that same question on depositions? A. There was pages of big discussion about what I—

The Court: He asked you a simple question. Do you recall or don't you recall?

The Witness: Recall what?

Q. Being asked the question on deposition that I am asking you now. A. What is the question?

The Court: Mr. Bremer, will you give it to him?

(Question read as follows: "Do you recall being asked that same question on depositions?")

The Witness: What question?

(Question read as follows: "Now, who do you say was present at my office on the occasion when you came there?")

A. The answer is yes.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

The Court: One little word, yes.

(1986) Q. Were you asked that question? A. Yes.

Q. What answer did you give at that time? A. I said I thought that a Mr. Tepper was present. I was under the impression that was his name.

Q. Did you say you thought Mr. Tepper was there, or did you say, in fact, without any qualification, that Tepper was there? A. I can't answer that, because you have got emphasis in it and I don't know whether I said it with emphasis. I don't think I said it with emphasis.

Q. All right, disregard the emphasis.

Mr. Grosman: That's the way he carried on all during these depositions.

The Court: We will get nowhere if you keep up like that, Mr. Schwartz.

Mr. Brigadier: I object to this remark made by Judge Grosman and ask that it be stricken from the record, that this is the way he carried on through the depositions.

The Witness: Judge, the question was phrased so that I said it with emphasis to indicate that I was absolutely positive. And if you will read the deposition, you will see that I said Mr. Tepper, I thought, was present, and if it isn't Mr. Tepper, I don't know who it (1987) was. It was some nonentity. He just sat there in the room and I don't know who he was.

The Court: You shouldn't say he is a nonentity. You don't know who he was.

The Witness: I mean in the sense that I don't recall his name.

The Court: Weren't you introduced to a stranger?

The Witness: Sure, but it was several years ago.

The Court: All right.

The Witness: I don't remember his name.

The Court: I can understand how you don't remember. You don't have to apologize for that. Are you sure now that it wasn't Mr. Tepper?

The Witness: Mr. Tepper has met me outside of the case and told me several times he was not present at the time. I am willing to say, if that is so, he wasn't present. Great.

The Court: I think you can take his word for it.

The Witness: Sure. I told him that. So he wasn't.

By Mr. Grosman:

Q. I direct your attention to page 70 of your (1988) deposition—

The Witness: Can I have a copy?

The Court: Yes. We will give you mine. I don't need it.

Q. —your deposition of July 7, 1954. You were then being examined on direct. A. Will you please hold it? Page 70?

Q. Page 70 of your deposition of July 7, 1954. A. Okay.

Q. You were then being examined on direct, I assume, by Mr. Brigadier—yes. You were asked this question: "Question: I want to direct your attention particularly to the date of the commencement of the taking of Mr. Marcus' first deposition on December 19, 1951; whether you have any recollection of his ever coming to you since the commencement of this deposition of his?"

And you answered, "Well, I can't place it exactly in time, but I think it must be after this particular litigation started. I don't recall the exact circumstances of it, but one way or another he spoke to me on the phone, as I recall—I can't remember who initiated the call, I think he did—and he said would I go out and see Mr. Grosman. And I asked who he was, and he told me who he was, and we arranged to go out about a week later.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

(1989) "Then Mr. Marcus didn't show up that particular day and he called me later in the day to say that he was waiting for me at the Pennsylvania Station, and I had been waiting at my office, and apparently we had got our signals crossed. So we made a subsequent appointment and we went out to see Mr. Grosman.

"Question: You and Mr. Marcus?

"Answer: Yes.

"Question: At Mr. Grosman's office?

"Answer: Yes. And Mr. Tepper—is that your name?

"Mr. Tepper: Yes.

"Answer—and Mr. Tepper, I think, was present, Mr. Grosman, Mr. Marcus and myself.

"Question: Will you fix the date of this in some way? I mean, you knew there was litigation already pending, you say.

"Answer: Yes, I am sure the litigation was pending."

A. Is this a question?

Q. Just a minute, I will get around to it.

Now, on page 71:

"Question: Well, somebody said it wasn't that kind of a deal."

A. Wait a second. Are you skipping this paragraph here? Oh, you went down to here.

(1990) Q. "Answer: Something to that effect. And I can't recall whether it was Mr. Grosman, Mr. Tepper or Mr. Marcus who said that. The effect was: 'Well, wasn't it really understood that only 650 shares were being sold?' And I can't recall who said it, so I am mentioning that because your question is: Did Mr. Marcus come to see me? so since I can't figure out which one, I will answer it that way.

"Question: That is what I am trying to find out. You say you went to Mr. Grosman's office, that Mr. Tepper was there, that there was a discussion as to the transaction that had taken place on September 14, 1948, is that right?

"Answer: Yes, that's right."

Now, do you still say that Mr. Tepper was not there? A. I refer you to the bottom of page 70.

The Court: He is going to say where he said, "I think," is that right?

The Witness: That's right. I am not sure. And I say now I don't know. And what of it?

Q. And this is on direct examination. A. Right. I just gave the best honest answer I could and I still don't know if he was there or not. He tells me he wasn't. I thought he was. If he wasn't, he wasn't, that's all.

Q. Well, now, you did say that Mr. Tepper was there. (1991) A. I said, "And Mr. Tepper—comma—I think—comma—was present."

Q. Well, later on you speak of Mr. Tepper possibly having asked you a question, do you not? A. If it wasn't Mr. Tepper, the other gentleman asked me a question or two.

Q. What was your answer?

The Court: Give it to him, Mr. Bremer.

(Answer read.)

Q. Well, now, are you as sure that there was another gentleman present on that occasion as you are that it was Mr. Tepper who was there? A. Since I only qualified Mr. Tepper's presence by saying "I think" he was present, I am just about as sure today as I was then, less his reassurance that he wasn't present.

Q. You might have been mistaken about Mr. Tepper being present. A. Certainly. Of course. I didn't deny it for a minute.

Q. Is it possible that you are mistaken that there was another man there? A. I don't think so.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

Q. You are sure about that? A. Yes. I just don't know his name, but it was some (1992) other person.

Q. You weren't introduced to that other person? A. I was.

Q. Do you remember his name? A. No.

The Court: It would have saved a lot of time if you would have remembered his name. About 20 minutes we would have saved this morning.

Q. Now, you say that somebody asked you repeatedly on that visit to my office: Didn't the thing happen this way; or didn't the thing happen that way?—referring to the transaction of September 14, 1948. A. No.

Q. Isn't that what you said—could it have happened this way?—and then proceeded to give you a hypothetical theory upon which it could have happened? A. Which of those two questions do you want me to answer?

Q. I want you to answer—

The Court: Hold it a minute. If you are going to continue like this, Mr. Schwartz—I don't want to say you are playing smart in being evasive—

The Witness: Judge, there are two questions.

The Court: Just a minute. We are not going to discuss it. Give him the question, please. You don't (1993) do this to Mr. Brigadier.

The Witness: He didn't ask me two questions at one time.

(Question read.)

The Court: That is, the transaction could have happened.

Mr. Grosman: Yes.

The Witness: All right. I can answer that part, sure.

A. Yes, you did.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

Q. I did. Now, how many of these hypothetical theories did I suggest to you? A. They weren't theories. You would say, for example, wasn't it possible that Sam Marcus was selling only half his stock "and you didn't understand?" and I'd say, "No, that's not true." And then I would explain to you why that couldn't have been true.

Then you would say, "Wasn't it possible that, for example, Miller and Marcus had a secret deal and you didn't know about it?" And I'd say, "No, that's not true, either."

And then he'd say—not "he," you—you would say to me, "Well, isn't it possible that you were confused about the instructions that Sam Marcus gave you?" And I'd say, "No, I wasn't confused. He was getting out of (1994) the deal."

Then you said to me, "Well, is this possible, that it was such a noisy session that you and Lieberman were so confused that you didn't know how many shares were being sold?" And I'd say, "No, that is not possible, either."

Q. And you say that I am the one who made those suggestions to you? A. I am.

Q. You are positive of that? A. I am positive.

Q. Now, I direct your attention, Mr. Schwartz, to your testimony on deposition, on page 71 of that same book that I referred to, wherein you were asked this question:

"Question: Well, somebody said it wasn't that kind of a deal."

And your answer, "Something to that effect. And I can't recall whether it was Mr. Grosman, Mr. Tepper, or Mr. Marcus who said that. The effect was: 'Well, wasn't it really understood that only 650 shares were being sold?' And I can't recall who said it, so I am mentioning that because your question is: did Mr. Marcus come to see me? so since I can't figure out which one I will answer it that way."

(1995) You are now certain that it was I who propounded those hypothetical questions to you? A. Yes, I am. And I will tell you why. Because when I was examined at this particular time, this was some six years later, but now that the case has been mulling around, and I have been examined extensively, a lot of this stuff has come back to me and I have been able to reconstruct it.

Now, in regard to any one word, or any one question that was presented on that particular day, even though Mr. Marcus may have presented the question, rather than yourself, at any one time, although most of the talking was done by you—Mr. Marcus was fairly silent, as I recall—nevertheless, you would pick it up and argue it with me. So that it would be restated by you, even if Mr. Marcus had originated it.

Q. Why didn't you say that in response to Mr. Brigadier's question on your deposition? A. Because this was the first time I had even given a thought to the entire matter in six years, and I was just reconstructing this whole thing in my mind, and I think I did a fairly good job. And I wonder if you could do as well after six years.

Q. Now, was your memory better back in 1954 than it is now? (1996) A. I don't know how you can answer that question.

Q. Well, you can't answer that?

The Court: You know that is a stock question that is asked.

A. No, it's the same. How is that?

Q. Now, how long did this meeting last at my office? A. Oh, over an hour.

Q. Are you sure about the time? A. Well, I didn't use a stop watch, and I generally go by a sort of feeling for time, and I assume it was somewhat over an hour.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

Q. Might it have been a half hour? A. No.

Q. Was anything else discussed at my office on that occasion besides what you have told us? A. Oh, yes, a few odds and ends, and different things. I can't recall just—

Q. Were you asked anything about your 125 shares of stock? A. Yes, there were a few questions about that. I was asked whether or not my stock was not—was included or not included in the deal.

Q. What did you say? A. I say I was asked whether my stock was included or (1997) not included in that deal of September 14.

Q. You were asked that question? A. Yes.

Q. What answer did you give? A. That it was included.

Q. That it was included. A. Uh-huh.

Q. Let me direct your attention to the question put to you by Mr. Brigadier on deposition with respect to this subject, page 72:

"Question: Had you been told that Mr. Marcus had testified that the sale did not include the 125 shares that you owned?

"Answer: Not at that time. I don't believe so. I may be wrong, but I don't think so.

"Question: You don't recall having been told that?

"Answer: No."

Now, you still say that you were questioned respecting your 125 shares? A. Yes.

Q. Your answer is yes? A. Yes.

Q. Well, how do you reconcile your present answer with the answer you gave Mr. Brigadier on deposition? A. I will refer you to this answer. "Not at that time. (1998) I don't believe so. I may be wrong, but I don't think so." It is just a recollection. We went over the entire deal.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

Q. What has caused you since to make up your mind that you were questioned about the 125 shares on your visit to my office?

Mr. Brigadier: Now, your Honor, I have refrained, and I will continue to refrain from interposing objections.

The Court: Don't apologize. Just object, if you want to object.

Mr. Brigadier: It is important to note that this deposition does not say what Judge Grosman has said it says. The deposition says—

The Court: I heard what it said from two people already.

Mr. Brigadier: All right. Then you know that what I have said is so.

The Court: What did you say that is so?

Mr. Brigadier: I say that the deposition did not cover the testimony that he is giving here. The deposition covered something else. The deposition asked had he been told—

The Witness: It's not necessary.

Mr. Brigadier: —that Mr. Marcus had testified that the sale did not include the 125 shares (1999) "that you owned?" And he answered, "Not at that time."

The Witness: Mr. Brigadier—

Mr. Brigadier: But the question—just a moment—that he had been asked here this morning was—

The Witness: Did I discuss it with him? It's two different things.

Mr. Brigadier: —whether or not his stock was included in the sale, which is a different question.

The Court: I know it is.

The Witness: We all know that. There is no connection.

Mr. Brigadier: But that isn't what he just said.

The Court: I know it isn't. You would think I was an old time Justice of the Peace or Recorder listening to this case.

Mr. Brigadier: If you had the deposition in front of you I wouldn't have gotten up. But I know you have loaned him your copy. May I give you another copy? I think we have one here. Then I won't have to do this.

The Court: Well, I hate to go wandering all through depositions, I'll tell you right now.

Mr. Grosman: Well, your Honor, in my opinion—

The Court: You have a right to resort to it, (2000) to contradict him. If he said otherwise in the deposition, I don't blame you.

Mr. Grosman: I think there is a contradiction between what he said then and what he said now. And while I hate to take all this time, you realize, of course, that this man is a hostile witness.

The Witness: I am not a hostile witness.

Mr. Grosman: I didn't ask you anything, Mr. Schwartz.

The Court: You have a bad habit of—

The Witness: Well, you have no right to call me a hostile witness when I'm not. I was dragged out here. This thing is a pain in the neck to me. And I wish I could get out of here.

The Court: They think you are a hostile witness—

The Witness: Because they are allergic to the truth and that is why they are hostile to me.

The Court: I don't know about that. We are trying to find out the truth. It's been quite difficult thus far.

The Witness: Can I answer this question?

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

The Court: What is the question?

The Witness: I didn't finish answering it. What caused me to change my mind?

(2001) The Court: Oh, yes.

A. Nothing has caused me to change my mind. You asked me if there were questions put to me about the 125 shares by you. And I said yes. Then you read me this, to say. "What caused you to change your mind?" And this says, "Had you been told that Mr. Marcus had testified that the sale did not include the 125 shares?" And I say, "Not at that time."

And I wasn't told by you that Marcus had testified to the contrary. And I haven't changed my mind. I wasn't told that. But you still did ask me about the 125 shares.

Q. Now, when you left my office, you say that Marcus was quite put over over the fact that you would not give him the kind of a statement he thought he ought to have? A. I never said that.

Q. Well, what do you say about it; did you leave on friendly terms? A. I was very much annoyed with him.

Q. And he with you? A. No, he was trying to pacify me. He said, "Take it easy; take it easy. Don't get excited. I will explain it to you." He followed me downstairs in the elevator. Then he followed me to the station. We walked down the street from your office to the station. Then he came (2002) back on the train with me. He said, "I will give you a lift to your office in a taxi." He dropped me off at my office and then he said, "I'm going upstairs with you." I was still very much annoyed with him the entire time.

Q. Now, isn't it a fact that on the second occasion when you were supposed to come to my office you positively refused to accompany Mr. Marcus to my office until and unless he gave you and your firm a release of any claim he

might have against you for improperly handling his affairs? A. That is not true. And I can prove to you why it is not true.

The Court: Don't volunteer. It is not true, that is the answer.

The Witness: Okay. I stopped short. No, not true.

The Court: You are like Marcus in your answers now, and Miller.

Q. Then as I understand it, even though Marcus was disappointed in your statement made in my office, nevertheless, he went back with you and gave you these releases? A. That's right. He was still working on me to soften me up and still modify it so I would go back and sign (2003) some kind of a statement for you. He was plugging away like crazy with me.

The Court: You mean he was wooing you?

The Witness: That's the word, Judge, or courting, or something.

Q. Now, Mr. Schwartz, thereafter did you and Marcus have any contact with each other, after the signing of these two releases? A. Yes, a couple of times on the telephone, a couple of times he came up to the office.

Q. With respect to this case? A. Yes.

Q. What did he say to you? A. When?

Q. On these couple of times that he came up to the office, or spoke to you on the phone. A. Well, once he came up with Mr. Roth as a follow-up of a series of—I don't know whether it was a series, but at least two telephone calls—and he says, "I understand that you met with Mr. Brigadier—and you had no right to meet with him—and you gave him papers in the case."

And I said, "I didn't give him any papers. And I met with him. But all he did was he wanted to talk with me about the case, and I wouldn't talk to him, but I (2004) couldn't refuse him the courtesy of speaking to him." He asked me for the file, and I didn't give him the file, or something like that.

And he said, "I understand from Mr. Brigadier that you did give him some papers."

I said, "I did not. I refused to talk with him because I felt that some of the matters were confidential."

So then he said to me, "Do you have any other papers in your file?"

I said, "I don't." I mean, this is a composite of several phone calls. I don't know which belongs in which phone call.

Mr. Roth and Mr. Marcus came up subsequently to the office to examine papers, and they were not in the file. And those were those two papers involving the personal deal between Mr. Marcus and myself on the stock. And they had not been exhibited to Mr. Brigadier at that time, you know, personally. They had been either exhibited in the deposition or not at all.

Q. Now how many times have you conferred with Mr. Brigadier or with anybody associated with his side of the case? A. Well, if you mean by "confer" to speak to them—

Q. Yes, that's my understanding of a conference. A. The first I heard from Mr. Brigadier, I was served (2005) with a subpoena to come out here on a deposition. And the funny thing about it was I was served in Mr. Marcus' presence by accident. Mr. Marcus and I were having a conference about something, or talk about something—I wouldn't call it a conference—and somebody said they had to see me, to give me a paper, for one minute. And I said

to Mr. Marcus, "Would you mind if I interrupt for just one second? I have to explain this to you so you understand it." And he said—

Q. Now, Mr. Schwartz, all I asked you is how many times did you confer with Mr. Brigadier or anyone connected with his side of the case.

The Court: Now are you going to go into a long—

A. Well, you are going to come back to it, but I will do it your way. You will come back to it.

The Court: Make the answers short. You get in less trouble, believe me. I told that to Mr. Marcus— A. When I was served with the subpoena, it was returnable on a certain date in the future.

The Court: Up until then you had never conferred with Mr. Brigadier?

The Witness: Correct.

The Court: You had never been contacted by Mr. Brigadier?

(2006) The Witness: Didn't even know who he was.

The Court: All right.

A. As a matter of fact—wait a second. Are you talking about anybody on the other side?

Q. Yes. A. I think it was served by the Chazins. Is that right?

Mr. Abraham Chazin: I think so.

The Court: He didn't ask you who served it.

The Witness: Because I want to say who I spoke to.

A. (continuing) So it was returnable on a certain day, for which I had a court appointment.

Q. Now, how many times did you confer with Mr. Brigadier, or anybody connected with his side of the case?

A. Right. Well, I am just giving you the first time, then I will give you the others.

The Court: You certainly didn't confer when you were served.

The Witness: No, I called up on the phone. Well, that's going to be the first time I spoke to him.

A. (continuing) And I called Mr. Chazin's office and—one of the two, I don't remember which—and again, for some reason, I couldn't reach either of the Chazins and (2007) I asked the girl in his office if he didn't have any telephone number where I could reach them, and they said, "If it's urgent, why don't you call Mr. Brigadier. He is in the case, too."

So they gave me Mr. Brigadier's number. And I called Mr. Brigadier—

Mr. Grosman: Now, if your Honor please, may I ask that the witness be instructed to answer my question responsively? We are going to be here a month.

The Court: No doubt about it. It seems to me it's a simple question. How many times, if any, did you confer with Mr. Brigadier, he asked you, about this case? He didn't ask you about anybody else.

Mr. Grosman: Brigadier or anybody connected with his side.

The Court: All right.

The Witness: Judge, if I omit it, later on I will be called to task for it.

The Court: Well, don't anticipate. Just answer the question, if you can.

The Witness: I know the way he likes to do things, so he will call me for it later.

A. (continuing) So I called Mr. Brigadier's office and spoke to him. And I said, "I am in court this particular

day." He says, "It so happens that I was (2008) going to call you, because we don't need you that day. We will call you when we need you."

The Court: You wouldn't call that a conference, would you?

The Witness: "Conference" means to talk to somebody, I guess.

The Court: No, it means a little more than a casual conversation, in my opinion. That's not a conference. About the case, he wants to know.

The Witness: Before I got into this, before I answered this question, I will refer you to my answer—I said to Mr. Grosman, I said, "Do you mean by a conference any conversation?" And he said yes. So that is the way I am answering. If he doesn't want that, I will do it differently.

The Court: Will you tell him what you mean by a conference? He apparently doesn't agree with my definition of a conference.

The Witness: It comes from conferio, to speak to anyone—con conferio.

The Court: I graduated with honors in Latin, high school and college, so you don't have to tell me what the word means. Confer means more than just talk. If I met you and said, "Bob, how are you?" that's not a conference. And that is not what Judge Grosman means, (2009) either.

About the case, how many times you discussed the case before you testified.

The Witness: You give me the definition, I will answer it.

The Court: I told you what he wants. How many times you discussed the case, any phase of the case, with Mr. Brigadier or anybody on his side.

The Witness: All right. Fine.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

A. Mr. Brigadier called me one day and he said, "I would like to talk to you about this Riviera case." And I said, "I can't talk to you about it. There is nothing I can tell you, because I am Mr. Marcus' attorney."

He said, "Will you please do me the courtesy of meeting with me? I need you for an affidavit."

I said, "I will not sign an affidavit."

I think it was on a day before I had a Board of Directors meeting at a hotel, and I told him that I was going to be at the hotel the entire day, but there might be breaks of 15 or 20 minutes during the day while they broke up for a recess, and if it was that urgent, and although I couldn't help him, I wouldn't refuse him the courtesy, as another attorney, to say hello to him, and meet with him, and just tell him that I wouldn't do anything further in the case.

(2010) So he said, "Will you please do this as a favor to me?" I said, "All right." I said, "If you will sit in the lobby of the hotel at about"—I guess the middle of the morning some time, say, 11 o'clock—I said, "when I get a break—you will just have to be patient, as soon as I get a break I will come down in the lobby."

I asked him what he looked like. He described himself as tall, handsome and slim.

Mr. Brigadier: I don't think I said "handsome." I said "slim."

The Witness: He did.

Mr. Brigadier: I'm sure I didn't say "handsome."

The Witness: He laughed when he said it. He said, "Of course, I am handsome. You will see me in a second."

A. (continuing) And I told him, if I recall, to sit near the entrance to the dining room, as I recall, which is in the rear lefthand corner, and I described it to him.

And he said, "Well, you are sure to recognize me, because I will have a brief case with me."

And subsequently that morning, although I admit I kept him waiting for quite a while, I met him. And he (2011) said, "This is a hell of a place to talk, but I guess it will have to do." I said, "Yes."

The Court: Now, did you discuss the case with him that morning?

The Witness: Yes.

The Court: Good. The No. 1 conference.

The Witness: I could take longer.

The Court: I don't doubt that. That's no exaggeration.

We will take a short recess, gentlemen.

(Short recess.)

The Witness: Shall I continue, Judge?

The Court: I think I had made the observation that so far there had been one conference. That was at the hotel, at the break in the Board of Directors meeting?

The Witness: That's correct.

The Court: That's No. 1. That was with Mr. Brigadier.

The Witness: That's correct.

The Court: Now, any more? He wants to know if there were any more.

A. (continuing) Then the second time I had a conference about the case was the first day that this trial began. I was subpoenaed to come and I sat in the (2012) courtroom during the morning session. And at lunch—I went out to lunch with Mr. Lieberman, Mr. Brigadier—well, we were about five or six, as I recall, but I think at the table there was Mr. Lieberman, Mr. Brigadier and myself.

The Court: Did you discuss the case then?

The Witness: Yes, there was a discussion of the testimony.

The Court: All right. That's No. 2. Did you have any more?

A. (continuing) The third one occurred—today is Friday—Wednesday morning, at my office. They called me up and they said, "Now, we would like to come over and talk to you about the case. You are actually being introduced by us and you owe us the courtesy of letting us sit down with you." And they came over—

The Court: Who came over Wednesday?

The Witness: Mr. Brigadier, Mr. Margulies and Mr. Kesselhaut came at 10:30, or somewhat later, and we were together until almost 12:30, because I had to leave.

The Court: Those were the only three times that you conferred, is that right?

The Witness: Conferred; yes, sir.

The Court: That's all Judge Grossman asked (2013) you, how many times.

By Mr. Grosman:

Q. Now, have you your diary sheets for those conferences? A. No.

Q. They were not charged for, to anybody? A. That's correct, not charged to anybody.

Q. Now, will you tell us, please, what you discussed with Mr. Brigadier, Mr. Margulies and Mr. Kesselhaut at your Wednesday conference? A. Well, in the first place, there was a general discussion about the entire case, and I don't want to get you involved in something that may be—something that shouldn't be said on the witness stand, so I will pass that by, I presume, with everybody's consent.

Mr. Brigadier: I don't know what you are referring to.

The Court: We don't know what it is.

The Witness: I'm afraid to say it.

Mr. Brigadier: As far as I am concerned, the witness is free to talk about anything.

The Witness: Is it all right? I will repeat everything that was said.

The Court: Well, you were asked a very simple question. If Judge Grosman wants to know what 2014) was said, you tell him what was said, whether he likes it or not, after he hears it.

A. (continuing) I said, "Is all of this necessary? Is the case going to be tried—is the case going to be finished or is it going to be settled?"

They said there were conferences about settlement, but they had made up their mind not to go a penny higher than they had offered, or something like that.

I was afraid I would create a situation which I shouldn't.

So then we got into the case and they mentioned this question about the certificates of stock, in other words, was I sure that Sam Marcus had signed the face of the stock? and we went through that.

And then they asked me—

The Court: Why did they ask you that? Nobody said he didn't. Mr. Marcus didn't deny that he signed the face of the stock.

The Witness: Well, that was one of the things I was asked about.

Mr. Abraham Chazin: In the deposition he wasn't sure.

The Court: On the stand he admitted he signed the stock.

Mr. Abraham Chazin: That's correct.

(2015) The Witness: Well, I am positive that was one of the—I can't help it, what they wanted to ask me about.

The Court: What else?

The Witness: Then they asked me about the insertion of the "up to 50 per cent," the circumstances of that.

The Court: And you related it as you did here, is that right?

The Witness: Substantially.

The Court: Substantially so?

The Witness: Yes, sure.

A. (continuing) Then they asked me about—let me think which came next—

Q. I don't care what order they asked you, Mr. Schwartz, just tell us what they asked you. A. Well, about the contract. We went throughout the basic contract, you know, the one that is about—

Q. September 14, '48? A. September 14. The one that's about five or six pages long. And we read through that entire thing. And then there was some discussion about how I ought to get out to Jersey. And we had some discussion about the Pennsylvania Railroad, and whether or not there was a train, and what time court started, and whether I ought to (2016) be a few minutes early or a few minutes late. And Mr. Kesselhaut suggested that I come a half hour early. And I told him a few things—which I shouldn't repeat.

The Court: You told him how you felt about coming a half hour early without getting paid.

The Witness: I told him that was just too much, to come a half hour early. It was bad enough to come out here altogether.

A. (continuing) And he said, "Well, you certainly should refresh yourself about this case."

And I said, "I am very refreshed, and I am satisfied to go on without anything further."

He said, "I know, but the last day of your testimony, you should be up to date on these things."

And I said, "But not a half hour before the case starts." And then they left.

The Court: That's substantially what was said.

The Witness: Substantially. But there may have been one or two other points raised, but I have just no recollection particularly of any one thing, except those points.

By Mr. Grosman:

Q. Now, was your testimony on deposition shown to you? (2017) A. At that time?

Q. Yes. A. Yes, they had a copy of it. Mr. Margulies had brought a copy.

Q. Was it referred to from time to time? A. Shown to me, you mean?

Q. Yes. A. No. They had it on the desk, but there was no occasion to open it up and show anything to me. Mr. Margulies was thumbing through it, as I recall. He would go from one book to another book as something turned up, but he never put anything in front of my face.

Q. What was the purpose of that conference on Wednesday, if you know? A. Well, I presume it's the usual conference that anybody has with a witness.

The Court: The usual witness conference before he takes the stand. I think we all take judicial notice of that.

The Witness: That's what I think.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

Q. Was it to refresh your mind as to what you were to testify to? A. I presume it was for all purposes, to go over questions which would be asked me, and to go over matters (2018) involved in the case, which I have done a hundred times, or possibly more.

Q. Mr. Schwartz, you say that one of the reasons you gave up Mr. Marcus was because he kept cutting your bills, or your firm's bills? A. That's correct.

Q. Do you have any recollection of any particular one he cut? A. Particular one?

Q. Yes. A. I know at the end of our relationship every bill was being cut, as far as I recall.

Q. And when did that relationship end? A. I think I testified that I don't recall exactly when it ended, because there were some odds and ends of things to clear up, and it went on for about—I will take a rough guess at it and say some time in '49. That's a rough guess, though. I mean, I have no particular recollection of why or when.

Q. Was it prior to the delivery of the file to Mr. Marcus? A. Oh, yes.

Q. Before the delivery of the file? A. You mean of the one in this case?

Q. Yes. (2019) A. Oh, yes.

Q. Your relationship with him as attorney and client ended— A. Yes.

Q. —prior to that time? A. That's right.

Q. But you retainded the file. Now, did you believe Mr. Marcus, as a result of your dealings with him, to be honorable with respect to his financial dealings? A. He was always honorable with me.

Q. Outside of this case, was he honorable generally in his financial dealings, not only with you, but with everybody else? A. I have no way of knowing.

Q Well, now, you were his attorney, you represented him. A. That's true.

Q. And you were asked that question once before, were you not? A. Show it to me and I will see if I can—

Q. You say you found him to be honorable in his dealings with you. A. Are you referring to a particular question?

Q. No, no. I am asking you now. (2020) A. He was honorable with me. He always paid off any obligation he had to me. I have no complaint on that score.

Q. Were your dealings with him reduced to writing, your personal dealings, outside of your relationship of attorney and client? A. It depended. Sometimes they were, sometimes they were not.

Q. Do you recall any occasion when you had a deal with Mr. Marcus, a personal deal, when the agreement was not reduced to writing? A. Any number of times.

Q. Name some of them. A. There were at least a half dozen times when Mr. Marcus was short of cash, as he was almost all the time. And, in fact, that condition got worse and worse as time went on, up until the time of this '48 deal. And he would call up and say he was short of cash and would I send over a check. And he would send a messenger over for it. Or, would I drop off a check, he needed some cash. And that happened on—well, I would say innumerable—I can't characterize by saying 15, 20, or 25 times.

Q. Well, a check, of course, is in writing? A. Yes.

Q. I am asking you about transactions where (2021) there was no writing; do you recall any such? A. Well, I don't deal in cash, so if I gave him any money there would be a check. But still I would have no note or other obligation from him.

Q. You had the check. A. He could still say it was a payment of something I had loaned him, couldn't he?

Q. Have you told us about all transactions you had with him that were not in writing? A. No, I couldn't remem-

ber them. It would be endless. You would be here—if the Judge objects to my taking a half hour, he would certainly object to my taking two days.

The Court: Why don't you make it a short answer instead of going into all this unnecessary chatter all the time?

The Witness: Judge, there were innumerable transactions. I have testified to that.

The Court: All right—period. That's it. And you can't tell us all of them, you have no recollection. You have no special reason to recall them.

The Witness: That's right. They were just normal, routine things for which he paid me when he could, or subsequently, and I have no particular recollection.

(2022) Q. Now, how many conferences did you have with Judge Lieberman about this case? A. One.

Q. When? A. The first day this trial began, when I had lunch with Mr. Brigadier, and Mr. Lieberman and myself.

Q. That's the only time you conferred with Mr. Lieberman about the case? A. About the case, that's right.

Q. You were on friendly terms with Judge Lieberman, were you not? A. I am not on unfriendly terms with him.

Q. You had had dealings with him prior to that? A. No, just this one deal in which he represented Mr. Miller at this closing. Well, wait. There was one time when we dispossessed the Riviera—when I say the Riviera I mean Bill Miller's Riviera. I don't want to get mixed up. They hadn't paid their rent and Mr. Marcus authorized me to start a dispossess proceeding in Jersey.

We hired some Jersey attorney. We started a dispossess proceeding.

The Court: Wait a minute. Do you want to hear any more about that?

Robert J. Schwartz—for Defendant Milmar Estate—
Rebuttal—Cross

Mr. Grosman: No, I just wanted to know if (2023) he had any other transaction.

The Witness: That was the other transaction.

Q. Did you have any dealings with Judge Lieberman after September 14, 1948? A. Dealings—you mean deals?

Q. Yes, any kind of dealings. A. No. I spoke to him on the telephone about ten days after September 14, when he called me up, about an insertion of "up to 50 per cent" into the contract. And that was the last time I spoke to him until just before the case—before one of the phone calls I had with Mr. Marcus.

Mr. Lieberman called me—Judge Lieberman called me up and said, "I would like to talk to you about this case."

And I said, "I'm sorry. I can't help you. There is nothing I can do for you." As I told Mr. Marcus.

Q. Did you have some dealings in relation to a liquor license with Judge Lieberman? A. With the liquor license. Oh, well, about—

The Court: Is the answer yes?

The Witness: Yes.

The Court: Yes.

A. About a year and a half ago, yes.

Q. When was that? (2024) A. About a year and a half ago I called up—

The Court: All right, a year and a half ago—period.

The Witness: That's right.

Q. Was it after this suit was started? A. After this suit was started? Yes.

Q. Now, you conferred with Judge Lieberman, I suppose, on a number of occasions with respect to that suit? A. What suit?

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

Q. The liquor suit. A. There was no liquor suit.

Q. Or the liquor license. A. If you let me answer, I will be glad to tell you.

Q. I will let you answer, if the Judge will.

The Court: You conferred with him about it. That's all he asked you.

A. No, I called him up and asked him to recommend an attorney in the vicinity of—I think it was Morristown or South Branch, New Jersey—who would be able to get a liquor license for a hotel down there. He recommended somebody. End of conference.

Q. Was there any correspondence between you and Judge Lieberman with respect to that subject? A. Yes, he wrote me a couple of times. I asked him (2025) to give me the man's name and address when he found out whom he would recommend, and he wrote to me. And then he subsequently wrote me another letter and said that he didn't think they were going to get the liquor license. As far as I know, they still haven't got it.

Q. Have you any idea, Mr. Schwartz, of the date on which you delivered the file to Mr. Marcus, or Mr. Roth, the file in this case? A. No specific recollection. I know it was at least—you know, a couple of years ago.

Q. A couple of years ago? A. Yes.

Q. Was it before this suit was started or after? A. Not sure.

Q. This suit was started, I think, back in 1950—December of 1950. Was it about that time that you delivered the file to him? A. I couldn't give you any accurate answer on that, unless I could see some kind of a receipt. And I am sure I don't have that—so—

Q. Would your docket sheet show when you delivered that file to him? A. I don't believe so—it might. I don't know. (2026) It's possible.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

Q. Did you get a receipt for the file? A. No. Unfortunately what happened was that—

The Court: He didn't ask you to explain it. You didn't get a receipt.

The Witness: No. Well, I want—

The Court: If he wants to know he will ask you. Don't go volunteering.

The Witness: All right.

Q. Did you personally deliver the file to Mr. Marcus? A. No.

Q. Who did? A. Some temporary help we had in the office.

Q. And I think you told us on direct examination how Mr. Marcus had demanded of you the file, and he had to have it immediately, and you were then in the trial of a cause, and you called up your office and directed that he be given the file? A. That's correct.

Q. Is that what happened? A. That's about it. He said it was an absolute emergency that he get the file. And I said, "Well, I am downtown, and I won't be back for a couple of days."

He said but he has to have it. I said, "Okay, I (2027) will phone the office and you can have the file."

Q. And that is the way it was done? A. That is the way I recall it.

Q. And that was done without a receipt for the file? A. That's right.

Q. I direct your attention to the interrogation of you on deposition, on page 43, on Tuesday of May 11, 1954:

"Question: Did you deliver all the papers that were in the file to him at that time?

"Answer: Actually, the entire file, he took the complete file."

Were you referring there to Mr. Marcus? A. I presume so.

The Court: Well, am I to understand, Mr. Schwartz, that you were not at the office when Mr. Roth and Mr. Marcus picked up the file?

The Witness: That's my recollection. But the file was in a couple of parts. They may have come back for some additional material.

The Court: They can't hear you, Mr. Schwartz.

Mr. Brigadier: We don't hear you over here at all.

The Witness: I said that it's conceivable (2028) that they came back for some additional material, but the file was picked up at that time.

Q. Now, on page 44 you were asked this question and gave this answer:

"Question: And you delivered everything that was in the file to Mr. Marcus?

"Answer: That's correct."

A. Yes.

Q. "Question: How long is it since you have been Mr. Marcus' attorney, or when did the relationship of attorney and client end, or if it has ended?

"Answer: I don't know."

Mr. Brigadier: No, Judge, that's part of your question. You said to him, "I don't know."

Mr. Grosman: That's right. It's part of my question.

Q. "Answer: It ended at least some time prior to delivery of the files."

The Court: Is that his answer, that it ended before the delivery of the file?

Mr. Grosman: Yes.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

Q. The relationship between you and Mr. Marcus ended some time prior to the delivery of the file? A. I am not sure exactly, because I can't put the time on the date of the file. And if you will tell me when (2029) that is, then I wi l know.

Q. Well, you recall that the file was delivered to Mr. Marcus? A. I wasn't present, I don't think.

Q. Did you say anything about your not having been present when the file was delivered to Mr. Marcus on your deposition? A. If anybody asked me, I would have told them. I didn't think it would make any difference. You had the file. Nobody said the file got lost.

Q. Mr. Schwartz, will you tell us, please, why it was that you exacted from Mr. Marcus the two releases, marked DME-64 and 65?

Mr. Brigadier: If your Honor please, I think it is important for me to note an objection. And I ask Judge Grosman to withdraw the word "releases." Just refer to them as documents. Whether they are releases is something your Honor will decide.

Mr. Grosman: Well, what you would call these things?

Mr. Brigadier: I don't know, but I don't call them releases. Just two documents. Let the Judge decide. There is a question as to whether they are releases.

The Witness: All right?

(2030) The Court: Yes, sir.

A. He came back to the office with me and he said, "What are you so mad about?" And I said, "From your conversation—"

The Court: This is after you have been to Judge Grosman's conference?

The Witness: Yes, it was about 5:30 or a quarter to six in the evening, or 6 o'clock.

A. (continuing) He said, "What are you so mad about, and why aren't you talking to me?" And I said, "I gather from the conversations we had with Mr. Grosman and yourself that you are trying to say that the deal is something other than it was, and that you are also saying that I didn't understand what the deal was about," and so on.

And I said, "You had no right to say anything like that." He said, "I don't make any statements like that to you. It is just for the case."

So I said, "What do you mean, it is just for the case? Suppose it leaks back to the office, I didn't understand the deal, won't that look just swell?"

So he says, "I will do anything you want. Just take it easy; take it easy." He was always going like this (indicating), "Take it easy."

And I said, "Give me a letter to myself, and the office, that you are not claiming that we did anything (2031) wrong." So he said, "Anything you say."

So we called in a girl, and I dictated these two letters, and he signed them.

Q. What time did this occur, what time of the day? A. Very late in the afternoon, just about half past five, or just before 6 o'clock.

Q. Can you tell us why there are no stenographer's initials on those letters? A. Couldn't possibly say.

Q. Isn't it customary for the stenographers in your employ to put their initials, and those of the person dictating the document, on the paper? A. No, only on letters.

Q. Only on letters. You didn't consider these to be letters? A. It's in the form of a letter, but it's not a letter to be mailed. I told her—no envelopes.

Q. No envelopes. And no initials. A. Right. I didn't tell her "no initials," she just didn't put them on. I didn't notice it until you mentioned it.

Q. Now, is it likely that you, yourself, typed them? A. No. I can't type that well.

(2032) Q. You can't type that well? A. I can type, but not that well. That's a rather well-typed letter.

Q. Now, I understood you to say that you made an agreement, or reached an understanding with Marcus with respect to your 125 shares of stock of Milmar? A. Yes, informal, but an understanding.

Q. And when did you do that, in point of time? A. When he called me up and told me he had a purchaser for the Riviera. You say "when." The tail end of August, or something like that.

Q. Prior to September 14, 1948? A. Oh, prior to September 3. It was some time around the last couple of days of August or the first couple of days of September.

Q. Are you sure about that? A. I am sure about it.

Q. I direct your attention to page 26 of your deposition testimony, on May 11, 1954.

"Question: Did you make any agreement with Mr. Marcus prior to September 14, 1948?

"Answer: No.

"Question: As to the sale of your stock?

"Answer: No."

A. Beg your pardon. Give me the line. I don't see it.

(2033) Q. Well, four lines from the bottom af page 26. A. "Did you make any agreement?" Is that the one?

Q. Yes. A. Okay.

Q. How do you explain your testimony? A. You are talking about a written agreement in this one, I presume.

Q. I didn't say anything about any written agreement. A. That's what I thought you were referring to, because we didn't have a written agreement until—you didn't ask this question, anyhow. I think this is Mr. Brigadier.

Q. No, Mr. Brigadier asked that question of you. A.

Right. I was under the impression he was referring to a written agreement.

Q. I see. Now, the question is, "Did you make any agreement with Mr. Marcus—" A. That's not the way—

Q. "—prior to September 14, 1948?" A. I don't see the word "any" in quotations.

Q. You don't see it? A. In quotation marks, or italics, the way you say it. It says—

> The Court: Just a minute. Please don't get ridiculous about it. It didn't have to be in quotations (2034) or italics. You were simply asked, "Did you make any agreement?" Not a written agreement or an oral agreement. That's all he asked. If you understood a written agreement, that's another thing.
>
> The Witness: I understood a written agreement and I so answered.
>
> The Court: That's the answer.

Q. That's what you understood? A. That's correct.

Q. Turn to the next page, page 27,

> "Question: Orally or in writing?
>
> "Answer: Prior to September 14?
>
> "Question: Yes, prior to the execution of this agreement. Let me put it this way, prior to the execution of Exhibit P-4 did you have any understanding or agreement with Mr. Marcus as to the sale of the 125 shares owned by you?
>
> "I object to that as being privileged."
>
> Mr. Brigadier: Read. "Mr. Grosman: I object to that as being privieged."

Q. "I decline to answer on the ground of privilege claimed."

(Discussion off the record.)

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

The Court: I do hope, Judge, we are not going to sit again for interminable minutes while you go (2035) reading to see what you are going to ask next.

Mr. Grosman: No. I notice reference was made as to whether or not the agreement was oral or in writing.

The Court: He wasn't permitted to answer it.

Mr. Grosman: He did answer it, at first, on page 26, when he was asked—

The Court: I heard that. But I mean the other question, about oral or in writing.

Mr. Grosman: Well, I was just trying to check that.

Mr. Brigadier: He answered it again, Judge, on page 30 of the deposition.

Mr. Grosman: I don't know whether he did or not.

The Court: Maybe after you claimed privilege he wasn't asked to answer it.

Mr. Grosman: But he was asked whether or not there was any agreement and he said no.

The Court: I heard that very well.

Mr. Grosman: Prior to September 14, 1948.

The Court: Now you say it is otherwise. Is that right?

The Witness: May I refer you to the middle of page 30, in which, at the same examination— "And you (2036) knew from that discussion that your 125 was included, is that right?

"Answer: It was included."

Q. What I want to know from you is why you said, on page 26 of your deposition, when you were asked by Mr. Brigadier whether you made any agreement with Mr. Marcus prior to September 14, '48, respecting the sale of your stock, you said no.

The Court: Don't answer. He said so. He thought he meant a written agreement. That's his answer.

Mr. Grosman: All right. He volunteered the information. He wanted me to look at page 30. There is nothing on page 30 about any agreement.

Q. Now, you told us—or told Mr. Brigadier, rather, on direct—that you recall that on September 14, 1948, it was definitely agreed that the amount of stock being sold under the contract was 1,250 shares, is that correct? A. Well, show me a page where I said that, so I will know what you are talking about. I don't recall that particular circumstance.

Q. No, I am talking about your— A. You mean in general?

Q. Yes, yesterday. (2037) A. I thought that you were referring to this deposition. Yes, that's about it.

The Court: Wait. Not "about it." Is it?

The Witness: Yes. I don't recall the words I used.

The Court: He is interested about the 1,250 shares.

The Witness: Yes, sure.

Q. Now, is there any doubt in your mind, Mr. Schwartz, that 1,250 shares was the number of shares mentioned as being sold under the contract, DM-5?

The Court: Call it the basic contract, then we will all know what you mean by it.

A. Not exactly, because you have to explain exactly what had occurred. And we have gone through that. And I would be glad to do it, if you will give me the contracts, and I will go through them with you. It isn't just as simple as that.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

Q. Did you testify yesterday in response to Mr. Brigadier's questions that 1,250 shares was the number of shares of Milmar Estate, Inc., that was to be sold under the contract, DM-5? A. In effect, yes. But I don't know whether I said it that way. But what I said was that the understanding was that we were selling whatever we had to get out of the (2038) deal.

The Court: By "we" you mean you and Mr. Marcus.

The Witness: Mr. Marcus, that's correct.

Q. Did you mention the figures 1,250 yesterday? A. I am sure some time during the day I mentioned 1,250, but I don't know in which connection or which sentence.

Q. What do you say now; on September 14, 1948, is it true that Mr. Marcus told you that 1,250 shares of stock of Milmar was to be sold? A. No, he didn't put it that way.

Q. You tell us how he put it. A. He didn't tell me anything particular on September 14, because all the conversations had taken place previously.

The Court: About the number of shares.

The Witness: About the number of shares.

Q. When did he tell you—or who told you that 1,250 shares was the number of shares to be sold? A. You are starting this thing all over from scratch, but if you want it that way I'll—

Q. I don't want it from scratch, I am asking you now who told you on September 14 to insert in this contract, DME-5, Paragraph 3, 1,250 shares? (2039) A. Mr. Lieberman and I didn't know how many shares of stock had been issued, or if any more had been issued over the 1,250,

so we left that place blank until we had Mr. Miller and Mr. Marcus present in the room, at which time we turned to both of them and said, "Is it correct that 1,250 shares are outstanding, and have any more been issued since that date?"

Q. And the answer was? A. No more than 1,250 have been issued.

Q. That's when you inserted— A. That's what we inserted.

Q. —the figure 1,250 in this DME-5. A. When I say "we" I mean Mr. Lieberman and I inserted it. It's in my handwriting.

Q. Did you both do it or did you do it? A. I wrote it, but we checked the point.

Q. And you say it wasn't until September 14—until the day of September 14, '48, that you were informed that 1,250 shares was all of the shares that had been issued? A. You have it exactly upside down. That's exactly what I did not say.

Q. What did you say? A. I said these things were all discussed as early and before September 3.

(2040) Q. Well, when was it that you asked Miller and Marcus whether any more than 1,250 shares of stock of Milmar had been issued? A. On September 14.

Q. That's what I am asking you. A. That's not what you asked me. You asked me when we discussed this thing. All I said to him was, "Are you sure more shares haven't been issued?" There was no further discussion about it. This was a double check to make sure that more shares, over and above 1,250, hadn't gone out.

Q. Do you recall being asked this question and giving this answer, on page 9 of your deposition of May 11, 1954, about line 10 from the bottom:

"Question: Now, as far as you know, did you inform

Mr. Marcus that the agreement called for the sale of 1,250 shares?

"Answer: Well—"

The Court: Wait. He didn't find it.

The Witness: I didn't find it. I have got two books with page 9. Which book is this? The one I have with page 9 is the one in which I refused to answer any questions because of privilege.

Mr. Grosman: May 11, 1954.

The Court: Isn't it on the front page, the (2041) date of that?

The Witness: Yes, I have it. It's the back one. I have it now. What page were you on?

Mr. Grosman: Page 9, 10 lines from the bottom.

Q. "Question: Now, as far as you know, did you inform Mr. Marcus that the agreement called for the sale of 1,250 shares?

"Answer: Well, we had a continued discussion. Every paragraph was fought over, and every line was argued about. But I don't have any specific recollection of mentioning 1,250, but we went through each and every paragraph in detail." A. Okay.

Q. Now, how do you square your testimony on deposition with what you said today? A. In the first place, this was the first time I had even been asked any question involving the Riviera for some six years. And now, as the case has come together, it has come to me that we had this question of 1,250 shares to be inserted, not just at this minute, I mean in the past year or two I have noticed that. I couldn't remember that from six years ago.

Q. You didn't remember— A. That we had to insert 1,250, no.

(2042) Q. —on May 11, 1954, but you did remember yesterday. A. I remembered it before then.

Q. Before then? A. Yes. I remembered it in the deposition. All you have to do is go through this deposition and you will spot where I remembered it long ago, a couple of years ago.

Q. After you went through the depositions. A. No, when I gave the deposition.

Q. Who pointed out the discrepancy to you, anybody? A. What discrepancy?

Q. Between your testimony on deposition, that you have no distinct recollection, no specific recollection of mentioning 1,250 shares, and the testimony you gave yesterday and today that you deliberately left this space open in the agreement, DME-5. That discrepancy. A. I think you are a little confused. When I testified on May 11, 1954, this was the first time I had taken a look at these papers in six years. Then when I testified about the insertion of 1,250, I created the discrepancy, and nobody had to point it out to me, because I created it myself when these papers were put in front of me.

(2043) Q. I see. A. I am glad you do.

Q. You now recollect, seven years later, what you didn't recollect six years later, is that it? A. Again you have got it wrong. I recollect that when I testified in this deposition, not now. When this deposition was taken I recollected it when the papers were put in front of me.

Q. Show me in that deposition where, as a result of recollection, you testified then as you testified yesterday with respect to this particular subject. A. Okay. Shall we adjourn for about two hours, or three hours, or something, and I will go through every page and read it over.

The Court: No.

Q. No, you make a mental note of it and you will have an opportunity to check it. A. When?

Excerpt from Deposition Read Into Record

The Court: Mr. Brigadier, will somebody at your table please make a note of it?

Mr. Brigadier: We have already done so. We have made a note.

The Court: All right.

Mr. Brigadier: Part of it is the very next question and answer, however, that appears in the (2044) deposition.

Mr. Grosman: Now, Mr. Brigadier.

Mr. Brigadier: I'm sorry. I was just saying to the Court that the very next question and answer, or part of an answer—

Mr. Grosman: If you know, or if Mr. Margulies knows where there is a statement in the deposition along the lines the witness suggests, I have no objection to your calling it to his attention.

Mr. Brigadier: I said we would do it.

Mr. Grosman: I said now.

The Court: You don't know as of now.

Mr. Brigadier: No, except what I see in the very next question and answer in the deposition, which I think might be helpful.

The Court: Let Judge Grosman look at it. Line 23, page 9:

"Question: And are you sure that the paragraph that I am referring to, which reads, 'whereas the corporation duly organized in the State of New Jersey and has an authorized and issued stock consisting of 1,250 shares of common stock' was actually read and discussed in the presence of Mr. Marcus, Mr. Miller, and Mr. Lieberman?

"Answer: I am positive of that." (2045) My heavens!

Mr. Brigadier: That is why I brought it up.

The Court: This is really getting disgusting. When you know there is an answer right after it, why try to deceive me?

Mr. Grosman: I didn't know that, your Honor.

The Court: Could it be stronger? "I am positive of that."

Mr. Brigadier: I would also like to suggest, your Honor, that the witness ought to look at the record. He could have saved us a lot of trouble if he had turned the page.

The Court: He isn't getting paid for this. I have got to be a little considerate, too. He is a lawyer losing time without being reimbursed.

Mr. Brigadier: I can't jump up and do it. I am not supposed to do it. I wanted to call it to your attention and didn't know how to do it. I suggest that the witness, when he is questioned on the deposition, look at the rest of the page.

The Court: You should have given it to him before and let him go over it at his leisure. I am not saying that you should give up your business for this. I don't expect you to, even if they do.

(2046) (Comments off the record.)

Mr. Grosman: Now, if your Honor please, I don't want you to—I don't care what happens in this case, but I don't want you to think I am trying to mislead you.

The Court: Well, I don't think you would try to do it to me, Judge, I will tell you right now.

Mr. Grosman: The man testified there that he has no specific recollection of mentioning 1,250. We went through each and every paragraph in detail. Now, apparently he will say anything that comes to his

mind, because he turns around here and says, as you have read—a New Jersey corporation duly organized in this state, has authorized and issued stock consisting of 1,250 shares—and it goes on—"was actually read and discussed in the presence of Mr. Marcus and Mr. Miller and Mr. Lieberman. I am positive that"—

Now, those things realte to two entirely different subjects. One speaks—

The Witness: There is a reason—

The Court: You don't have to answer it. I was a member of the bar before I came up here.

Mr. Grosman: One speaks of the organization of the corporation and the authorized and issued stock. That's what that second question speaks about. Now, even (2047) about that he is wrong, because the authorized and issued stock of the corporation is a hundred thousand shares.

The Court: I know exactly what it is.

Mr. Grosman: And the number of shares outstanding is not 1,250, I think it's 1,276.

The Court: Is that true, 1,276?

Mr. Brigadier: No, because they canceled all the shares, as you know, and issued 1,250 shares.

The Court: I know what they issued.

Mr. Grosman: The old stock in the book was 1,276.

Mr. Brigadier: You know, for example—let me just answer that, so you will see what kind of nonsence you are getting.

You remember, Mr. Marcus produced a certificate for 500 shares which he says he holds as collateral for the note of $50,000. Remember, I called to his attention that in his answer he concedes 20 of those shares belong to Bierman and it is really 480. What they

did was issue another certificate for 20 without first changing the certificate from the 500 and cutting it down to 480. But there isn't any dispute on anybody's part that there were 20 shares to Bierman and that he is left only with 480. So it brings you back to 1,250.

(2048) Aside from that, don't forget that this agreement was drawn on the same day when all the stock was canceled and new stock issued.

The Court: I know all about that.

(Discussion off the record.)

The Court: I think it is best that we do adjourn.

• • •

(2055) Afternoon Session

The Court: Judge Grosman did say that if you could find in the transcript where he specifically stated it, that he would accept it.

Mr. Brigadier: On page 63 of the deposition of July 7, 1954:

"Question: Was there anything said to you about your stock being included?

"Answer: Yes, there was.

"Question: Was there anything said to you—well, what was said as to whether it was to be included?

"Answer: He said, 'It's for the entire deal, we're getting out completely.' "

And the other reference is on page 83, where the reference is to the figure. That's about half way down the page, a little less than half way.

"Question: And the suggestion that was made by him that new certificates be issued for the 1,250 shares of stock?

"Answer: Yes, that is my recollection.

"Question: The intention was that that was to represent all of the issued and outstanding stock?

"Answer: That's right, yes.

"Question: Which was being sold under this agreement for $125,000?

(2056) "Answer: Right."

I don't want the Court to understand that these are the only ones. These are the one we found just on a short check.

ROBERT J. SCHWARTZ, resumed the stand.

Cross examination by Mr. Grosman (Continued):

Q. Now, you say, Mr. Schwartz, that Judge Lieberman called you up about a week or ten days after September 14, 1948, and called your attention to the fact that the words "up to 50 per cent" were missing in Paragraph 5 and Paragraph 10 of the main agreement of September 14? A. Well, I don't have the agreement in front of me, but he did call me up. I don't know the paragraph numbers.

Q. Well, it pertained to the omission from that agreement of the words "up to 50 per cent"— A. That's correct.

Q. —or not exceeding 50 per cent? A. In one place "up to 50 per cent" and in another place—

The Court: At least.

A. —"at least 50 per cent." That's right. Five has "up to 50 per cent" and ten has "at least 50 per cent," that's right.

(2057) Q. Now, what did you do then when Judge Lieberman called you up, called that to your attention? A. Oh, I

said, "What makes you think that insertion should be put in there?" And he said—I can't remember his words—he said, "That was the intent of the deal as called for in mentioning several other pages of the agreement."

I said, "Wait a second. I will try and get the file while you are on the phone." I got the file and I pulled out one copy of the agreement. There were any number of each agreement. And I pulled out one while I was talking to him, and went back to the phone.

He said, "I will refer you to Paragraph 5." I don't remember that he said "five" but I see now that that is the paragraph. And he says, "'up to 50 per cent' is to be inserted in five and 'at least 50 per cent' is to be inserted in Paragraph 10."

And I said, "I think you are absolutely right." I said, "How come we missed it?" He said, "I guess we just overlooked it at the closing on September 14" or "closing date," whichever he said. And I said, "I think you are right."

He said, "Are you inserting it on your copy?" I said, "I am." He said, "I am inserting it on my copy and I am initialing it." I said, "I am not initialing it, (2058) because it doesn't mean anything. It has got to be initialed by both parties, one wouldn't do any good."

So he said, "Well, is it okay with you?" I said, "It will be okay after I speak to Sam Marcus." I said, "If I don't call you back, it's okay."

So I hung up the phone and spoke to Sam Marcus, you know, within a few minutes after that.

Q. Now, what did you say you said to him, that you are not initialing your copy because it wouldn't mean anything? A. Something to that effect. What I meant by that was, he wanted my initials on his copy, and I wanted his initials on his copy. My initials on my copy meant nothing, and his initials on his copy meant nothing.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

Q. So you deliberately omitted to put your initials on your copy where these insertions were made? A. I don't remember putting initials on it, no.

Q. Well, didn't you say a moment ago, distinctly, that you were not initialing your copy? A. That was my recollection.

Q. Now, you say you don't remember whether you initialed it or not. A. I don't recall initialing it. I recall saying I wouldn't initial it. I don't know whether I initialed it or not.

(2059) Q. Now, what do you say called your attention or refreshed your mind in the agreement—have you the agreement before you? A. I do.

Q. When Judge Lieberman called you up, and you looked at the agreement, what is it in that agreement you say refreshed your mind that "up to 50 per cent" or "at least up to 50 per cent" should have been in Paragraphs 5 or 10? A. That is not what I said.

The Court: He didn't say it was in the basic agreement.

A. There were other papers.

Q. What other papers? A. The other papers that were part of the deal of September 14.

Q. Is there anything in any of the other papers signed on September 14, '48, which referred to the fact that only "up to 50 per cent"— A. Yes, there is the escrow letter of Judge Lieberman's which deposits 625 shares with him.

Q. Yes. Is that your authority for having conceded to Judge Lieberman that these insertions should be made in the Exhibit, DME-5? A. That's one of my reasons. The other reason was (2060) that Lieberman was absolutely correct, that it should have been inserted, because we had agreed to insert it.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

The Court: Now, do we have to drag out all these memorandums that he went through yesterday to prove that point? If so, get them out now and give them to him.

Q. Now, I understood you to say, a moment ago, Mr. Schwartz, that when Judge Lieberman told you of this omission in the contract, DME-5— A. Five is this one here?

Q. Yes. A. Yes.

Q. —that you said to him, "What makes you think so"? A. That's right.

Q. Well, weren't you sure immediately when he called it to your attention? A. I didn't even know what he was talking about for the moment. He said, "There is a mistake in the papers." He said, "We should insert 'up to 50 per cent' twice in the contract." I said, "What makes you think so?" It's just a conversational gambit, anyhow, till I could collect my wits and knew what he was talking about. I don't put any significance to it.

Q. Now, you say that you called Marcus? (2061) A. Yes.

Q. And you told him what Lieberman had said? A. I told him of Lieberman's call and I said, "Lieberman has called my attention to the fact that the words 'up to 50 per cent' are missing in one place and 'at least 50 per cent' are missing in another place."

And he said, "Why wasn't it inserted?" I said, "I guess we overlooked it." He says, "Is it okay?" I says, "I think so." He said, "Well, it sounds all right to me."

But we never did anything further about it because Lieberman never brought his paper to me and I never brought my paper to him.

Q. Now, why did you think you had to call Marcus first? A. I'd do it as a matter of common decency, knowledge,

and, in practice, to let a client know what is going on. That is all.

Q. Now, you continued to represent Marcus as his attorney after that incident for a time, did you? A. For a time, yes.

Q. Your office, I take it, was about a block away from Mr. Marcus' store? A. Well, it's not a block.

Q. Well, a very short distance. (2062) A. About three blocks.

Q. A very short distance away? A. Yes.

Q. You were then on an annual retainer with Mr. Marcus? A. No.

Q. And you— A. I said no. I didn't say yes.

Q. No? A. No.

Q. When did that cease? A. I don't know, but it had ceased somewhere around that time, just before then, or something like that.

Q. Just before? A. We were billing him individually at that time.

Q. Now, you did go over to see Mr. Marcus a number of times after this conversation with Judge Lieberman? A. Oh, yes, I think so.

Q. Why didn't you take the agreement, DME-5, with you, or your copy of it, and ask Marcus to initial those insertions? A. Well, it was something for Lieberman's benefit, and if he didn't remind me about it, I was perfectly happy to let it slide.

(2063) Q. That is your answer to why you didn't have Marcus initial— A. I have no particular recollection.

Q. —your copy of the agreement? A. I have no particular recollection of why I did or didn't do it. All I know is we didn't do it.

Q. You didn't do it. A. That's right.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

The Court: Let me ask you, Mr. Schwartz, didn't you place any special significance on the fact that you were altering a contract after it had been signed, sealed and delivered?

The Witness: It was only altering one copy, without the initials of the respective parties. And if my initial had to be put on it, I would have gone back to Sam Marcus with it. I was doing nothing at all except making a notation on one copy. That's all. I wasn't altering an instrument, because it was no good unless our initials were alongside of it. And the other copy—see, there were five copies in the file. I carefully avoided marking that on the original. I put it on a copy, and the original has no alteration on it at all.

The Court: None at all?

The Witness: None at all, to that effect.

(2064) A. (continuing) I purposely used a carbon copy.

Q. Well, you realized, of course, Mr. Schwartz, that that insertion in Paragraph 5 and 10 altered the whole sense of the agreement? A. You mean of this particular agreement?

Q. Yes, that particular agreement. A. It didn't alter—it altered the wording of it.

Q. Yes. A. Yes. But no paper stands by itself. There were a series of papers, and it didn't alter the sense of the papers, it altered the sense of this particular Exhibit.

Q. Now, you are sure that you made an alteration in one of the copies— A. On one of the copies.

Q. —to conform with what Judge Lieberman had said to you? A. Right on the telephone, holding it in one hand, and listening on the phone on the other, I altered one copy.

Q. That was before you spoke to Mr. Marcus or after? A. That was before so I'd know what to tell him, and to have it in the right spot.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

Q. Now, I direct your attention to page 66 of (2065) your deposition of July 7, 1954. A. Go ahead.

Q. You were asked this question, the last line on that page:

"Question: Now, did you make any alteration on the copies in your file?

And you answered, "I haven't any distinct recollection about that because I haven't the file and haven't seen it in about six years."

Do you recall giving that answer? A. I did.

Q. Now, when did you refresh your mind that you had made an insertion of that sort on a copy? A. During the course of the deposition I was reminded about the exact circumstances leading up to this thing.

Q. Who or what reminded you? A. Just in thinking over this general thing, there was an—I was out here about a dozen times, at least, and at some stage of the game, you keep thinking about the case, and what have I forgotten about this thing, and gradually this thing more or less came back to me, as a unit.

When you asked—when this question was asked of me, on page 66 and 67, I hadn't seen a paper in six years and I just didn't remember. I remembered making the (2066) alteration. But I now recall that I didn't put it on the original, I only put it on one copy. And I didn't initial it, because I felt that if it was that important they would come in and see that it was initialed. I did not alter our original.

Q. Now, you hadn't seen a copy of the agreement for so many years. A. Yes.

Q. Later on Mr. Brigadier—

Mr. Brigadier: Judge Grosman, I don't know whether you want me to do this each time, but there is on page 109 of his deposition, at the deposition, a correction of that very statement, in which he makes this answer, "I have a distinct recollection of getting the

file and talking to Judge Lieberman, and discussing this, and making the correction as I was talking to him."

The Witness: That's the way it was, too. I remember very distinctly.

Mr. Brigadier: I simply want the Court to know that this is not the first time the correction is being made. It was made in the taking of the deposition, as the witness says.

Q. But you did say, as I read to you from this record, on your deposition examination by Mr. Brigadier, that you didn't have any distinct recollection about that— (2067) referring to the alteration of the copies—because you hadn't seen the file in about six years. The top of page 67 and the bottom of page 66. A. You are talking only about copies now. Is that the point?

Q. Whatever you said there. I am asking you whether you didn't, in fact, say it— A. That's right.

Q. —notwithstanding what Mr. Brigadier calls your attention to your having said at 109. A. No, I answered the question at that time— "Now, did you make any alterations on the copies in your file?" and my answer was that I didn't have any distinct recollection about the copies.

Q. Because you hadn't seen the file in six years? A. That's correct. But—

Q. Now, following that— A. Okay. Go ahead.

The Court: Wait a minute. Hold it. Don't you think I heard what Mr. Brigadier said and what he read at page 109? Were you going to add that in, that you had corrected it later?

The Witness: I was going to say—I just wanted to know whether or not it was on the same day of (2068) examination, or whether there was any hiatus or not. I just didn't know.

Robert J. Schwartz—for Defendant Milmar Estate—Rebuttal—Cross

The Court: Can you tell him that?
Mr. Brigadier: The same day.
The Court: That's settled now.

Q. Now, Mr. Schwartz, Mr. Brigadier, who was then examining you, then showed you a photostatic copy of Exhibit P-8, which is the same as DME-5—I believe, Mr. Brigadier; is it?

Mr. Brigadier: No, P-8 is yours.
Mr. Grosman: I mean it's a copy.
Mr. Brigadier: The one without the insertions.
Mr. Grosman: Well, that would be DM-22.
Mr. Brigadier: That's right.

Q. Do you remember being asked this question and giving these answers:

"Question: I show you a photostatic copy of the Exhibit, P-8, which is a copy of the Exhibit produced by Judge Grosman from the files pursuant to our demand for such production, and you will observe that this insertion does not appear in the fifth paragraph, is that right?"

And you answered, "That's right. Is that a photostat of an original?"

Do you remember being asked that question and giving (2069) that answer? A. Where do you come in and where does the question stop? "That's right. Is that a photostat of the original?" Is that the end of the quotation?

Q. Was that your answer? A. That's my answer.

Q. "Question: This is a photostat of the one that was in a file delivered by you to Mr. Marcus. It is an executed copy, I suppose, of the same agreement. Now, do you recall whether or not there was more than one such copy of such agreement in the file?"

And your answer, "There were several."

Is that correct? A. That's correct.

Q. "Question: There were several?

"Answer: At least three or four.

"Question: As far as you recall, you don't know whether or not you may not have made the insertion on one of those copies?

"Answer: I have no distinct recollection of either making it or not making it."

Do you remember giving that answer? A. That's quite correct, and it is still correct.

Q. Then you were asked this question:

"Question: But, as you have testified, the (2070) insertion was made pursuant to the understanding that was had with Mr. Marcus while all the parties were present, is that right?"

And your answer was, "Insertion by whom?

"Question: The insertion by Mr. Lieberman. When you gave the okay for the insertion it was to carry out the understanding to which Mr. Marcus had agreed originally, at the September 14 closing?

"Answer: Yes, that's right, that is correct."

Do you remember being asked those questions and giving those answers? A. And I stand by them.

Q. And you stand by them now? A. Right.

The Court: I always thought that depositions were used to contradict the witness when he said something else in the deposition from what he says on the stand. He is being asked to corroborate on the stand what he said before on the deposition. If that isn't a waste of time, I don't know what it is.

Mr. Grosman: Now, your Honor will remember that this man testified that he made—on direct examination,

my recollection is that he testified that he made the correction on the copies.

Mr. Brigadier: Oh, no, he never said that.

(2071) The Court: One copy.

Mr. Grosman: On one copy. Now I want to show that when he was examined on deposition he was asked that same question and he said that he had no distinct recollection of having made—

The Court: That has been impressed on me four times already. Now you are still keeping at the same thing which he corrected later at 109.

Mr. Grosman: I don't know whether he did or not.

The Court: That is what he said he did, anyway. And you know that I am bound by what this man says at the trial on the stand, that the only reason you can use those depositions is to contradict him, to affect his credibility. That's supposed to be the only purpose of depositions.

Mr. Grosman: Well, I think we have done that, your Honor.

The Court: Well, maybe if you were up here and I was down there—

The Witness: He can't forget that he used to try cases.

Mr. Tepper: I don't think that the witness has any greater latitude than any other witness merely because he is a member of the New York Bar.

(2072) The Court: I am inclined to agree with you, a member of any bar.

Mr. Tepper: I think this man has gone way out of line as a witness and I wish the Court would admonish him about that.

The Court: All I can say is, Mr. Schwartz, you should know better. You make a lot of voluntary state-

ments that you have no right to make at all, and a member of the bar ought to know better.

The Witness: Judge, I just got off the telephone with my office—

The Court: I heard it from your senior the other day.

The Witness: I don't feel too happy about being here and I am not in a very pleased mood about it.

The Court: I don't doubt that, but you know you are supposed to observe decorum, you are a member of the bar, and you know you are not to make any voluntary statements from that stand addressed to counsel, nor to the Court, either.

The Witness: Until the comment was made to me, I shut up. The comment was made by Mr. Grosman, so I answered it.

(Discussion off the record.)

Mr. Grosman: Put this on the record, so I (2073) won't be charged with stating this as an afterthought. On April 11, 12 and 13 I have the case of Renwich versus Renwich set down before Judge Nimmo in Trenton. Of course, as you say, the Judge may get sick, or the clients may get sick, but I would like to have that fact noted.

The Court: You may note it on the record.

(Whereupon, the hearing was adjourned to be resumed April 12, 1955.)

(2074) Newark, N. J., Tuesday, April 12, 1955

(Hearing resumed pursuant to adjournment.)

(Appearances as previously noted.)

The Court: Gentlemen, what point had we reached when we adjourned?

Mr. Brigadier: We had called Mr. Schwartz out of turn, your Honor remembers. They had not yet completed their case, but since they had not called me to tell me they were going to call another witness, I had brought Mr. Schwartz in. We hadn't completed his cross examination.

I spoke to Mr. Schwartz yesterday and he told me that he had informed Mr. Leichtman, the gentleman sitting at the end of the table, that he would not be available today, but that he would be available some time tomorrow, because he is tied up in the trial of a case, as I understand it, in New York, to finish the cross examination.

At this point, therefore, I would suggest that we ought to go on and have them complete their case, so that we get it over with, once and for all.

The Court: That sounds like a sensible suggestion, Judge Grosman.

Mr. Grosman: I didn't hear that last.

(2075) The Court: He suggested that since Mr. Schwartz can't be here today, because of a court engagement, that you go ahead now with the rest of your case.

Mr. Grosman: We have virtually completed our case.

The Court: That's what I thought.

Mr. Tepper: We only reserved the right, if we were able to procure one witness, to bring him in. Other than that we had rested.

Mr. Brigadier: Well, they have had all this time to find out whether they are bringing in that witness. I think that we ought to now know whether they are bringing in the witness. The case should be rested, like a normal case, so that I can now go on with my rebuttal.

Mr. Grosman: Now, if your Honor please, we don't want to be captious about this thing. This is the first I knew, or late yesterday afternoon—rather, Friday afternoon I was told by Mr. Leichtman that Mr. Schwartz would not be here today. Now, he hasn't communicated with us, nobody has told us that Mr. Schwartz was not going to be here, except in this off-hand manner. It seems to me if Mr. Schwartz wasn't going to be here, at least somebody could have told us, somebody in authority, that he was not going to be here.

(2076) Now, we want to complete our cross examination of Mr. Schwartz.

The Court: Yes, indeed you should, too.

Well, they have no other witness to call, Mr. Brigadier.

Mr. Brigadier: If their case is at an end, that's what I want to know.

The Court: Subject to finishing up with Mr. Schwartz.

Mr. Brigadier: Well, he is part of my case, sir. He is my witness.

The Court: All right. And your witness is not available, gentlemen?

Mr. Grosman: No, your Honor, we haven't been able to obtain him.

The Court: Then let's start from that point and go ahead.

Mr. Brigadier: And their case is rested.

The Court: Yes, sir.

Mr. Brigadier: I want to ask your Honor to permit me to reserve the right to move to dismiss. I don't want to do it at this point. I think perhaps the best way to handle it will be to do it through a briefing, if your Honor is going to have a briefing of the case.

Francis D. Murphy—for Defendant Milmar Estate—Rebuttal—Direct

But I would like the record at this point to (2077) show that I do want to reserve the right to move to dismiss their case on the fraud count on the ground that they have offered no evidence of fraud.

Mr. Abraham Chazin: I would like the record to show my reservation to the same effect.

Mr. Tepper: Your Honor will recall that we addressed certain motions to their case in chief, and they countered with certain motions. And your Honor stated for the record that all motions will be reserved for the time after the closing of the case.

Mr. Brigadier: That's right.

Mr. Tepper: On both sides. So that we, too, have certain reservations with respect to motions to be addressed to their case.

Mr. Brigadier: Mr. Murphy.

Francis D. Murphy, called and sworn for the defendant Milmar Estate, in rebuttal, testified as follows:

The Clerk: May we have your full name and address, please, sir?

The Witness: Francis D. Murphy, 244-08 54th Avenue, Douglaston 62, New York.

The Court: He has been sworn before, hasn't he?

The Witness: No, your Honor.

The Court : All right. Take a seat, Mr. Murphy. (2078) And keep your voice up, please.

Direct examination by Mr. Brigadier:

Q. Mr. Murphy, are you associated with Albert D. Osborn? A. I am.

Q. What do you do, share offices together; is that it? A. No, I am associated with him on some cases.

Francis D. Murphy—for Defendant Milmar Estate—Rebuttal—Direct

Q. I see. And is he at the present moment engaged in some proceedings in New York— A. Yes, he is.

Q. —official proceedings in Queens? A. I don't know just where it is, but he is engaged.

Q. He is in court at this moment. A. As far as I know.

Q. And did he request that you also make a study of certain documents that he had examined for us? A. He did.

Q. I see. And you did make that study? A. I did.

Q. Let me get the background into evidence first. You live at what address? A. 244-08 Fifty-fourth Avenue, Douglaston 62, New York.

Q. And what is your business or occupation? A. I am an examiner of questioned documents, which includes (2079) the identification of handwriting, typewriting, papers, inks and allied subjects.

Q. And where is your office? A. 101 Park Avenue, New York 17, New York.

Q. And how long have you been an examiner of questioned documents? A. Since 1931.

Q. Will you state briefly your qualifications? A. I studied the leading works on the subject, worked in conjunction with other experts, I was the handwriting expert for the New York City Police Department from 1931 until 1951.

The Court: Pardon me. You testified in this court before. That is why I remembered your name and face.

A. (continuing) I have testified on numerous occasions in every criminal court in New York, and every civil court, testified for the district attorney, for the United States Army and Navy, testified in court martials in Fort Hamilton, Fort Wadsworth, Fort Jay, Fort Monmouth, Fort Hancock, Camp Shanks, Camp Kilmer—

Francis D. Murphy—for Defendant Milmar Estate—Rebuttal—Direct

Q. You testified in the Hetty Green Wilks will case, did you not? A. I did. I submitted—

Q. That was a case that involved over a hundred (2080) million dollars.

The Court: Now, don't both talk at one time, please. Wait till he gets through with the question and you wait till he gets through with his answer.

The Witness: Yes, your Honor.

A. Yes, I worked on the Hetty Green—I testified as an expert in different states, in New York, New Jersey, Pennsylvania, Florida, California, testified for the United States Government in the United States federal courts in the Eastern and Southern Districts of New York, in the Southern District of Los Angeles—

The Court: Hold it a minute. Are you satisfied, Judge Grosman?

Mr. Grosman: I am satisfied, your Honor.

Mr. Brigadier: Will you let me have Exhibits DME-2, DME-50 and 51?

(Documents handed to Counsel.)

Mr. Grosman: The only thing I want to be certain of is that Mr. Murphy examined these documents, that he didn't take Mr. Osborn's report.

Mr. Brigadier: Oh, no. He made his own independent examination. That will be brought out.

By Mr. Brigadier:

Q. Did you make your own independent examination of Exhibits DME-2, DME-50 and DME-51? (2081) A. I did.

Q. And at what conclusion did you arrive as to whether the document, DME-2—that is the one dated August 26, your Honor will recall, the disputed one—whether or not

that was typed upon the same typewriter as Exhibit DME-50 and DME-51?

Mr. Grosman: Now, if your Honor please, I would like to examine Mr. Murphy as to the nature of the examination which he made.

Mr. Brigadier: He is going to detail it. I am going to have him detail it in just a moment, Judge.

Mr. Grosman: You are asking him for his conclusion.

Mr. Brigadier: That's right. And have him tell us how he arrived at that conclusion.

Mr. Grosman: I want to know the nature of the examination that he made first.

Mr. Brigadier: Well, I have a right to ask him on the basis of his qualifications whether he arrived at a conclusion and then to have him tell us—

The Court: Of course. And then the basis for the conclusion.

Mr. Brigadier: That's right.

Q. Will you tell us what conclusion you arrived at, Mr. Murphy? (2082) A. I believe they were all typed on the same typewriter.

Q. Now, will you tell us how you arrived at that conclusion? A. I examined and compared these three documents, the typing on them. I compared them with specimens of type and found that they were typed on a Royal typewriter. And the size was elite. That is twelve letters to the inch.

This particular typewriter was manufactured between 1945 and 1950.

I further compared individual characteristics between these typings and found similarities between the actual letters themselves.

Q. Will you state what they were? A. Yes. I found that the small letter—the small letters "a" and "m" running together. In the word "Riviera" I found that there is a characteristic combination of the letters as they were typed in that, with the "v" high and the "i" lower. I found a lightness on the capital "M" on the right-hand side.

The Court: Have you a list of your findings or are you browsing through there now to find them?

The Witness: I can refer to some notes.

The Court: You may, if they are your own notes, and you need them.

Mr. Grosman: May I inquire, your Honor, when (2083) he made these notes?

The Court: When did you make them, sir?

The Witness: Well, these particular notes that I have here I was just jotting down this morning in court. I have some other notes which I made previous to this.

The Court: Do you have notes that you made during the course of your examination of the questioned documents?

The Witness: Yes, I have.

The Court: Do you require them?

The Witness: I don't think so.

The Court: Well, you are certainly going very slowly. That's the only reason I ask. If you need them, please use them. If you can do without them, it's perfectly all right.

A. (continuing) I think that the similarities—

Q. What about the letter "r"?

Mr. Grosman: I object to that as leading.

The Court: Yes, I don't think we should lead experts.

A. Yes. I think I mentioned that the "r"—for example, in the word "Marcus", in DME-2, the "r" is high.

I think that the similarities, and the fact that they are all typed on the same kind of typewriter, the (2084) same model, the same year, the same size, makes me believe that they were typed on the same typewriter.

Mr. Brigadier: That is all.

Cross examination by Mr. Grosman:

Q. Now, may I ask you, Mr. Murphy, where did you examine these documents?

Mr. Brigadier: Wait a minute, Judge Grosman. I have another question. Would you hold it just a minute, please. I omitted two documents.

Will you let me have DME-1 and DME-3?

(Documents handed to Counsel.)

Direct examination (continued) by Mr. Brigadier:

Q. Did you also made an examination and study of Exhibits DME-1 and DME-3? A. I did.

Q. And can you tell us whether DME-1 and DME-3 were or were not typed on the same typewriter? A. In my opinion they were typed on the same typewriter.

Q. Will you tell us how you arrived at that conclusion? A. These two documents were typed on a Royal typewriter of the pica size. That's larger than the elite, ten letters to the inch. This particular machine was manufactured between 1920 and 1948.

There are also similarities and faults between (2085) these two typings. For example, on the letter "h", the small "h", the serif has been knocked off the top of the "h". And that is the same in both of the typewritings. It is a defective letter and it appears in both of them.

Francis D. Murphy—for Defendant Milmar Estate—Rebuttal—Cross

The Court: Is there anything else you observed in them, that you found?

The Witness: Yes, there were.

A. (continuing) The small "g", the small letter "g" is very heavy at the bottom and light at the top.

The Court: Anything further?

A. (continuing) The capital "A" was off its feet in that it was lighter—

Mr. Grosman: Off its what?

The Witness: Feet, f-e-e-t.

A. (continuing) —in that it is lighter at the top than at the bottom.

These characteristics, together with the fact that they were both typed on a Royal typewriter having the same size type, manufactured in the same—the same size, the same model, and the same typewriter, cause me to believe that they were typed on the same machine.

Mr. Brigadier: All right, Judge. Your witness.

(2086) *Cross examination by Mr. Grosman:*

Q. Now, may I ask you, Mr. Murphy, where you examined the first three exhibits? A. Yes.

Q. DME-2, 50 and 51. Where did you examine these? A. In 233 Broadway. That's Mr. Osborn's office.

Q. And do you know how they got there? I believe they were submitted by Mr. Chazin.

The Court: He asked you if you know, not what you believe. Do you know how they got there?

The Witness: Mr. Chazin submitted them.

The Court: Keep your voice up, please.

Mr. Brigadier: There are two Mr. Chazins. Perhaps it would be well to get the one it was.

Francis D. Murphy—for Defendant Milmar Estate—Rebuttal—Cross

The Witness: It was Theodore Chazin.

Q. You didn't see the typewriters on which you think these letters were written? A. No, I did not.

Q. Did you see Mr. Osborn's report? A. I discussed this case with him, but I haven't seen—read his report.

Q. Did he make a report? A. I believe he did.

Q. Can you tell us when these letters were written, except by reference to the date? (2087) A. No, I can't, except in a general way. They would have to be written when the typewriter was manufactured, between '45 and '50. They couldn't be written previous to that, because the typewriter—

Q. How do you know that—

The Court: I suggest that you make your answers brief and right to the point. And don't volunteer and don't guess.

The Witness: Yes.

Q. How do you know that this typewriter on which these three letters—DME-2, 50 and 51—were written on a Royal typewriter of this particular year? A. Because I compared it with known samples or standards of the Royal typewriter.

Q. And you don't have those known samples or standards here, do you? A. No, I haven't. I have a large file—

The Court: The answer is no.

The Witness: Yes, your Honor.

Q. Now, the exhibits, DME-1 and 3, which you testified to lastly, you don't mean they were written on the same machine that the first three exhibits were written on. A. No, it was a different machine.

Francis D. Murphy—for Defendant Milmar Estate—Rebuttal—Cross

Mr. Brigadier: He so testified.

(2088) The Witness: It's larger type.

Mr. Grosman: Let him testify.

Mr. Brigadier: But the question is based on a false assumption of fact.

The Court: He distinctly said they were two different typewriters.

The Witness: And two different sizes. This is elite and this is pica.

Q. Now, some of these letters—or, to be specific, letter DME-2 is a carbon copy, is it not? A. It is.

Q. And DME-50 is an original? A. It is.

Q. And DME-51, is that an original? A. It is.

Q. And you say that one of the things that you have taken into consideration is the fact that some of these letters are shaded a little differently? A. Yes.

Q. Will you show me which letters are shaded differently on these first three exhibits? I don't remember whether you said there was any shading difference in the first three exhibits. I don't want to confuse you.

Mr. Brigadier: I don't think he so testified. He testified as to the last two.

(2089) The Court: He certainly should know what he said.

Mr. Grosman: Well, I don't want to mislead him.

The Court: That's right. He is an expert.

Q. DME-2, 50 or 51, are there any differences in shadings? A. Yes, I think the capital "M"—

Q. Where? A. In "Miller," on DME-50 where it says, "Care of Bill Miller."

Q. Do you require a magnifying glass to see the words "Car of Bill Miller"? A. No, I do not.

Q. I notice you use it. A. Yes, it helps.

Francis D. Murphy—for Defendant Milmar Estate—Rebuttal—Cross

Q. I was wondering. Now, you say there is a difference in shading in the "M" of "Bill Miller's Riviera", between that and which? A. No, I didn't say there was a difference. I said there was a similarity.

Q. Oh, I see. A. That there was a similarity of the shading of the capital "M" in "Bill Miller" as it appears in DM-50 and DM-51, and in DME-2.

Q. Of course, there is a difference of shading between the copy, DME-2 and DME-50 and 51. (2090) A. There is.

Q. Tell me this, Mr. Murphy, how long did it take you to reach your conclusion with respect to the exhibits, DME-2, 50 and 51? A. I don't know exactly. I looked at it for some time and then looked at some photographs of it later on.

Q. Can you give us an approximate time; was it a day, or a week? A. I would say many hours.

Q. On one day? A. No, not only in one day. I looked at it at various times. I don't know exactly how long I looked at it.

Q. Did you say you were shown photostats? A. No, I saw the originals.

Q. The originals. Only the originals? A. No, I saw the originals and I saw some photographs.

Q. Photographs? A. Yes.

Q. Of the originals? A. Yes.

Q. Made by whom? A. Made by Mr. Osborn.

Q. Not by you. A. No.

Q. Now, was Mr. Theodore Chazin present during (2091) this examination? A. No, he was not.

Q. Did he leave the documents with you or with Mr. Osborn? A. He left them with Mr. Osborn.

Q. You don't happen to have Mr. Osborn's report with you? A. I do not.

Q. You did read it, however? A. I did not.

Q. You did not? A. I discussed the case with him, but I didn't read his report.

Francis D. Murphy—for Defendant Milmar Estate—Rebuttal—Cross

Q. Now, how long did it take you to make your examination of these remaining exhibits, DME-1 and DME-3? A. I don't know exactly. I worked many hours on the problem.

Q. You have no record of how long it took you? A. No.

Q. And where did you get these two exhibits from? A. 233 Broadway, from Mr. Osborn.

Q. From Mr. Osborn. You don't know who brought them over there? A. Yes, Mr. Theodore Chazin brought them over there.

(2092) Q. You discussed these two documents with Mr. Osborn? A. Yes, I did.

Q. And did Mr. Osborn give you his report on these two? A. No, he did not.

Q. You made your independent investigation? A. I did.

Q. And came to your own conclusions? A. I did.

Q. Did you know Mr. Osborn's opinion with respect to all of these exhibits before you made your own conclusions? A. No, I did not.

Q. He didn't tell you his own conclusions? A. No. He asked me to look at these—

The Court: He asked you a very simple question. Will you give it to him, Mr. Bremer?

A. No.

The Court: You know the question, do you?

The Witness: Yes, your Honor.

The Court: All right. The answer is no, Judge.

Q. Let me ask you, notwithstanding that you worked—or are associated with Mr. Osborn, that he (2093) turned these exhibits over to you, you didn't think it important to find out what his conclusions were? A. I thought it was important not to find out his conclusions until after I examined them.

Walter G. Winne—for Defendant Milmar Estate—Rebuttal—Direct

Q. Well, did you find out subsequently what his conclusions were? A. Yes, I did.

Mr. Grosman: All right, that's all.
The Court: Anything further?
Mr. Brigadier: No further questions.
The Court: That is all.

(Witness excused.)

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(2098) WALTER G. WINNE, called and sworn for the defendant, Milmar Estate, Inc., in rebuttal, testified as follows:

The Clerk: May we have your name and address, please, sir?
The Witness: Walter G. Winne, W-i-n-n-e, 381 Anderson Street, Hackensack.

Direct examination by Mr. Brigadier:

Q. Mr. Winne, you are a member of the Bar of the State of New Jersey?

Mr. Grosman: All of his qualifications are admitted.
Mr. Brigadier: Well, I am not calling him as an expert, I just want to establish that he is a member of the bar.
The Witness: Yes, sir.
The Court: Yes, I will take judicial notice of that.

(2099) Q. In April, 1946, did you represent Ben Marden and the Michael Realty Company? A. Yes, I represented the Michael Realty Company and Marden in April, 1946; that's right.

Q. Did you handle the transaction of the contract for the sale by Michael Realty to William Miller and Samuel

Marcus? A. The executed contract was brought to me, executed before I ever saw it. It was prepared somewhere else and brought to me executed.

Q. Already executed before it was brought to you, sir? A. Well, see, these things are so long ago, Judge, I have got so many papers, I can't always turn to the thing I want, but I am sure that is the fact, and I think I can find it.

Q. All right. A. Please. I would like—if you don't mind—to be sure what I am testifying.

Q. I think the closing took place at your office, at any rate, did it not? A. I have the executed contract in front of me, dated April 2, 1946, signed by Michael Realty Company, by Herman Bloom, by William Miller and Samuel Marcus, on the (2100) stationery of Schimmel & Gadofsky, 11 West 42nd Street, New York. And it is my testimony that that was prepared, executed and delivered to me after execution.

Q. Now, did the closing take place at your office, Mr. Winne? A. Yes, we searched the title, closed the title, prepared a closing statement, recorded the deed, and recorded a bond and mortgage at my office.

Q. I show you the deed from Michael Realty to William Miller and Samuel Marcus and ask you if that is the deed?

Mr. Grosman: May I ask, your Honor, what counsel is trying to prove. Maybe I will admit it.

Mr. Brigadier: I am just leading up to what the transaction was that he will be able to tell us about.

Q. Make it very brief. A. Yes. This deed is the deed on Winne & Banta stationery. It was recorded by us, and returned to us, and then delivered to the purchaser.

Q. Did you represent, at the time of the closing, William Miller and Samuel Marcus, individually, as well? A. Yes, I did. I called their attention to the fact that I represented the sellers. Mr. Miller was complimentary enough to say

that if I was good enough for Marden, I was good enough for him. I said, "Well, (2101) you are entitled to your own lawyers, but if you want me to, I don't see any reason why I can't act, as long as everybody understands it." And I represented both the sellers and the purchasers.

Mr. Brigadier: I would like to put this deed in evidence, if your Honor please.

Mr. Grosman: I have no objection.

The Clerk: DME-66, deed dated April 5, 1946.

(Received and marked Exhibit DME-66.)

Q. At the time of the closing did you receive instructions from Mr. Miller and Mr. Marcus as to the organization of any corporations? A. About that time. I am not sure whether it was before or after the closing.

Q. And what instructions did you receive and what did you do about it? A. I was instructed to prepare the corporate papers for the incorporation of Milmar Estates, Inc.—that "Mil" is part of Miller's name and "mar" is part of Marcus' name, M-i-l-m-a-r—and I did prepare and file the certificate of incorporation. And the stock, according to the certificate, was issued, nine shares to Miller, nine shares to Marcus, and two shares to Marguerite Kane, who was a secretary in my office. And then I got the corporate books, and they were delivered to somebody, I (2102) don't know to whom, but I never issued the stock or anything of that kind.

Q. Now, I notice that in Milmar, as you have just testified, you issued the shares in equal amounts to Miller and Marcus, is that right? A. That appears in the certificate, but, actually, our office did not issue the shares. The stock book was delivered to somebody and the shares were issued somewhere else.

Q. Well, the original subscriptions, Mr. Winne, were in equal amounts, is that right?

Mr. Grosman: I object to that. It's whatever the record shows.

A. I prepared the certificate of incorporation, which shows that nine shares were subscribed to by each of them. And that is, I think we all understand, the way lawyers do it. I never saw a subscription blank.

Q. Now, what about the Riviera, did you prepare that, too? A. Yes, quite different. Bil Miller's Riviera was incorporated by me. And Mr. Miller provided the incorporators. He was one, and the other two were people I didn't know at all. My office didn't supply any qualifying shares and Mr. Marcus did not appear in Bill Miller's Riviera.

Q. Now, did you render a bill for your services, (2103) Mr. Winne? A. Yes, I sent a bill to Mr. Miller and Mr. Marcus for $1,000 for closing the title and forming the two corporations.

Q. Did you have any difficulty about collecting that bill?

Mr. Grosman: I object to that.

Mr. Brigadier: I think it is very important, because of something Mr. Winne has in the file, which will reflect upon Mr. Marcus' credibility—and I think it is a very important thing- that this man disputed.

The Court: I will allow it.

Mr. Grosman: All right.

A. Yes, this was in 1946. And in March, 1947, I was corresponding with Mr. Marcus trying to get my bill paid.

Q. And this is after you had billed both Mr. Marcus and Mr. Miller, is that it? A. I took the position that I was working for Mr. Miller and Mr. Marcus, because when I was retained there was no corporation in existence and I didn't want to have a claim against the corporation, I wanted a claim against Miller and Marcus.

Walter G. Winne—for Defendant Milmar Estate—Rebuttal—Direct

Q. Did you receive a letter from Mr. Marcus disputing the fact that he had retained you in any way to act as his attorney? (2104) A. Well, not that. I have a letter which speaks for itself. It suggested that he didn't owe me any money.

Q. Didn't the letter do more than that? Let's have the letter. Let the letter speak for itself. A. Two letters. A letter of March 6, 1947, and August 11, 1947.

(Documents handed to counsel.)

Mr. Brigadier: I would like to read this letter to your Honor. May I?

Mr. Grosman: Now, wait a minute. Let me see the letter.

The Court: Let's see what it is about first.

Mr. Brigadier: It is a letter from Sam Marcus to Winne & Banta, dated August 14, 1947.

Mr. Grosman: It is not signed by Marcus. Somebody's initials—

Mr. Brigadier: You say it is not signed by Sam Marcus. We don't know that it isn't signed by Sam Marcus. It's in reply—

Mr. Grosman: Now—

Mr. Brigadier: Wait a minute. The law of evidence is that a letter that is received in due course of mail, and in reply to a letter that is sent, is presumed to have been sent by the addressee of the letter.

(2105) The Court: Unless there is proof to the contrary.

Mr. Brigadier: And it is a reply to a letter Mr. Winne sent to Mr. Marcus.

Mr. Grosman: Wait a minute. Apparently he is doing all the testifying. Mr. Winne hasn't said anything about sending a letter, or receiving a letter in

reply to his letter. And there are somebody's initials under Marcus' signature, which would indicate—

Mr. Brigadier: It says, point blank, "This is in receipt of your letter of August 13."

The Witness: Judge, there is no question about it. I wrote a letter on August 13 and—

Mr. Grosman: I don't want him telling it.

The Court: Yes, he refers to the receipt of the letter of August 13, that's right. And here is a copy of the letter of August 13.

Proceed, will you please.

Mr. Brigadier: This letter reads, "Winne & Banta. Gentlemen: I am in receipt of your letter of August 13 and am somewhat surprised at its contents. You advise that this money is owed to you by me. This is incorrect. Th money is owed to you by Bill Miller's Riviera and this demand should be made from Bill Miller's Riviera. You are no doubt in constant touch with that (2106) organization, having legally represented them in some litigation, and I do not see any reason for your addressing demand for payment to me at this time when he is fully capable of taking care of his bills. I did advise you at one time that I would see that your bills were paid, but it is rather peculiar for me at this time to demand payment to you from a person who owes your money and who is your own client."

I don't know, that's the way it reads, Judge. I am reading it as it is.

"We feel certain demand for payment made at the proper sources will bring satisfactory results. We trust this matter will be taken care of to your satisfaction. Very truly yours, 42nd Street Fotoshop, Inc., Sam Marcus."

Walter G. Winne—for Defendant Milmar Estate—Rebuttal—Direct

Q. Now, did you eventually receive payment of that fee? A. Yes, I was paid a thousand dollars by two payments, of $500 each.

Q. From whom did you receive the money? If you don't recall, you don't. I realize this is a long time back. A. I could find out, but I don't remember. I didn't think that was important.

Q. Now, Mr. Winne, did you represent any creditors of these corporations—withdraw the question.

(2107) Did you procure insurance for them? A. Yes. There was some difficulty about insurance and one of my clients, and friend, the Conklin Agency in Hackensack, wrote a policy on the plate glass, and some other insurance, and had a bill of somewhere around $5,000, which we put in suit and took judgment for, and issued execution on and finally collected.

Q. Did you continue to represent Michael Realty after the Michael Realty acquired the purchase money mortgage? A. Yes, I did.

Q. And did you sort of act as watchdog for them with respect to that mortgage? A. Well, that might describe what I did. I advised them that I thought they ought to see if the taxes were paid.

Q. And did you check occasionally upon the condition of the property, as to whether the taxes were being paid, etcetera?

Mr. Grosman: I object to this as leading and as having nothing whatever to do with the case.

The Court: Unless it is going to be tied up in some way.

Mr. Grosman: Just like the letter, I suppose, attacking Mr. Marcus' credibility.

(2108) Mr. Brigadier: Well, I think it does attack his credibility.

Mr. Grosman: Because he didn't want to pay a bill?

Mr. Brigadier: He denied that this man was his lawyer, after he rendered him the services.

Q. Did you have occasion to make a foreclosure search with respect to that mortgage? A. Yes.

Q. Will you tell us the circumstances under which it came about?

Mr. Grosman: I object to that as immaterial.

The Court: Will it be connected up?

Mr. Brigadier: Yes, because we are going to bring in, eventually, the whole picture of the bankruptcy proceeding. Remember, there is some question here as to—well, there is this whole picture that they have been trying to produce some proof of, but actually haven't, as far as I can see, of this tremendous business we were doing, making so much profit, that he heard rumors to the effect that we were taking money off the top somewhere. I want to show you what this picture was, that they actually were threatened for a foreclosure of the mortgage in December, '46, that immediately thereafter they go into the bankruptcy, what actually happened in this case.

(2109) The Court: Proceed.

Mr. Grosman: And they got out of it fast enough.

The Court: They will bring that out, too, I guess.

Mr. Brigadier: Judge Grosman, I think it is time that you stop making these "aside" remarks. They have nothing to do with the case and you are not a witness. And I think it is high time you stopped.

Mr. Grosman: I made my remarks to the Court.

Mr. Brigadier: You have done it now for six weeks before.

Mr. Grosman: All right.

Mr. Brigadier: And I ask the Court to stop it.

The Court: Let's say it is a bad habit.

Mr. Brigadier: Well, I haven't learned to live with it. Maybe that is my trouble.

(Discussion off the record.)

The Court: Will you read the question?

(Question read as follows: "Will you tell us the circumstances under which it came about?")

A. I know that it was some time after 1946—in the month of December, 1946, I communicated with the representative of the Schimmel Realty Company—the (2110) Michael Realty Company, Michael Schimmel—the name Michael came from Mr. Schimmel's first name, Michael—and was instructed to commence foreclosure on the bond and mortgage, the purchase money bond and morfgage that was given when Miller and Marcus purchased this property. And at that time I told Mr. Marcus that my position was antagnositic to him and I could no longer represent him. And we prepared a foreclosure bill. And I then was advised by Mr. Miller that the taxes would be paid that day, December 27, 1946. And I did not proceed with the foreclosure. I assume the taxes were paid.

Q. You knew of the bankruptcy proceeding that took place immediately thereafter? A. Well, I would like to refer, if you don't mind—

Q. I would like to save some time. A. Yes. You say immediately thereafter. I don't know anything about that, immediately thereafter.

Q. Mr. Winne, I show you a deed, dated the 7th day of May, 1946, from William Miller and Samuel Marcus to Milmar Estate of the property in question, and I ask you whether you had anything to do with that deed? It was

suggested by Judge Grosman here some time ago that you had some connection with the preparation of that deed. A. May I say, Judge, that the contract for purchase provided that the purchasers might form a corporation, (2111) and title might be vested in a corporation, and that the purchasers—that's Marcus and Miller—would retain a substantial interest in the corporation.

I did not prepare the deed from Miller and Marcus to the corporation. I did not know that it was prepared. I didn't know who prepared it. It obviously was prepared—it was at least returned to Louis Feldman, 220 Broadway, New York. I never knew the deed existed until there came a question as to whether or not there was a dower interest in Miller's wife and Marcus' wife. And that I didn't learn until years after that deed was on record.

Mr. Grosman: Now, for the sake of the record, if I may, your Honor, I have no recollection of ever having accused Mr. Winne of having prepared that deed.

Mr. Brigadier: Oh, yes, you did, Judge.

The Court: Let him finish, will you please.

Mr. Grosman: If he did, I know he would have included the wives' dower rights.

The Court: I am inclined to agree with you. I think if a New Jersey lawyer had drawn that deed the wives' dower rights would have been included.

Mr. Brigadier: And I agree, too. But, unfortunately, he made the other statement, and when I got up and I said, "I don't think Mr. Winne needs my (2112) defense, but I can't allow this statement to be made unanswered," I said, "I represent to your Honor that Mr. Winne had nothing to do with this deed." And I made that representation to you.

I want it now to come into the record that what I represented was the fact.

The Court: So now it is abundantly clear that he had nothing to do with the preparation and execution of the deed.

We will take a five-minute recess.

(Short recess.)

By Mr. Brigadier:

Q. Mr. Winne, in 1947—I think it was June or July of 1947—did Mr. Miller come to see you about a dower question that had arisen as to whether—in 1949. I am sorry. I gave you the wrong year. A. Yes. There was a time when I discussed with him the fact that the title to the corporate property might be questioned because there was no release of dower from the wives of Miller and Marcus.

Q. And did you, as a result thereof, write to Samuel Marcus? A. I did.

Q. Will you produce the letters, the correspondence that ensued?

(2113) Mr Grosman: I object to that, your Honor, as being wholly immaterial to this issue.

The Court: How is it pertinent in this case?

Mr. Brigadier: I think it is very relevant, if your Honor please, because here is Samuel Marcus, who claims that he still remained the owner of the stock of the corporation, that he had only sold, at best, 625, and even that was being held in escrow, and here a proceeding was eventually brought to quiet the title with respect to the outstanding claim of dower.

Certainly, if he was interested in the corporation, it was his interest to step in somewhere, somehow. On the contrary, we find that he, as you will see from the correspondence, turns it over to Mr. Roth, who, in turn, turns it over to Mr. Tepper, who, in turn, ends

up, both Tepper and Roth, representing Samuel Marcus.

And I think the whole picture is essential to show what Samuel Marcus has been doing ever since he got out of the property. In other words, to hold us up at the point of a gun, anytime that he could, for money, and that he actually never regarded himself as the owner of stock of that corporation, or wouldn't have taken these various positions that he did.

Mr. Grosman: That is merely an inference on the part of—

(2114) Mr. Tepper: Irrespective of my love for Mr. Brigadier, and I have due deference for his physical ailment at this time, I resent the statement made by him, for the record, using the term "holding up a gun." Mr. Brigadier knows that Mr. Marcus testified here that at the time of this occurrence he was estranged from his own wife. Your Honor will recall that testimony.

The Court: I do.

Mr. Tepper: But Mr. Brigadier just brushes that aside and tries to now indicate some continuing interest on the part of Mr. Marcus in something because he was no longer interested in the real estate or in the Riviera proposition. And I think your Honor will well remember that testimony and I don't have to go into it.

The Court: I do recall he said at the time he was estranged, he occupied the same premises, but they were not on a very friendly basis.

Mr. Grosman: Your Honor, I don't care whether you let this in or not. It is merely going to clutter up this record. It has absolutely nothing to do with the issues of this case.

Walter G. Winne—for Defendant Milmar Estate—Rebuttal—Direct

Now, whether Marcus could control his wife in giving up her right of dower—certainly because of the six or seven thousand dollars involved in the settlement (2115) of that dower claim Marcus wasn't going to jeopardize his interest in the main corporation.

If you want to let it in, I have no objection, your Honor.

The Court: Well, we might save time by letting it in, instead of arguing whether it should go in or not.

Mr. Grosman: Except that we will have to take the stand and contradict it.

By Mr. Brigadier:

Q. Do you have that correspondence? A. Yes, I have the correspondence.

Q. Will you please read the correspondence to us that ensued?

Mr. Grosman: May I inquire how many letters there are involved in this correspondence?

The Witness: Let me state what I have here, Mr. Grosman.

Mr. Grosman: Yes.

The Witness: I have a letter of July 19, 1950, addressed to Mr. Marcus. I have a reply of July 28, 1950, from Mr. Norman Roth. I have a letter of August 1, 1950, to Miller, the only importance of which probably is that it would refresh my recollection of what transpired, because I put it in a letter to Mr. Miller.

(2116) The Court: That's all you have?

The Witness: No, sir. I have a further letter of October 17, 1950, to the Roth office—Olcott, Roth & Norton—about the same matter, about the proposed suit over the dower. Their reply of October 18, 1950.

And a further letter of November 4, 1950, in which they turned our claim down, and said—

Mr. Grosman: Eight or 10 letters, have you?

The Witness: Whatever I read, those are what I have.

Mr. Grosman: I object to it.

Mr. Brigadier: Are you examining the witness or am I?

Mr. Grosman: I am addressing my remarks to the Court. I want to know how many letters there are so I can make my motion to the Court.

Now, he is going to read 10 letters into the record?

Mr. Brigadier: He didn't say there were 10.

Mr. Grosman: Well, there are eight, whatever he—

Mr. Brigadier: No matter what number there are, if they are admissible, they should be received in evidence.

Mr. Grosman: I object to them.

The Court: I will allow it.

(2117) A. Letter written by me on July 19, 1950, to Mr. Sam Marcus, Fotoshop, Inc., 18 East—

Mr. Brigadier: Would you raise your voice a little, Mr. Winne? We are having a little trouble back here.

A. "Mr. Sam Marcus, Fotoshop, Inc., 18 East 42nd Street, New York 17, New York. Dear Mr. Marcus: Of course, you remember me through the sale from the Michael Realty Company to you and William Miller on April 5, 1946, of the Riviera property. That deed was recorded on April 10, 1946, in Book 2662 of Deeds, page 312. There was an agreement entered into between the sellers and Mr. Miller and yourself which provided that the purchasers intended to form a corporation to take title to the premises and that the corporation would execute the bond and mortgage. We

did form for you the Milmar Estates in June, 1946, and a deed from Bill Miller and Sam Marcus was made and acknowledged in New York and recorded August 1, 1946, in Book 2667, page 35. No revenue stamps were affixed to this deed and it was returned to Louis Feldman, 229 Broadway, New York City.

"We have been asked by Mr. Miller to obtain a release of dower from Mrs. Marcus. We never knew that you were married. As a matter of fact, we had nothing to do with the deed to Milmar Estates, which was executed in (2118) New York City. However, there is no doubt that you and Mr. Miller took title merely for the purpose of holding the title till the corporation was formed, and I think a suit could be maintained which would compel the execution of a release of dower by Mrs. Marcus.

"I think the matter should be cleared up while we are all in good health and able to recall the circumstances. I would appreciate very much hearing from you at your first convenience. I will see you in New York or do whatever is necessary to help straighten out this difficulty. Yours very truly." Copy to Miller.

Now, that letter was answered by July 28, 1950, nine days later, by a letter from Olcott, Roth & Norton, lawyers, at 70 Pine Street, New York, letter addressed to Winne & Banta—

Mr. Grosman: Pardon me. May I have the date of that?

The Witness: July 28.

Mr. Grosman: What year?

The Witness: 1950.

A. (continuing) "Your letter of July 19, addressed to Mr. Sam Marcus, with respect to the dower rights of Mrs.

Marcus in the Riviera property, has been delivered to us as attorneys for Mrs. Marcus.

"It is our understanding, based upon the opinion of (2119) Tepper, Tepper & Verney, Esqs., of Newark, our correspondent attorneys, that Mrs. Sarah Marcus does have inchoate dower rights in the property. We shall be glad to meet with you for the purpose of discussing an adjustment of this matter, as you suggest in your letter."

I then had the conference which was suggested, in their office, and told them that I thought that either there was a trust established in favor of the corporation, or that there was a partnership, in which case the wife would not have any dower, and I was convinced that we could maintain a suit and be successful.

And the next letter is my letter to Olcott, Roth & Norton on October 17, 1950. And I say, "Since my last conference with you we have spent a great deal of time in research concerning the claim of Mrs. Sarah Marcus of a dower interest in the Miller property at Fort Lee and are convinced that we can be successful in a suit against her, which we are about to start.

"In view of our past conversation, it may be that a conference on the subject would be of value and I am prepared to come to your office on short notice. Time is important. I would appreciate hearing from you promptly."

The Court: That's August 17, 1950?

(2120) The Witness: October 17.

A. (continuing) And it was answered the next day by Olcott, Roth & Norton, saying, "This will acknowledge receipt of your letter of October 17 with reference to the matter of Mrs. Marcus' rights in the Riviera property. I shall be pleased to confer with you at any time, meeting your convenience."

Walter G. Winne—for Defendant Milmar Estate—Rebuttal—Direct

I then again went to their office in New York and tried to persuade them that a modest sum might be paid to avoid a lawsuit, as sort of a nuisance value, a very small sum.

And they wrote me on November 4, the same firm—Olcott, Koth & Norton, "November 4, 1950. Dear Mr. Winne: Since our conference at this office last week I have again investigated the facts with respect to the above situation. I am of the opinion that the facts do not support the theory you advanced on that occasion. Should you desire to consult with me further concerning the matter I shall, of course, be glad to meet with you at any time. Very truly yours."

And as a result of that I advised Miller to start litigation. And I think litigation was started.

Q. Mr. Winne, prior to September 14, 1948, did you have occasion to ever visit at the Riviera premises itself? (2121) A. What is the date?

Q. Prior to September 14, 1948. That is the date of the sale. A. I would say from the time they opened in '46 I went there at intervals, every three, four, five weeks I would be over there for dinner, maybe with Mrs. Winne, maybe with somebody else.

Q. And upon these occasions did you see Samuel Marcus there? A. Oh, there was a time—I don't know when it was—there was a time after they opened in '46 when I always saw him. Every time I went there, he would be there. I have had a drink with him at the bar, conversation, that sort of thing.

Q. And since September 14, 1948, when the sale took place, did you have occasion to go there again? A. I can't fix the date. And I had nothing to do with the purchase, or whatever happened between Miller and Marcus, I had nothing to do with that. But there came a time when I just never saw him any more. I would go there and he would just not be there.

Walter G. Winne—for Defendant Milmar Estate—Rebuttal—Direct

Q. And that was over a period of several years? A. I would not know, but I would say it was certainly not '46 and '47, but after '47, probably.

Mr. Brigadier: That is all, Mr. Winne.

(2122) I might want to ask the Court a question. We have put in no proof—because I think I understood your Honor's ruling correctly—on our last claims. You remember our last counts are on the tort count for the slander of title by the erroneous filing of lis pendens. When we get to that I will need Mr. Winne again as a witness, since he knows all about this proceeding.

The Witness: Your Honor, may I say—

Mr. Brigadier: Just let me finish, Mr. Winne.

The reason we can't take the evidence now—and I am anticipating your question—is that, as I understand the law, you can't pass upon those claims until you first decide the other counts, anyway. In other words, you would first have to decide whether Marcus was entitled to a recision or not before we could even try the other counts.

The Court: Did I make a ruling on that?

Mr. Tepper: May I be heard? We are here without a jury. We are on the equity side of the Court. Your Honor wants to expedite this trial, I know; we do, too. I see no point in bringing Mr. Winne back again at some date in the future. If Mr. Brigadier has any testimony he desires to produce on the part of Mr. Winne, (2123) it should be done now.

Your Honor can hold it, pass upon it, in the proper order of events, and when proper motions are addressed to your Honor.

And I think you can resolve one point, if that is the law—I don't agree with that statement of the law—

but I think that since Mr. Winne is here, he should now, since they have their witness on the witness stand, exhaust every possible avenue of examination.

Mr. Brigadier: No, I will not offer the evidence at this point.

The Court: I certainly can't compel you to.

Cross examination by Mr. Grosman:

Q. Mr. Winne, as I understand it, you presented a bill for a thousand dollars for incorporating this company and closing this title, is that right? A. Yes, sir.

Q. And you presented it to Marcus? A. Marcus and Miller. I made the bill out to both.

Q. Well, Marcus said he wasn't responsible for the bill, that the bill should have been paid by the Riviera? A. That's right.

Q. What did Miller say? A. I think—well, they didn't pay; whatever he said, (2124) it resulted in not paying.

Q. Did Miller say anything when you asked him for money? A. Oh, yes; he was always very pleasant about it. He said he didn't have any, that's all.

Q. Eventually the bill was paid? A. Yes.

Q. By whom? A. I can't be sure, but I think I got two checks, each for $500, from Bill Miller's Riviera. I think so.

Q. Now, were you told, in respect to this dower claim, this outstanding dower on the part of Mrs. Marcus— A. Was I what?

Q. Were you told. A. Yes.

Q. —when you negotiated with respect to this dower claim of Mrs. Marcus, that Mr. Marcus had no control over Mrs. Marcus— A. Yes.

Q. —that he was having difficulty with her over the fact that he was spending too much time in this nightclub? A. Well, I will tell you what I recall having been told.

William Miller—for Defendant Milmar Estate—Recalled—Redirect

It was not exactly that. I was told that they were on such terms that he could not expect her to do anything (2125) for him in that regard.

Q. And as far as you know, that statement was true? A. I have no reason to—I have no proof of anything to the contrary.

Mr. Grosman: All right. That's all.
Mr. Brigadier: That's all, Mr. Winne.
The Court: Then we can excuse Mr. Winne now?
Mr. Brigadier: Yes.

(Witness excused.)

Mr. Brigadier: We have one witness due at 2 o'clock and I have just two or three questions to ask Mr. William Miller on redirect. I want to avoid, if your Honor please, having to open up the whole business. I am going to limit it to three or four questions on redirect.

WILLIAM MILLER, resumed the stand.

Redirect examination by Mr. Brigadier:

Q. Mr. Miller, did you ever have possession of the books —I am talking now of the books of account, or the stock book, or transfer book, or Minute Book—of Milmar Estate, Inc., prior to September 14, 1948? A. No.

Q. Who had possession of those books? A. Sam Marcus.

(2126) Q. Do you know where the books were kept? A. In his office.

Q. Where? A. In the Fotoshop.

Q. Who told you that they were kept there? A. Jack Hoffman and also Marcus.

Mr. Grosman: I move that testimony be stricken as hearsay.

William Miller—for Defendant Milmar Estate—Recalled—Redirect

Mr. Brigadier: He said "and also Marcus."

The Court: Do you hear what the witnesses say sometimes when you make objections?

Mr. Grosman: I didn't hear the last word.

The Court: He said Sam Marcus told him.

Mr. Grosman: I didn't hear him say that, your Honor.

A. (Continuing) And Sam Marcus. In fact, I saw them in Sam Marcus' office when I was there at one time.

Q. Now, I want to direct your attention to September 14, 1948. And please just answer these questions, because I don't want to go into the testimony that you have already given once before.

On that date, after all the documents were signed—remember the documents that were exhibited to you once before—after they had all been signed by Samuel Marcus, did Samuel Marcus turn to you and ask you for $50,000 on (2127) the note? A. He did not.

Q. Did you at that time offer him any kind of notes—blue, pink, yellow, I don't know what other colors he described them as—to meet that $50,000 note? A. I did not. I take an oath to God that I did not.

Q. After the papers were signed by Marcus did you and Marcus—now, please listen to me, Mr. Miller, don't listen to any side conversations over there—did you and Marcus leave the room and negotiate a new transaction? A. No, positively not.

Q. Did you and Marcus, after the papers had been signed by Marcus, change the deal to a sale by Marcus of 625 shares for $140,000, with a wiping out of your note of $50,000, and a wiping out of your right to acquire the option for the 480 shares; did you make any such deal? A. No.

William Miller—for Defendant Milmar Estate—Recalled—Redirect

Q. Was there any new deal made of any kind after the papers had been signed on September 14, 1948? A. None whatsoever. I never saw Marcus again.

Q. Now, did Mr. Marcus at the time of the closing on September 14 deliver to Al Lieberman 625 shares of the (2128) stock that had been issued, the old stock, the original stock that had been issued prior to September 14? A. No, I don't know—I didn't see anything delivered. I don't know what happened. I just know that I didn't see a thing there, nothing whatsoever, except that we issued new stock.

Q. Did you see him deliver to Al Lieberman any stock—A. No.

Q. —other than the new stock that was issued on that day?

Mr. Grosman: I object to that. The witness has already said he doesn't know what happened.

The Witness: I'm sorry. I didn't mean that. I mean the old stock. What I mean, that all I saw was that we destroyed all the old stock, we issued new stock, and it was given to Al Lieberman.

The Court: I don't think you get Mr. Brigadier's question.

The Witness: I'm sorry. Maybe I don't.

Q. What I am asking you is whether or not at the same time, on that day, at that closing, there was delivered to Al Lieberman, in your presence, 625 shares of stock that had been issued prior to September 14, the old stock? (2129) A. No.

Q. Was any of that stock present? A. No.

Q. Did you see any of it? A. No, I didn't see any.

Q. Did Marcus exhibit any of it? A. None whatsoever.

Mr. Brigadier: That's all. Those are the only questions.

William Miller—for Defendant Milmar Estate—Recalled—Recross

Recross examination by Mr. Grosman:

Q. Now, did I understand you to say that you did not leave the room with Sam Marcus during the course of the negotiations of September 14?

Mr. Brigadier: I object. That is not what the witness testified to.

Mr. Grosman: Let me finish my question.

The Court: Let him finish.

Q. Did I understand you to say that you did not leave the room with Sam Marcus on September 14, 1948, and make a new deal?

Mr. Brigadier: I object to that, if your Honor please. That is not what his testimony was. His testimony was, after the signing of the papers. We know from the original testimony that was given that they did leave the room for the sweetening up of that fifteen (2130) thousand.

And I represented to the Court that I was not going to go back over the whole transaction all over again, but would nail it down simply to the parts of the redirect as to which the contradiction had arisen.

The Court: Your question was directed to after everything was signed?

Mr. Brigadier: That's right.

The Court: And that is all he testified to. He has already testified in his direct that he did leave the room on prior occasions.

Mr. Grosman: Yes, he did, that is what he testified.

Now, my recollection is, your Honor, that he just testified, in response to Mr. Brigadier's statement, that he did not leave the room and make a new deal with Sam Marcus.

William Miller—for Defendant Milmar Estate—Recalled—Recross

The Court: Nothing was said about leaving the room at all, he just said he didn't make any new deal.

Mr. Grosman: If your Honor please, may we have the record read back? He asked him that specific question, did you leave the room with Sam Marcus and make a new deal, and he said no.

Mr. Brigadier: After the papers were signed, (2131) whereas the original testimony is that he left—

The Court: Don't go over it again.

Mr. Grosman: All right.

Q. Now, let me ask you, did you leave the room with Sam Marcus during the course of these negotiations? A. Yes, I did.

Q. How many times? A. I believe only once.

Q. And did you negotiate a new deal? A. I did not.

Q. Why did you leave the room with Sam Marcus? A. We were talking about the $15,000 that he wanted extra, and I tried to show Sam how silly it was, and what was going on, that I couldn't get Kevelson to go for more than a hundred and twenty-five thousand—

The Court: Now, don't go over all that again.

Mr. Brigadier: I object. This is not redirect.

The Court: I said don't go over all that again. I don't want to hear it again. I am sick of hearing it.

Mr. Brigadier: That is my objection, sir.

The Court: I am a man of patience, but, believe me, it has been tried in this case more than in any case I ever had. If you people have nothing else to (2132) do, I have; I have other lawyers waiting to dispose of their cases, which mean just as much to them as this does to these litigants here. And they are going to be tried soon.

Next question, please.

William Miller—for Defendant Milmar Estate—Recalled—Recross

By Mr. Grosman:

Q. Now, you say that prior to September 14, 1948, you never had possession of the books of Milmar Estates? A. Never.

Q. You say you saw them in the possession of Sam Marcus? A. Yes, I did.

Q. What books did you see there? A. I saw the Milmar stock books, and some other books, and the bank books, and things that he had over at the office.

Q. Will you name the books that you saw there? A. The stock book, the Minute Book and the bank books.

Q. Is that all you saw? A. That is all I think I saw. That is all I can remember.

Q. Who had the ledger, the cash book? A. The ledger, the cash book I saw over there, too.

Q. You saw those over there, too? (2133) A. Yes, I did.

Q. So there were no books whatever over at Bill Miller's Riviera? A. Not that I know of. I never saw them.

Q. Where were the bookkeepers who kept the books, where were they located? A. They were over at the Riviera, but they didn't keep Milmar books there, they only kept Riviera books there. The Milmar books were kept by Sam Marcus.

Q. Who made the entries in the books? A. Our accountant.

Q. And he would go over to— A. Over to Sam Marcus' office, and on the instructions of Sam Marcus do as he told him to do.

Q. You are now talking about Mr. Hoffman? A. No, I am not. I am talking about Hoffman and whatever associates he had.

Q. And you saw none of the old stock there on September 14, '48, in the possession of Sam Marcus? A. No, I did not. He said he lost the stock.

William Miller—for Defendant Milmar Estate—Recalled—Recross

Q. All of the stock? A. Yes.

Q. And none was produced whatever? A. No.

Q. You are sure about that? (2134) A. I am sure—naturally, I am sure.

The Court: I wish I could be as sure.

The Witness: Well, I mean, as far as I know.

The Court: As far as you know. You saw no stock that day.

The Witness: I saw no stock. That day he said he had lost them. That's what I really mean, your Honor.

Q. And now, did you ask for your stock? A. No.

Q. Did you ask for Robert Schwartz' stock? A. No.

Q. All of that was lost? A. I asked for nothing. I only left it to the attorneys to make a deal to buy out Marcus—period.

Q. Did you see any Bill Miller's Riviera stock there that day? A. I don't remember.

Mr. Brigadier: I object, if your Honor please. It is not proper recross. It should be limited to the lines of the redirect examination. I did not ask him about Bill Miller's Riviera.

The Court: Not a word did I hear asked about Bill Miller's Riviera.

Mr. Grosman: All right. I think that is all.

(2135) Mr. Brigadier: That is all, Mr. Miller.

The Court: Step down, please.

(Witness excused.)

Mr. Brigadier: Now, the only other witness I can have for today is coming at 2 o'clock. That's Mr. Schimmel of Michael Realty, who will be here at 2 o'clock.

The Court: How long do you think he will be?

Colloquy

Mr. Brigadier: He will only take, I imagine, 15 minutes on direct examination. There probably will be no more than six or seven questions that will be put to him.

I would like to outline to your Honor what I have left, so you know what time period is involved. We have Schwartz' cross, and Al Lieberman is my last witness in rebuttal. And that's the rest of my case.

The Court: Very good.

Mr. Brigadier: So I anticipate that we ought to be finished even before Friday.

The Court: I shall be very grateful if you are. Shall we adjourn for lunch now?

Mr. Abraham Chazin: If your Honor please, Mr. Schimmel wanted to put it off to another day, because he is tied up in some merger he is handling, but he has got to be in Philadlephia late this afternoon on that (2136) matter, so he agreed he would be here promptly at two, or maybe a little before two. As soon as he gets through he is going down to the business session which he has in Philadelphia.

The Court: Well, if there is any possibility of his being here before two, I would like to come back before two.

Mr. Abraham Chazin: I will call his office.

The Court: Suppose we adjourn until 1:30 and you try to get him on the phone.

Mr. Abraham Chazin: I would like to state one other thing, your Honor. During the next two days Mr. Kesselhaut will appear for me, because I will not be able to appear.

Mr. Theodore Chazin: The same goes for me, your Honor.

The Court: All right. We will adjourn for lunch, gentlemen.

(Noon recess.)

Michael Schimmel—for Defendant Milmar Estate—Rebuttal—Direct

AFTERNOON SESSION

(2137) MICHAEL SCHIMMEL, called and sworn for the defendant, Milmar Estate, in rebuttal, testified as follows:

The Clerk: May we have your full name and address?

The Witness: Michael Schimmel, S-c-h-i-m-m-e-l, 145 Central Park West, New York City.

Direct examination by Mr. Brigadier:

Q. Mr. Schimmel, you are a member of the bar? A. No, sir.

Q. Oh, I thought you were. I don't know where I got that impression.

Are you connected with Michael Realty Company? A. I was.

Q. And as an officer thereof? A. Yes, sir.

Q. And you were associated there in that company with Mr. Marden, is that right? A. He was no officer or had no position in the company.

Q. In the company itself? A. Right.

Mr. Brigadier: Did you find that original, Judge?

Mr. Grosman: No.

(2138) Mr. Brigadier: I will have to use a photostat furnished to me by Judge Grosman, the original being in his possession, but he doesn't seem to have it at this point.

Q. Well, you know, of course, about the mortgage that was given to Michael Realty upon the sale of the property by Michael Realty to William Miller and Samuel Marcus? A. Yes, sir.

Q. And that mortgage was in the sum, originally, of $300,000, was it not? A. Yes, sir.

Michael Schimmel—for Defendant Milmar Estate—Rebuttal—Direct

Q. Bore interest at the rate of 4 per cent? A. Yes, sir.

Q. And called for monthly installments of $5,000 each? A. Yes, sir.

Q. Now, did you have any difficulty collecting those installments of $5,000 each? A. Yes, sir.

Q. Will you tell us when that difficulty commenced? A. Well, a few months—commenced a few months after the mortgage was given to us. I don't remember how many months, but I know we collected a few and then they began (2139) to get into trouble.

Q. And did Mr. Marcus ever come to see you about this mortgage? A. Yes, sir.

Q. On how many different occasions do you recall Mr. Marcus coming to see you about the mortgage? A. I should say probably three or four times.

Q. And can you tell us when, about what time these visits were that he made? A. Well. I can't pinpoint the dates, no. But I know that we used to call him when there was a default and he would come up there. And sometimes he would come with Mr. Miller and sometimes he would come alone. His office was right near me and he would come in to see me about it.

Q. Were there ever requests received by you for modification of the terms of the mortgage for various periods of time? A. Yes, sir.

Q. And who would make those requests of you? A. Either Miller or Marcus, or both.

Q. I see. Now, do you know where Marcus' office is in relation to yours? A. Yes, he was right on the next street.

Q. Just a block away? (2140) A. Yes, sir.

Q. And there were modifications at different times, were there not? A. Yes, sir.

Q. Now, I call your attention, in particular, to the Exhibit that was marked in the depositions as P-53 for identification, which was produced by Judge Grosman from his

file—I having only the photostat that he furnished me—I direct your attention to this one which is dated July 30, 1947, and in particular I direct your attention to the paragraph on page 4, which commences with the words, "and $5,000 per month on the first day of August, 1948, and thereafter in payment of $5,000 on the first day of each subsequent month until the first day of July, 1951."

Now, do you recall that modification? A. Yes, sir.

Q. Did you receive, during the month of August, the $5,000 called for by that agreement, in 1948? A. I haven't got the record, but I know we received some payments right after this.

Mr. Brigadier: I am sorry. I have just been informed that it is already in evidence, and let the record show that the document I refer to is DME-59, already in evidence.

(2141) Q. I show you a check dated September 22, 1948, to the order of Michael Realty, $20,758.33, drawn by Milmar Estate, Inc., Al Kevelson, president, which bears on the back the endorsement, Michael Realty, and ask you whether you received that check? A. Yes, sir.

Q. Can you tell us what that check represented? A. It represented interest and some payments that had been in arrears and some—I think an adjustment at the time toward a sale of the mortgage. I don't recall just this, but I know it represented some arrears.

Q. Well, in reference to the agreement that is in front of you, the agreement called for $5,000 beginning the month of August, right? A. Yes, sir.

Q. 1948. So there would have been $5,000 due for that month? A. Yes.

Q. There would be $5,000 due for the month of September, is that right? A. Right.

Michael Schimmel—for Defendant Milmar Estate—Rebuttal—Direct

Q. But this check is for twenty thousand? A. Yes, that's $10,000 more.

Q. So that it also covered two additional months in advance? (2142) A. That's right, that's what I think it was. That's what I referred to. It had something to do with an adjustment. They paid us some in advance and then made another arrangement for us, so as to wait for a while until the business was running smoothly, when they could continue the payments.

Q. I see. Now, I show you a check in November, 1948, for $691.67, to the order of Michael Realty; does that represent the interest? A. That must be interest.

Q. For the month? A. Yes, sir.

Q. And a check of December 1, 1948, for six ninety-one sixty-seven; that's also interest? A. Yes, sir.

Q. Is that also true as to the checks which I will now show you, lumped together, January 3, 1949— A. All those are interest items.

Q. January 31, 1949? A. Yes.

Q. March 2, 1949? A. Yes, sir.

Q. And April 1, 1949? A. Yes, sir.

Q. May 1, 1949? (2143) A. Right.

Q. Now, on May 13 you get a check for $2,400, is that right? A. That's for insurance.

Q. That's for the insurance? A. Yes, sir; premium on the insurance.

Q. And on May 31 you get a check for $5,691.67? A. That's right. That's one installment, plus interest.

Q. So that upon making the payment to you in September, of $20,000, they made no further installments of principal until May, is that right? A. That's right.

Q. Although the agreement itself, the modified agreement, called for $5,000 for every month? A. That's correct.

Q. During that whole winter.

Mr. Grosman: What's the amount of that check, twenty thousand?

Mr. Brigadier: Which one? $20,758.33. I would like to offer these as one Exhibit.

Mr. Grosman: I object to them as being wholly immaterial to this case.

The Court: How are they relevant and material?

Mr. Brigadier: I think they are relevant (2144) and material in view of the representations which they claim were made to them about the mortgage, which they say first that we made, and that they were false—that we made representations that the mortgage would be foreclosed if the payments were not made. These are evidentiary to show that upon a payment of twenty thousand dollars being made they agreed to postpone the payment of additional principal until next May, but that it took $20,000 to accomplish that.

Recall that I said that one of the things that Mr. Marcus was concerned about in August, and one of the reasons that we contend he sold, is that he knew this agreement called for the payment of $5,000 every month, and that within two months later they were going to be closed, with no income, and that he was concerned what was going to happen during those winter months.

And this was accomplished in this way so that it does negate the charge of fraud that has been brought against us.

The Court: I see.

Mr. Grosman: Now, if your Honor please, this all happened, as I understand it, after September of 1948—a check for $20,000 given in December and thereafter whatever arrangement they made between them.

Now, our contention has been that the installments (2145) had been reduced from $5,000 per month to

$2,000 a month because the Riviera couldn't pay the rent, and we were told—rather, Mr. Marcus was told by Miller that Mr. Marden insisted upon the restoration of the monthly installments from two thousand to five thousand and that he couldn't pay the amount required to make those payments because the business of the Riviera didn't warrant it.

What has all this got to do with what happened *prior to September*, 1948, when they claim he sold out?

Mr. Brigadier: You overlook the fact that prior to September 14, 1948, this agreement, which has been put in evidence, was already entered into and that it in itself called for payments of $5,000 a month, beginning with August, 1948, and I have established from this witness that your client was able to come to him, so that there is no question that, even assuming that it were true, that any representations were made to him—and I can't see that there is even a remote basis for assuming—that there was no evidence of any kind of reliance, because he was in contact himself directly with this man.

And I think this whole thing ties into the one picture and shows that there were no fraudulent representations made.

(2146) Mr. Grosman: I suppose that this witness was available. I could have walked in to him and spoken to him, and talked to him, but that doesn't mean that any representations were made. The mere fact that Marcus knew where the man was to be found and could walk in there and could talk to him—

Mr. Brigadier: And that he had gone to see him.

The Court: And he did get information.

Mr. Grosman: I don't know what information he got.

The Court: The agreement speaks eloquently. I will allow it.

The Clerk: DME-67, series of 10 checks.

(Received and marked Exhibit DME-67.)

By Mr. Brigadier:

Q. Mr. Schimmel, did you ever have any conversation with Mr. Marcus in which he ever offered you any money to get an extension of the time of payment?

Mr. Grosman: I object to that as leading.

The Court: Well, it is leading, there is no doubt about that.

Now you heard the question.

Mr. Brigadier: He knows what I said.

Mr. Tepper: That's right, no matter what you (2147) say, he knows what you said.

Q. Was there any conversation at all with Mr. Marcus with respect to an extension of the mortgage? A. Mr. Marcus came up to see me one day, and he was much concerned about the fact that there was a default, and there was such pressure used. As a matter of fact, I think we had asked our attorneys to communicate with him. And he came up to see me, and he asked for an extension of the mortgage. He explained his problem and he offered to give us a bonus for the extension. I think he offered me $5,000 if I would extend the mortgage.

I told him, "Since you are in trouble, I am going to extend that mortgage, and I am not going to exact any bonus from you. But I wish you would meet these payments based on this new arrangement."

The Court: Is that prior to this modification agreement that you have there?

The Witness: Yes, your Honor.

Michael Schimmel—for Defendant Milmar Estate—Rebuttal—Cross

Q. Now, did you ever have any conversation with Mr. Marcus about the sale of the mortgage? A. Well, I told him—I told both Marcus and Miller, when they were up there, that they should try to get a buyer for this mortgage, because "I am going to put it in the market and I am going to sell it, and I am (2148) going to sell it at a discount, and it might get into much more unfriendly hands," and somebody is liable to push him into it.

And I said, "All we are trying to do is get out of this deal in a nice way," and I said we will give him a discount —I forget the amount we offered him, but I know it was quite a substantial discount from the face of the mortgage, in order to be relieved of these annoyances, failure to meet the payments.

Q. And did you eventually sell the mortgage at a discount? A. Yes, sir.

Q. Could you tell us what that discount was? A. I believe it was $15,000.

Mr. Brigadier: No further questions.

Cross examination by Mr. Grosman:

Q. Mr. Schimmel, was there a time when the $5,000 monthly installments on account of this mortgage were reduced? A. Yes, sir.

Q. To what? A. I think they were reduced to two thousand.

Q. And who arranged that? A. Well, I don't remember which—

Q. Was it Marcus or Miller? (2149) A. I wouldn't remember who it was, because both of them used to come in, and mostly—usually they used to come in together. Occasionally—I believe Mr. Marcus came in a couple of times alone. Maybe Miller came in alone, too. But I never kept any record of that. It was never important to me to know.

Michael Schimmel—for Defendant Milmar Estate—Rebuttal—Cross

Q. But you remember definitely that Miller did come in, either with or without Marcus, and discussed the financial end of this with you? A. Miller used to come in with Marcus. Whether he came in alone for this, I don't recall. But I do recall Marcus coming in.

Q. When he came in would he talk about the mortgage? A. There was always talk about the payments on the mortgage.

Q. It wasn't a social visit of any kind? A. Oh, no, we had no social contacts at all.

Q. Now, you were associated in this venture with Mr. Ben Marden, were you, Mr. Schimmel? A. Yes, sir.

Q. And was Mr. Marden, to your knowledge, a friend of Miller's? A. I don't know whether he was a friend, I know that he knew him.

(2150) Q. Were they on social terms, Miller and Marden? A. I wouldn't know that. I have no knowledge of that.

Q. You never met them at any social functions? A. No, sir; I never went out with Mr. Miller to any social functions.

Q. Now, Mr. Marcus was quite disturbed about this mortgage, was he not? A. Yes, sir.

Q. And he offere you, you say, a $5,000 bonus, which you very generously rejected? A. Yes, sir.

Q. Now, after September, 1948, did Mr. Marcus communicate with you further respecting this mortgage? A. I wouldn't know. I can't pinpoint dates.

Q. Did he show any interest? A. Sir?

Q. Did he show any interest in the status of this mortgage? A. I can't pinpoint any particular date.

Q. Give us your best recollection. A. I wouldn't know. I can't tell by a date.

Q. I show you a photostatic copy of a letter and ask you whether you received the original of this letter? A. I

don't recall it. If I got a letter, I probably (2151) answered it.

Q. This is a carbon copy of a letter? A. Yes.

Q. You don't remember? A. I wouldn't remember that. It would be one of the routine matters that come in in relation—

Mr. Brigadier: I am sorry. I don't hear you.

A. (Continuing) It would be a letter that is just routine, in the matter of the collection of a debt. I wouldn't remember it specifically.

Mr. Grosman: I ask that this be marked for identification.

The Clerk: DM-49 for identification, carbon copy of a letter dated August 8, 1949.

(Marked Exhibit DM-49 for identification.)

Q. This photostatic copy of the agreement, marked DME-59, which you have identified; you remember this agreement? A. Yes, sir.

Q. Were you a party to it? A. I arranged it. This is signed by my notary and my office.

Q. Is that your signature on there? A. No, that is Mr. Bloom.

(2152) Q. Your signature does not appear on there? A. No, sir.

Q. But you remember arranging it? A. Yes, sir. Yes, I arranged this modification.

Q Now, in what respect was it a modification of the original agreement, of the original mortgage? A. Well, I don't recall. There was a lot of defaults and we agreed to take certain payment on this—on that basis. I haven't got the original there, but I know that at the time this was made the mortgage was substantially in default.

Michael Schimmel—for Defendant Milmar Estate—Rebuttal—Cross

Q. Well, now, the original mortgage provided for a $5,000 a month payment, did it not? A. Yes, I think the mortgage must have been due by this time. I don't recall what the basis—the reason for this modification at the time, but you would have to compare the original with this to find out the reason. I wouldn't remember.

Q. Well, the reason I ask you this question is because you refer to this agreement as a modification and I was wondering in what respect it was a modification of the original mortgage. A. You would have to compare the two. I wouldn't remember.

Mr. Brigadier: Judge Grosman, maybe you have (2153) been misled. There is another prior modification that I didn't question him about. If you have been misled, I want you to know it is in evidence, DME-58. This is the second of the modification agreements.

Mr. Grosman: Well, it is a modification agreement.

Mr. Brigadier: This is the one I obtained from you. This came out of your file.

Mr. Grosman: It is a modification agreement.

Mr. Brigadier: The earlier modification.

Mr. Grosman: This DME-59 is a modification of the mortgage?

Mr. Brigadier: It modifies the mortgage and the prior agreement. You see, you have two modifications. The first one is DME-58. That is dated August 29, 1946. That is your first modification.

By Mr. Grosman:

Q. Now, Mr. Schimmel, you are not prepared to tell us in what respect the Exhibit, DME-59, is a modification either of the original mortgage or of the previous agreement of modification, marked DME-58? A. No, sir.

Michael Schimmel—for Defendant Milmar Estate—Rebuttal—Cross

Q. Now, did Miller tell you that he couldn't meet the mortgage installments? A. I don't know if he told me, I know they didn't meet (2154) them.

Q. Do you remember discussing that with Miller at all? A. I only discussed the requests for payments. I used to call, or have somebody call either Miller or Marcus and dun them for the payment, that's all.

Q. Well, now, let me ask you this, Mr. Schimmel, what was your status in regard to the mortgagee; were you a part holder of this mortgage or were you employed by the mortgagor, or what? A. Originally I had this company. I was responsible for the financing of this entire building, and the Michael Realty Company was my company, and eventually I got paid off. But I continued the servicing of the mortgage until it was paid. At the time of these transactions referred to, I had been personally paid out of the Michael Realty Company.

Q. So that you were merely an employee of the Michael Realty Company? A. Call it that.

Q. And who was the actual owner of this mortgage, Ben Marden? A. The Michael Realty Company was the actual owner.

Q. The owner of record? A. Yes, sir; the owner of record of this. And the (2155) stockholders of the Michael Realty were different people. Ben Marden was one of the stockholders.

Q. Wasn't he the principal stockholder? A. Yes, sir; he was the principal stockholder.

Q. Now, you did tell both Miller and Marcus that you want to get rid of this mortgage? A. Yes, sir.

Q. And that they had better find a buyer for it? A. Yes, sir.

Q. You were willing to sell it at a substantial discount? A. Yes, sir.

Michael Schimmel—for Defendant Milmar Estate—Rebuttal—Cross

Q. Now, did you tell all of these things to Marcus? A. That I am ready to sell it at a discount?

Q. These things that I have just enumerated. A. Of course.

Q. And you had actually placed this mortgage in the hands of your attorney for foreclosure? A. At one time I did.

Q. When was this? A. I don't remember. I remember once when I just couldn't—

Q. How soon prior to the time when the mortgage was actually sold? (2156) A. I don't remember the date. All I remember is I couldn't get Miller or Marcus on the telephone, they wouldn't call me back, so in desperation I sent the papers to the attorney.

Q. Was it in August of 1948? A. I wouldn't remember the date, sir.

Q. Was it in 1948? A. I don't remember the date.

Q. Do you remember when you sold the mortgage? A. I would have to refer to the date there.

Q. Well, I haven't got the date. A. Well, I would have to refer to it. I don't keep those records in my mind. This is just one incident of many.

Q. Now, you recall when these installments had been reduced to $2,000 a month? A. Yes, sir.

Q. Did you supervise, or give orders that the installments be reinstated to five thousand? A. No, that was an arrangement. They wanted relief for a certain period, and I gave them the relief of the $2,000.

Q. Did it automatically go back? A. Then automatically it went back to the five.

Q. And how long an extension of time did you (2157) give them? A. I don't remember. The papers will show.

Q. Do you remember Marcus calling you and telling you that he had been informed by Miller that the installments

were to be restored to $5,000? A. That they would be restored?

Q. Yes. A. I don't.

Q. He might have done that? A. He might. I don't know. I wouldn't say no or yes to that.

Mr. Grosman: I think that is all, Mr. Schimmel.

Mr. Brigadier: That is all, Mr. Schimmel.

(Witness excused.)

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(2160) Newark, N. J., Thursday, April 14, 1955.

(Hearing resumed pursuant to adjournment.)

Counsel present:

Mr. Brigadier
Mr. Margulies
Mr. Kesselhaut
Mr. Grosman
Mr. Tepper

Mr. Tepper: While Judge Grosman is preparing to continue with his cross examination, may I make a statement to your Honor that pursuant to your Honor's instructions when last we recessed—I don't mean the last court day, but before the long recess—under arrangement with counsel on the other side, and under your Honor's direction, we are informed that Mr. Marcus did go to Mr. Kevelson's place of business and there was shown certain cartons, and that obviously these cartons contained records, canceled checks, vouchers, etcetera, relating to a period prior to September 14, 1948, which is the period that your Honor allowed us to inquire into, and that he was there with his two accountants, and that at about 4

o'clock, or so, Mr. Kevelson, or whoever was in charge, wanted to close the establishment, that they retired, and then asked leave to continue the examination (2161) thereafter.

I am informed—I wasn't there, it is not my own knowledge, it is hearsay with me—that he was denied the right to come back with these two accountants to complete that which he had already started.

I am further advised that there are certain records in the cartons which Mr. Marcus deems very important to his case. And so, your Honor will recall, I presumed upon your Honor's good nature in calling your Honor, which I should not have done, with respect to it. It was not according to the rules. But I forgot to mention this when we were here the day before yesterday.

I realize that Messrs. Chazin are not here this morning. They were present—either Abraham or Theodore Chazin was present. I don't know which one of these gentlemen was present. And I should have made this statement which I am making now while Mr. Chazin was present, but it escaped my memory that it was under the supervision of Messrs. Chazin that this examination was being made.

Now, the only point I make now is this. It is apparent that we are not going to complete our examination today, because we have certain rebuttal witnesses, and particularly the writing expert whom we are going to bring in, and who is now examining the documents under the (2162) instructions of the Court. I would like your Honor to direct counsel, or perhaps, if your Honor would like us to make a formal application for an order for that purpose, to permit us to complete the examination of these cartons, only with respect to the documents relating to a date prior to Septem-

ber 14, 1948, based upon what we are informed by Mr. Marcus.

I say to your Honor very sincerely, very honestly—not for the purpose of delay—that we are unable to properly present and complete Mr. Marcus' side of the case unless we are permitted to do this.

The Court: That puts Mr. Brigadier at a great disadvantage, since he wasn't there.

Mr. Brigadier: Yes. I would like to be heard first, most specifically, about this, because I think it is extremely unfair that this should be done at this point.

In the first place, the only person who has personal knowledge of what transpired there on our side is Theodore Chazin, who is the only one who was present. The Kevelsons were not here, they were in Florida at the time. So that I cannot refute, except to tell you what Mr. Chazin said to me. And at no time, according to what Theodore Chazin said to me, on that day did they make any request, on that day, for a continuance of the (2163) examination.

On the contrary, all that day Mr. Marcus kept running back and forth, calling cabs, running to Newark, coming back, and they had to sit there and await his pleasure each time.

The first that we knew that they wanted additional examination—and I want your Honor to note these dates—is the letter that we received from Judge Grosman, which is dated March 7, 1955, in which Judge Grosman says, and this is the first information we have of it:

"Mr. Marcus informs me that Mr. Chazin has refused him permission to continue examination of the books of the Riviera in the possession of Mr. Kevelson. The examination could not be completed within the short period of time which Mr. Marcus and his ac-

countants were able to devote to it and he desires an opportunity during the adjournment to finish his inspection."

I called Mr. Chazin when I received this letter and Mr. Chazin said, "I received a call either a day or two prior to the date of this letter from Mr. Marcus in which Mr. Marcus requested that he be permitted again to go back."

And I said, "No, you have already had your opportunity and there is no reason why we should be subjected (2164) to the harassment all over again. You didn't request it at the original time."

I then wrote a letter on March 17 to Judge Grosman in which I informed Judge Grosman as follows:

"With reference to the examination of the Riviera books, you apparently have been misinformed." —because what he asks for are the books—"the Riviera books are in evidence and are in the hands of the clerk. I am advised by Mr. Chazin that Mr. Marcus was permitted to examine certain papers which he came upon in the course of his search for books. The books of Riviera are in evidence and therefore are available to Mr. Marcus."

And he asked for this Exhibit, that we sent him, of the bank account. The following day, or the day thereafter, I received a telephone call from Judge Grosman in which Judge Grosman said Mr. Marcus still insists he would like to have the examination. That would be around March 18 or 19. I said, "Judge Grosman, we will not give it to him. If you want it, you are to apply to the Court. And you are to give us notice of the application so that we can be heard by the Court."

Now, they don't make any such application. This is from March 17 on, Judge, until today, April 14, the

day that the Chazins are not here, the Chazins who were (2165) present and could tell you personally what transpired that whole day.

I say that this application is not in good faith. Not only that, sir. But they don't tell you that on Tuesday at 10:10, 20 minutes before the case started, we were served with a notice to produce these documents. Now, they served that notice on Tuesday at 10:10, and at 10:30 they rested their case, without calling for the production of these documents as to which they had served us with a notice to produce. Where is the good faith in this, sir, at this stage? This is nothing more than what I anticipated it would be, and that is the only reason I jumped up, you remember, to object about the handwriting expert.

Of course, they had a right to have the document examined by the handwriting expert, but I was afraid that that was going to be another application for another adjournment so that we wouldn't get the case finished. They had all these weeks to get that document out of court and have it studied by the handwriting expert, so that their handwriting expert would be here today, when we could finish the case, or tomorrow, at the most.

Is this case going to go off again, sir, because they decide to do things the way Marcus decides to do them, (2166) at his pace and his desire?

The Court: Does that notice to produce have specific documents?

Mr. Brigadier: Yes, it says all in singular orders for restaurant checks and bar checks placed by Bill Miller's Riviera, Inc., with the Whitney Duplicating Check Company of 406 West 31st Street, New York 1, New York, during the years 1946, '47, '48 and '49, or with any other company whatsoever during the afore-

mentioned period of time, and all correspondence pertaining to the above. Served on us, as I say, 20 minutes before the case was to go on on Tuesday. And they rested their case without calling for the production of these papers.

The Court: How is it that it was served at the last minute?

Mr. Tepper: May I explain to your Honor.

First, I am amazed at the position Mr. Brigadier takes. He always injects personalities and this business of charging bad faith comes with bad grace, in my judgment, coming from Mr. Brigadier.

His statement to your Honor was that on the 17th of March, or thereabouts—this is an admission, irrespective of the fact that the Chazins aren't in the courtroom—that Chazins told him that Mr. Marcus called Chazins and requested leave to continue the examination of (2167) these records which your Honor had ordered, and which they were unable to finish the examination of on that day.

The Court: The point that I am interested in primarily, Mr. Tepper, is: Was Mr. Chazin told that day that they required additional time or is this an afterthought again? That's what I want to know.

Mr. Tepper: Your Honor, I have Mr. Marcus here who is willing to raise his right hand and testify that with ample time within which to do it, between the last recess and the day before yesterday—

The Court: I don't need his testimony to know that. My question is: Did Mr. Marcus, at the end of the day when they looked at the documents, tell Mr. Chazin, or whoever was there representing Bierman and Miller, that they would require additional time, that they didn't complete the examination, or is this another

afterthought by Mr. Marcus? That's what I want to know right now.

Mr. Tepper: I think your Honor will recall that your Honor stated that they could send their accountants over there to look at—

The Court: Don't repeat that. I asked you a specific question. Did he tell him that?

Mr. Tepper: Mr. Marcus was not there at the (2168) time of recess, his accountants were there.

The Court: Did they tell them that they needed more time?

Mr. Tepper: When he was advised that they were unable to complete, he tells me, he thereafter phoned Mr. Chazin, which is confirmed by Mr. Brigadier, and Mr. Chazin said, "You have had your day, you have no more," according to what Mr. Brigadier told your Honor.

Now, I must say this. Mr. Brigadier, right throughout this case, has indicated that he is a past master at muddying the water. We are addressing our attention specifically to the record in Mr. Kevelson's office which we were entitled to examine under your ruling relating to matters prior to September 14, 1948. He comes along and, in answer to my argument, produces a notice which is unrelated to that application at all, and says, "This is an example of what they do. They come here at the eleventh hour and just before they rest their case they present us with a demand to produce."

Sure, we presented them with a demand to produce. To produce what? One of the theories of this case is that there was fraud practiced upon Mr. Marcus, that they told Mr. Marcus that everything was going down the drain, insofar as the Riviera operation was concerned, (2169) and that he had better flee to the hills, grab what he could and run.

Mr. Marcus had on the stand attempted to introduce into evidence testimony that he was informed that they had double sets of tabs, as he put it, at the Riviera. He was precluded from putting that testimony in because somebody had told it to him. So during the recess he located the place where this double set of tabs was ordered, and was printed, and we have here now duplicates of those receipts, and those orders. And so we served a demand upon them to produce the originals of those orders and receipts, stating that if they failed to do so we would introduce secondary evidence to show that they ordered 50,000 tabs "and repeat," meaning duplicate tabs; and also that in 1949, after Mr. Marcus was shaken out of this situation, they ordered tabs, but didn't say "and repeat." Mr. Marcus was already out of the deal.

This is what we want to prove. This is the fraud that we want to introduce.

So what Mr. Brigadier said relating to this notice which is before your Honor is immaterial to the argument which I have addressed to your Honor relating to these records.

Now, let us see whether or not there is good faith. (2170) You know—and as Mr. Marcus testified—Mr. Roth told him that fraud is a very difficult thing to prove, "go out and investigate." And what we are trying to do, we are bending the oars insofar as the fraud is concerned. We realize that. Insofar as the other counts are concerned, we are not a bit concerned about that, the fact that the documents were altered after execution, the fact that there was no contract with Mr. Marcus, as such. We are not concerned with that. We have ample testimony in there to support our position.

Colloquy

But with respect to the fraud, to entitle us to recision, we must look at these records.

Our application, your Honor, was to see the records after September 14, 1948, which we believe we are entitled to see at this time. We have made a sufficient showing to entitle us to see the records after September 14, 1948. But your Honor has ruled and we do not renew that application, because your Honor has ruled.

But with respect to the records prior to September 14, 1948, I challenge the statement of Mr. Brigadier that we should have made a formal application to your Honor. What is this business now, at the eleventh hour, of saying "they should have made a formal application"? It was in open court, without a formal (2171) application, and without an order, that they agreed to permit us to examine these records. And when we find them—to use the vernacular—with their guard down, and we find, according to Mr. Marcus, certain leads and certain documents in there, they say, "The books are in evidence."

Who is talking about the books of Milmar? There has been testimony about that. They have testified what the books consisted of. We didn't go to Kevelson's office to examine books which your Honor has already ruled if they say they haven't got them, they haven't got them—we went there to find evidence of the fraud, and to produce this fraud here in support of our case. What nonsense is this that we are not allowed to continue to finish this examination when we had ample time to do it?

And so I say to your Honor that there wasn't any need for us to come to you and make a formal application. All of this was informal before the Court. They agreed, they consented to it. And I say to your

Honor, I regret very much that this statement is being made for the record during the absence of the Chazins. I said that at the outset, and he doesn't have to become dramatic about it. I know I should have made the statement while the Messrs. Chazin were here. But based (2172) upon the admissions made by Mr. Chazin to Mr. Brigadier, that Marcus did telephone him, that's corroboration enough to justify your Honor saying to these gentlemen, "Produce these records. Let them examine these records."

And if they don't want our accountants to examine them at Kevelson's place of business, let them produce them in court. And if we are to make a formal application, I now ask leave to make such a formal application, with a formal notice to be served upon them, according to the rules of this Court to produce these records.

The Court: That will be more delay.

Mr. Brigadier: If your Honor please, I must reply to some of these things, because they are on the record. This is an extremely unfair way of getting something into the record as to which there isn't the slightest bit of truth. But I was told by Theodore Chazin, when I spoke to him, that at the end of the day when the examination took place there was no request at that time for any continuation of the examination. The call that he is referring to was an afterthought call that Marcus made shortly before March 7, the date of Judge Grosman's letter, which is several weeks after the examination took place.

When they say they should be permitted to go into (2173) all of this matter because they are charging fraud, they are overlooking several things. One, that Roth told Marcus in 1949—"The difficulties of proof of fraud," he said. But it didn't prevent Marcus in

1950, '51 and '52 from making charges under oath that there was such fraud. Where was Marcus all this time? Why wasn't this examination conducted long before this? Instead they wait until after they have rested their case—this is what is extremely unfair in this posture of the case—remember my getting up on Tuesday and asking, "Have you rested your case?" and I was most specific in making that inquiry. And I was assured—yes, they had rested their case—before I called my witnesses in rebuttal of their case.

Now they say they haven't rested their case, they first want to go into the question of the fraud.

Now, let me point out to you that we went way out to allow them to have this examination. The transcript shows that what your Honor ordered was an examination of the books of Riviera, because the witness who took the stand, Mr. Dobkin, said that when he looked at the books that we had put in evidence he didn't feel that they were all the books, that there must be more books than those books. Your Honor said if that is the way he feels he ought to be allowed to look at those cartons (2174) and see if there are other books.

They went through all these cartons, 20 of them. They found no other books, but instead they began to copy down things that had nothing to do with the books, per se, which your Honor gave them permission to look for—time slips, names of employees, as he said, correspondence with respect to companies who had supplied checks, the number of the checks that they found, none of which was embraced by the order that you made.

But when I got the call as to whether they should be permitted to look at it, I said, "Yes, let them look at everything that is in those boxes," because I anticipated that if I didn't we would have another hassle

and another delay and this case would never be finished.

So when I got the telephone call from Theodore Chazin—I was in court at the time—I said, "Let them look at anything, everything in those boxes, as long as it is prior to September 14, 1948."

He said, "What about the things they copied?"

I said, "Let them copy; let them write down anything; let them take notes on anything, but let's get it finished."

They left that day. There wasn't the slightest suggestion by anyone to Theodore Chazin—I have it on (2175) his representation—I would rather take that than the representations that you are making about what Marcus would say under oath—that no request was made for any continuation of this hearing.

But, Judge, above all, think of Tuesday. Why, on Tuesday—if this is a crucial part of their case, as he now tells you it is, can you explain—can you imagine why they remained silent on Tuesday and said, "We rest our case,"—and you remember, when I put the witnesses on I directed it solely to rebuttal. That is all we are on now. We are rebutting the few specific facts.

Is this case going to be opened all over again? Are we going to be here another six weeks, seven weeks, in the trial of the case?

Mr. Tepper: Just one minute, if your Honor will permit. Again we have the pattern. Everybody is willing for us to see the records prior to September 14, 1948, but nobody is willing to permit us to complete it.

Now Mr. Brigadier again puts me in the position where he is putting words in my mouth. I didn't reflect upon Abraham or Theodore Chazin. I will take

the word of either one of these gentlemen, not under oath, but in a statement in open court.

(2176) I said to your Honor that Mr. Marcus wasn't there when they concluded, that his accountants were there. When they told him that they hadn't completed and they required time to complete it, he phoned Messrs. Chazin—

The Court: I understand.

Mr. Tepper: —and it wasn't permitted.

Irrespective of when it was, there was ample time between then and the day before yesterday to enable us to do this thing. Everybody protests his innocence, everybody says the records were there. Your Honor didn't permit us to look at books alone. Your Honor will recall it was when Mr. Hoffman was on the stand that all of this occurred. Mr. Hoffman said that under his supervision, and under his direction, a number of cartons were removed from the Riviera, where they were housed at that time, to Mr. Kevelson's place of business; and—"Had you seen them lately?"—yes, he had seen them. And so at that point we asked—"Is there any objection to our examining those cartons with matters relating to prior to September 14, 1948?" They agreed. Your Honor directed it, and we did, but didn't complete it.

Mr. Brigadier: May I just read one line from the record—what he says. Your Honor says, "He should (2177) look at all the books." That is all he says. There isn't a word in there of looking at any other papers.

I told you that I said, "Let them look," because I anticipated that if we didn't, we would have this kind of thing happen.

They had the opportunity; they rested their case on Tuesday—

The Court: Don't keep repeating it. I heard you.

Mr. Grosman: We didn't rest our case, your Honor, with respect to examination of the books, because your Honor said that we might examine them during the interim.

Now, may I say this? Mr. Marcus tells me that he was not there at the conclusion of that day, the first day when the books were examined. He had left to come to my office about 3 o'clock. He left his accountants there. He states that the very next morning—not a matter of weeks—he called up Mr. Chazin, one of the Chazins, and asked permission for his accountants to go back—

Mr. Brigadier: Not true.

Mr. Grosman: —and that was refused to him.

Now, your Honor never said that we were to be limited to one day in examination of these records. Now (2178) they make much of the fact that the order calls for books. Now, maybe I made a mistake, maybe I should have put in, "books, records, papers, letters, documents and so forth." We are in equity. They know exactly what your Honor had in mind; they know what we had in mind. There weren't 20 cartons of books there. And for them to take the position that all we could look at was books—a bound book—is perfectly ridiculous.

Now, as soon as I learned about this situation I wrote to Mr. Brigadier, because he is chief counsel in charge, and I called this to his attention—this was way back in March—and I asked him to instruct the Chazins to permit Mr. Marcus and his accountants to examine the books—the records or the books. When I used the word "books" I meant all the records, I didn't mean merely the books that had been here in evidence. We didn't have to go to Kevelson's office

to examine books that had already been introduced into evidence. And I called him.

He said, "All you are entitled to examine is books. You can't examine anything else."

Now, that was not, I am sure, your Honor's intent; that was not our request. We want to examine all these records.

The Court: It couldn't have been limited to (2179) books, because all the books prior to September 14 are in evidence, aren't they?

Mr. Grosman: Sure.

Mr. Brigadier: The idea was to let them go through the boxes to see if they could find the so-called missing books. Remember, we offered the books only from 1948. We were unable to find Bill Miller's Riviera books prior to '48. And they said, "Well, maybe we can find them in those boxes," and that is why your Honor made the order, that they could go through the boxes to see if they could find the books. That was what they were supposed to be doing.

They didn't do that. But as I told you—I don't want to repeat again—I told Chazin to go ahead.

I just want to add this one thing. If it turns on veracity, of Marcus versus Chazin—

The Court: You don't have to comment on that at all.

Mr. Brigadier: —please wait till Friday till I can get the Chazins here and let Theodore tell you that it wasn't the next day after this examination that he got this call from Marcus. It wasn't till the lapse of several weeks that he got that call from Marcus.

The Court: Well, check with Mr. Chazin. If you have to put it in affidavit form, do it that way.

(2180) Mr. Grosman: Now there, your Honor, as I say, you didn't limit us, you said—

Robert J. Schwartz—for Defendant Milmar Estate—Recalled—Rebuttal—Cross

The Court: That is not the point. He said he called Chazin the next day. I will take Mr. Chazin's word for it. If it was several weeks later, I know what to do with it; if it was the next day, that's another thing.

Mr. Brigadier: He will be available tomorrow.

The Court: All right. We will take under advisement the application. Go ahead with the proof now.

By the way, is Judge Lieberman coming today?

Mr. Brigadier: Yes, I have arranged for him to come at 2 o'clock.

Mr. Grosman: Now, your Honor, I am told by Mr. Leichtman that I didn't understand Mr. Marcus, that he said it was within a couple of days that he spoke to Mr. Chazin. Of course, the letter referred to March 7, so—I don't remember when he adjourned the hearing—it couldn't have been very long before that.

The Court: We adjourned on February 25.

Mr. Brigadier: The examination, I think, was the very next day or the day after.

Mr. Grosman: All right.

(2181) The Court: Do you want a few minutes to collect your thoughts before you start with him?

Mr. Tepper: Yes.

The Court: I know you have been a little distracted by what just happened. I didn't anticipate starting off like that.

Mr. Tepper: I didn't, either.

The Court: I will give you about ten minutes, then.

(Short recess.)

(2182) Robert J. Schwartz, resumed the stand.

Cross examination (Continued) by Mr. Grosman:

Q. Now, Mr. Schwartz, I think you told us the last time—I am trying to find the last question and answer, your

Honor; we got involved in some colloquy here—I think you told us that you made the insertions in the contract of September 14, '48, without first having consulted Mr. Marcus. A. Insertions in a copy.

Q. In your copy. A. Yes.

Q. And did you also tell us that thereafter you spoke to Mr. Marcus? A. I did, immediately after.

Q. Immediately after. A. After the conversation with Mr. Lieberman I called Mr. Marcus.

Q. And he told you what? A. We had a conversation.

Q. With respect to the insertions— A. That's correct.

Q. —of that fifty percent business, right? A. Correct.

Q. Now, what did you say to him and what did he say (2183) to you with respect to the insertion of "fifty percent" in the contract of September 14, '48? A. I repeated the conversation I had with Mr. Lieberman and I said, "It seems we overlooked it." I said, "What do you thing about it?" And he says, "I agree with you. I guess it should be in there." And I said, "I think he's right." And then he said, "Sounds o.k. to me," or something like that. And that was the end of the conversation. But we did nothing about it.

Q. Now, did you make a note of that conversation you had with Mr. Marcus anywhere? A. I may have written him a letter about it, I'm not sure. But you have the files, so I haven't any way of telling.

Q. Are you certain you may have written him a letter? A. No, I said I may have written him a letter.

Q. I see. Now, if all this was done on the same day, namely, the request made of you by Mr. Lieberman, by Judge Lieberman, for the correction, your acquiescence thereto, and immediately thereafter your conversation with Mr. Marcus, may I ask you why you didn't wait until you

spoke to Marcus first before you gave your consent to Mr. Lieberman? A. I didn't say I gave my consent.

Q. To make the insertion. (2184) A. I didn't say I gave my consent.

Q. Pardon. A. I didn't say I gave my consent to Mr. Lieberman.

Q. Well, you agreed with him, did you not, that the insertion was proper? A. I agreed the insertion was proper, but I didn't give my consent to the making of the insertion. That's quite a different thing.

Q. Pardon? A. That's quite a different thing.

Q. Well, now, what is your understanding of consent to making the insertion? A. I'm afraid I don't follow you.

Q. You made an insertion in your copy of the agreement, did you not? A. I did.

Q. Of "fifty percent." A. "Up to fifty percent" or something like that.

Q. "Up to fifty percent," whatever the phraseology is. Now, you did that before you spoke to Marcus. A. That's correct.

Q. Did you also tell Judge Lieberman that he might do likewise with his copy? A. I didn't tell him anything. Those were not valid alterations, those were notes made so I would know what I (2185) was talking about.

Q. They were no valid alterations made in the contract? A. Of course not.

Q. Now, you were aware of the fact then that they were not valid alterations at the time that you made the insertions in your copy of the contract of September 14th? A. I merely did it, as I have testified on several occasions, to have a note so that I would know what I was talking about and the exact position it should be in. It was a fourth or a fifth copy, it was not initialed either by myself or the other side, and was merely an office record. It is not a valid alteration.

Robert J. Schwartz—for Defendant Milmar Estate—Recalled—Rebuttal—Cross

Mr. Grosman: May I have the copy of that contract of September 14th?

The Clerk: There are two, Judge.

Mr. Grosman: Let me have them both.

The Court: DME-5?

Mr. Grosman: That's one of them, Judge.

The Clerk: 22 is yours.

(Documents handed to Counsel.)

Q. Now, I show you Exhibit DM-22, which appears to be an original of the contract of September 14, '48. That is the contract you and I have been speaking about? A. Yes, this is one of them.

(2186) Q. And the insertion or notation—

Mr. Brigadier: Will you raise your voice a bit? We don't hear Mr. Schwartz's answers over here at all.

The Witness: Yes. I'm sorry.

Mr. Grosman: His answer was yes, this is the contract.

By Mr. Grosman:

Q. Now, can you tell me, Mr. Schwartz, whether DME-22 was the copy that you retained in your possession? A. I couldn't possibly say. I haven't any way of knowing whether this was my copy, or Mr. Marcus' copy, or three other copies. There were at least a half dozen copies in the file.

Q. Now, I show you Exhibit DME-5, which appears to be a duplicate of DM-22. Do you recognize that as such? A. If it is, it is. I'm sure I don't know. It looks like the same agreement.

Q. How about the signatures, the attestations on there? A. Correct.

Robert J. Schwartz—for Defendant Milmar Estate—Recalled—Rebuttal—Cross

Q. Now, you can't tell us which of these two contracts were in your file at the time that you turned it over to Samuel Marcus or his attorney? A. As I told you, there were six or more copies. We had exactly a dozen copies typed up of this agreement. (2187) There were at least another half a dozen copies in the file.

Q. Now, to your knowledge did any of these copies, which you say were in the file, bear your initials alongside of paragraph five wherein the "fifty percent" reference was made, and again paragraph 10 on page 4 where the notation "at least fifty percent" appears? A. I have no recollection.

Q. You have no recollection. A. And if it would appear, it would merely prove that Mr. Lieberman's contention was all the more correct. It means that we did it on a couple of copies and we didn't do it on all when we were at the meeting.

Q. Now, Samuel Marcus' office, or his place of business, was very close to your office, was it not? A. Approximately three blocks away.

Q. You were under a monthly retainer by him at that time? A. No.

Q. Pardon? A. No.

Q. Well, you had been until when? A. I don't know; some time prior to it.

Q. Prior to September 14th?

Mr. Brigadier: Mr. Schwartz, we really don't (2188) hear your voice. You're dropping it.

The Witness: I'm very tired, but I'll try and build it up.

A. I really don't recall.

Q. You don't remember. A. No, I don't.

Robert J. Schwartz—for Defendant Milmar Estate—Recalled—Rebuttal—Cross

Q. You had been on a monthly retainer by Mr. Marcus for quite a time. A. Well, for about a year and a half, I'd say, some time back in '45 or '46.

Q. And you had the free run of his place of business, you were free to come there whenever you liked and use his office facilities? A. I don't believe that's correct.

Q. It is not correct? A. I don't believe so. I know I was there a number of times.

The Court: Haven't we been all through this, the way he went in and out of Marcus' office, even used his typewriter. I suggest you direct direct questions at him. I know what you are driving at. Give it to him straight.

Mr. Grosman: The record shows what he testified previously and I don't want to take any more time than I have to.

(2189) The Court: I am sure you have some specific question in mind that you want to ask him. I don't think you ought to beat around the bush anymore. Put it to him directly.

By Mr. Grosman:

Q. Why didn't you have Mr. Marcus himself either come to your office, or you go to his place of business, and initial these notations as you put them in these contracts? A. It was none of my business. This was something for the benefit of Lieberman and his clients, and not for mine. And as such, as I have testified before, if Lieberman was that interested, to come in, I would have arranged to get them signed. But, as such, it wasn't my job, and it was his problem.

Mr. Brigadier: May I call to your Honor's attention that all this has been testified to on page 2062

of the record on prior cross examination. There is nothing new being asked now that hasn't been covered before.

Mr. Grosman: We are getting a new answer.

The Court: I suggest that you don't repeat.

Mr. Brigadier: That's exactly the answer that he gives at the bottom of page 2062. "Well, it was something for Lieberman's benefit, and if he didn't remind (2190) me about it, I was perfectly happy to let it slide." That is what he testified to.

The Court: All right, so that's the answer why he didn't go to Mr. Marcus for initialing.

By Mr. Grosman:

Q. Well, didn't you think that Mr. Marcus, as a principal, and as your client, should have been informed of this thing and given an opportunity to approve this change? A. He was.

Q. He was given that opportunity; how, by phone? A. I spoke to him immediately after speaking to Lieberman, and I called Marcus the very next call, within the next two minutes, and I told him about the conversation, and he said, "It sounds o.k. to me; it sounds all right. What do you think?" I said, "It sounds o.k. to me. We overlooked it." And he said, "That's that," or something like that and that was the end of the conversation.

Q. Well, why did you call Marcus at all, if this thing was being done exclusively for the benefit of Lieberman? A. To tell him of the call.

Q. Just to tell him about it, that was all? A. I think it is perfectly obvious. He pointed out (2191) some change in the contract which he thought he was entitled to and I, in turn, called Mr. Marcus and told him about it. But I wasn't the least bit disturbed about it because the altera-

tion was not a valid one until it was initialed by the parties. And I never did initial it and it is not initialed on their copies, if you will notice.

The Court: That's the best answer to the question, I guess. Whether you or I would have done it that way is another thing.

Mr. Grosman: It suits me, your Honor.

The Court: Frankly, I would never alter any written instrument that had been signed, unless my client initialed it. Never. It could be a two dollar promissory note.

Mr. Grosman: That's right.

The Court: It only leads to great trouble.

The Witness: It does.

Mr. Grosman: No other lawyer I know of would do anything different.

The Court: Now it is done and he has explained it the best way he can.

By Mr. Grosman:

Q. Let me ask you, Mr. Schwartz, on September 14, 1948, did Marcus produce any of the old stock of Milmar, (2192) Inc.? A. I have no specific recollection. I really don't know.

Q. You have no specific recollection. A. No.

Q. Do you remember being asked that on your deposition, Mr. Schwartz, whether or not all the certificates, or any of the certificates of Milmar were present on September 14, 1948? A. I will give the same answer. I wish I recalled, but I don't.

Q. I direct your attention to page 264— A. I will have to get a copy of the deposition.

Q. —of your testimony on deposition, which reads as follows: "Question: Did Mr. Miller make such an

affidavit?" Your answer, "Not all of the stock certificates were missing. There were just one or two." Does that refresh your mind as to whether or not there were some of the old certificates present? A. No. I say that I still don't know whether any or all were present—any or all were missing, I mean.

Q. Can you say whether any of the old certificates were present? A. No, I don't recall.

Q. Then this question was put to you, "Whose certificates (2193) were present?

"Answer: I couldn't answer at this time, but I know my certificate was missing, for one, and I think one other certificate was missing." A. The same answer. I still don't have any definite recollection on that. All I know is that my certificates definitely were missing, and I remember there was quite a discussion about the fact that we did not have the certificates present. That's why we went through that procedure.

Q. I direct your attention to the first line on page 420 of your deposition—page 419, about twelve lines down, "Question: And at that time how many shares were turned in by Mr. Marcus?

"Answer: I don't know exactly, but there were a couple of certificates." Do you remember that? A. My answer is exactly the same. I have no definite recollection, and I couldn't possibly tell you whether some or all were there. I have some vague recollection of a certificate—certificates being missing. But whether they were all missing or not, I still can't tell you, as you will see from the next two pages of testimony.

Q. "Question: Whose certificates?

"Answer: Mine, among others, possibly more.

"Question: Who else?

(2194) "Answer: Possibly one other of Mr. Marcus. I am not sure of that.

"Question: Yours were missing?

"Answer: I claim I turned it over to him; he claims I didn't—previously, I mean.

"Question: Did you call for the production and surrender of all the old outstanding certificates?

"Answer: I did.

"Question: Did you call for the surrender of the certificates issued in the name of William Miller for five hundred shares of stock in Milmar?"

Mr. Margulies interjected, "I don't think you will find the records show that.

"Question: Well, five hundred shares issued to Mr. William Miller in the name of William Miller.

"Answer: As far as I recall, Mr. Marcus had that certificate.

"Question: Did he ever surrender it?

"Answer: He had it with him, as I recall.

"Question: Did he surrender it?

"Answer: I believe so, but I wouldn't know. I think they were all present, except one certificate of mine and possibly one of Marcus'."

Now, does that refresh your mind as to whether or not there were any of the old certificates present on (2195) September 14, '48? A. I stand by this testimony exactly. I wouldn't alter it in the slightest. That's exactly the way I testified, and it's my best recollection, but it's not the best and it's not accurate, and I couldn't possibly prove it.

Q. Your testimony given in court or your testimony on deposition, which do you say you stand by? A. Both.

Q. On both. A. I agree with every word I said here. That's my very best recollection of what happened.

Robert J. Schwartz—for Defendant Milmar Estate—Recalled—Rebuttal—Cross

The Court: Well, do I take it now that no matter what he calls to your attention, your testimony now is that you don't recall whether any, all or none were there, is that right?

The Witness: That's correct. And I still say so.

The Court: And you can't swear to any—

The Witness: That's right. Judge, you see, what happened—

The Court: I don't want you to explain it. If you can't recall it, you can't. What I am trying to do is save time and not have you repeat that over and over again.

The Witness: Yes. Well, that's exactly my (2196) statement. I can't say—I'm only positive of one thing.

The Court: That yours wasn't there.

The Witness: That mine wasn't there. Beyond that I can't answer, because I have no distinct recollection beyond my own, which I know I turned over to Mr. Marcus early in that summer of '48 before I went down to Mexico because I thought there might be a sale, so I turned over my certificate. But the others I don't recall specifically.

By Mr. Grosman:

Q. Then, as I take it, Mr. Schwartz, you have no desire to make any change to your testimony on deposition or in your testimony in court. A. You mean referring to this particular—

Q. Referring to these certificates. A. That's my best recollection.

Q. Whether they were present or not on Septembr 14, 1948— A. That's correct.

Robert J. Schwartz—for Defendant Milmar Estate—Recalled—Rebuttal—Cross

Q. —whether they were surrendered or canceled; whatever you said on both occasions you stand by, right? A. That's right.

Q. Now, there were more than 1,250 shares of stock of Milmar, Inc., issued and outstanding on September 14, '48, were there not? A. Well, there was some discussion about Mr. Bierman's (2197) stock, some twenty odd shares, or something like that, but it was all understood that there was 1,250 shares.

Q. Actually, were there not 1,272 shares issued and outstanding? A. The things that were in the books, or the correction of that, I wouldn't know about, because I never had possession of the books, and on that one day Miller and Marcus represented to Lieberman and myself that 1,250 shares were outstanding. We waited until the 14th of September to insert the correct amount. They told that was the correct amount. That's what we inserted.

Q. You say that you are not familiar with the corporate books of Milmar Estates, Inc.? A. That's correct. The corporation was formed by Mr. Walter Winne and I never had possession of them at any time, except possibly for—

Q. You were secretary of the company— A. Even when I was secretary.

Q. —and you were not familiar with the books. A. That's right.

Q. Now, did Marcus and Miller leave the room on September 14, '48, and make some sort of a private agreement between themselves? A. They left the room on numerous occasions. What went on there, I wouldn't know.

(2198) Q. You weren't told? A. I was told on a couple of occasions they made various terms of the deal, and so on. And then one time when they came back they told me to draw up a promissory note for $15,000, which Mr. Marcus

told me was an individual obligation of Bill Miller's to him, and which later turned out to be a part of the purchase price which he concealed from me.

Q. Were there a lot of secret deals made on that day between Marcus and Miller? A. There were loads of conversations and deals, but whether I know them or not, I couldn't say. I haven't any way of knowing whether they told me everything or nothing.

Q. Well, didn't you on one occasion refer to the fact that secret deals had been made between Marcus and Miller on September 14, '48? A. They were negotiating between themselves constantly. Whether or not I learned of them, and then they no longer were secret or not, is something I can't say.

Q. Didn't you testify, Mr. Schwartz, in no mistakable terms, that there were secret deals made between Miller and Marcus? A. I don't know whether I used the word "secret." That's possible.

(2199) Q. You don't remember that? A. No, I wouldn't at all. It's possible.

Q. Now, may I call your attention to page 129 of your testimony in court—

Mr. Brigadier: 129 in court?

Mr. Tepper: In his deposition.

Q. I'm sorry. Of the the deposition. A. Yes, I see that. I don't have any specific recollection—

Q. Let me ask you a question, if you don't mind, to keep the record straight. About the center of the page.

"Question: I see. What was to become of the remaining 625 shares of stock of Milmar Estates, Inc., issued and outstanding?

"Answer: I don't have any specific recollection of what Mr. Marcus was doing. There was an awful lot of secret

deals between them. When I say 'them'—Mr. Miller and Mr. Marcus. They would often go into rooms and exchange notes, papers, and other things, and come back and tell us that they took care of something, or something of that sort. I don't know what they agreed to about the balance and I didn't even want to know."

Now, does that refresh your mind that you stated that there had been secret deals between them? A. Yes, I did say that. That's correct.

(2200) Q. And you stand by that statement. A. Well, I don't know—this point wasn't clarified, but as long as it's being raised now, some of the things I was told about and some I wasn't. I say that it was a secret deal when your client, Mr. Marcus, concealed from me the fact that he was getting $15,000 from Mr. Miller as part of the purchase price. That's correct, that was a secret deal.

Q. Well, didn't you tell us ten minutes ago that you had been requested to draw a note for $15,000? A. That's right.

Q. What was secret about that then? A. The secret was that it was not an individual obligation of Mr. Miller's to Mr. Marcus, whereas in fact—

Mr. Brigadier: Would you please raise your voice. You are dropping it. We don't hear you.

The Witness: I'm sorry.

A. (Continuing) The secret was that Mr. Marcus was not telling me the truth, that he had actually an understanding to increase the price by fifteen thousand, but he lied to me in order not to give me my share of the $15,000. That was the secret part of the deal.

Q. Well, did you become aware of that when he asked you on September 14, '48, to draw this note by Miller in his favor? (2201) A. No.

Robert J. Schwartz—for Defendant Milmar Estate—Recalled—Rebuttal—Cross

Q. Well, what did you think that note was for, if it was an increase in price? A. Just exactly what I testified to ever since this deposition started, that Mr. Marcus told me, when I asked him what it was about, he said it was a personal obligation of Mr. Miller's to Mr. Marcus. And I said to him, "For God's sake, Sam, don't tell me you loaned him $15,000 more." And he said, "Yes, I did." And he says, "This is something he owes me individually, and it has nothing to do with the deal." That was a secret deal, in my opinion.

Q. Weren't you present when Miller called up Mr. Kevelson and told him that Marcus wanted more money and the $15,000 was agreed on? A. Mr. Miller made a half dozen calls—well, I don't know whether it was a half a dozen or four or five—to Mr. Kevelson. Some were in my presence, some were not. Some were partly in my presence, some were not. Mr. Lieberman and I had papers to dictate, we were working in two or three different rooms—

The Court: Wait a minute. Don't explain. Did you hear him say that—

The Witness: I don't have any recollection of that.

(2202) The Court: That's the answer. Don't go into a long speech about it.

A. No, I didn't.

Q. You didn't hear that conversation. A. No. If I had I certainly would have said to Mr. Marcus, "Why did you tell me that fifteen thousand is a personal obligation; why don't you give me part of it?" Wouldn't I have gotten my ten percent of that? Of course I would.

Q. I don't know why you did a lot of these things. A. Well, I know, because your client doesn't tell the truth, you see. That's the point. That's exactly the reason.

Q. Well, didn't you tell us, in your previous testimony, that up to the time when you and Marcus broke up you had

always found him to be honorable in his dealings— A. That's correct.

Q. —with respect to his financial dealings? A. He seems to have fallen in with rather bad company since he got away from me.

Q. And that bad company was who? A. I really couldn't say.

Q. You think that when he was with you he was in good company. A. Well, I kept him straight, let's say.

(2203) Q. Well, we'll not debate that. A. No, I think not.

Q. Now, Mr. Schwartz, did you ever find out exactly what Marcus was being paid for his stock? A. Well, I know he was getting a hundred and forty thousand instead of a hundred and twenty-five; if that's what you mean, yes.

Q. You knew that? A. Yes, sir.

Q. When did you know that? A. During the course of the depositions.

Q. Is that the first you knew of it? A. That's right. I had no way of knowing until the depositions were under way, and I found out—I was asked questions about $140,000 purchase price.

Q. How much were you to receive for your stock? A. Is that the end of the question? I'm sorry.

Q. How much were you to receive from Marcus for your 125 shares of stock? A. Seventy percent of—seventy cents on the dollar, as I recall, on my original investment.

Q. Of what? A. On my original investment of $11,250.

The Court: I have a distinct recollection of hearing this several times before.

(2204) Mr. Grosman: Yes.

Q. Well, now, were you to receive payment for your stock on the basis of a hundred and forty thousand or on the

basis of a hundred twenty-five thousand? A. I have just said, a hundred and twenty-five thousand.

Q. Pardon? A. On the basis of a hundred twenty-five thousand. It worked out, according to Mr. Marcus' calculations, to seventy cents on the dollar of the original investment, and so he represented it to me.

Q. I see. Now, is it true that in view of the fact that none of the old stock was present on September 14, 1948, when the exhibits, DM-22 and DME-5, were drawn, that new stock was issued? A. The first part of your statement I can't answer, as I have testified to, because I don't have any recollection whether part was missing—

The Court: Don't say that all over again. You have no recollection. What about the second part?

A. The second part was about new stock being issued?

Q. Yes. A. Yes, that was Mr. Marcus' suggestion.

Q. And new stock in the sum of 1,250 shares of Milmar Estates was issued? A. That's correct.

(2205) Q. What became of the remaining 27 shares of stock that were issued and outstanding on September 14, '48? A. There was, as I recall, no statement made to us—when I say "us" I mean to Lieberman and myself—as to the fact that these shares were outstanding. It was our understanding, and we were advised by Mr. Marcus and Mr. Miller, both, that 1,250 shares were outstanding. Until the depositions started I had no knowledge that there was a question about these other shares. But, as I recall, I thought that point was clarified.

Q. Weren't there additional 27 shares of stock?

The Court: Twenty-seven?

Mr. Grosman: Twenty-two shares of stock.

The Court: Are you talking about Bierman's shares?

Robert J. Schwartz—for Defendant Milmar Estate—Recalled—Rebuttal—Cross

Mr. Grosman: I don't know whose they were, your Honor, except by reference to the books.

Q. Weren't they attested by you as secretary when the certificates were issued? A. I attested to all the issuing certificates, but whether—at that time I knew what I was doing, but a year later I didn't recall whether it was a thousand, 1,200, 1,500, or what the number was. And that is why we waited until the proper time. I hadn't seen the books (2206) in all that time and I didn't recall.

Q. On September 14, 1948, it became important to know exactly how many shares of stock of Milmar, Inc., were outstanding, did it not? A. That's correct.

Q. And on that day the books, the corporate books of Milmar Estates, Inc., were present, were they not? A. Just, as I recall it, the stock certificate books.

Q. All right, the stock certificate book. And you checked it, did you not? A. Yes.

Q. And didn't you observe at that time there were 1,272 shares of stock outstanding and not 1,250? A. And Mr. Lieberman and myself asked Mr. Miller and Mr. Marcus about the total number of shares and they said to us that that is not correct, the correct amount is twelve hundred and fifty dollars—1,250 shares. I'm sorry. And that is all we had to go by, because we had no knowledge of what they had done.

Q. Well, they couldn't have issued any stock without your signature as secretary, could they? A. It was issued originally in Mr. Winne's office.

Q. Well, there was only 20 shares of stock issued in Winne's office, was there not? (2207) A. Twenty?

Q. Twenty, yes; nine, nine and two. A. No.

Q. Nine in the name of Miller, nine in the name of Marcus and two in the name of Mr. Winne's secretary. A. No, not correct.

Robert J. Schwartz—for Defendant Milmar Estate—Recalled—Rebuttal—Redirect

Q. Are you certain about that? A. That is my recollection.

Q. You were there? A. That's right.

Q. And you don't know what happened? A. I do. I said you were wrong.

The Court: Well, either you are wrong or Mr. Winne is wrong, then, because Mr. Winne so testified yesterday, if my recollection is correct.

The Witness: Mr. Winne was not present in the room that day. I don't know how he could possibly know about this. There was a young man from Mr. Winne's office there at the time. Mr. Winne was not even present.

Q. Mr. Winne wasn't present? A. No, there was some young man, I would say slightly under 30 years of age, present.

Mr. Grosman: I think that is all.

(2208) *Redirect examination by Mr. Brigadier*:

Q. Judge Grosman asked you questions about the original issuance of stock and I show you—we don't have the certificates, but the stub numbers, the stubs for the original certificates—

The Court: Referring to what Exhibit?

The Witness: DME-21.

Q. Will you notice that the Certificate No. 1 was issued to William Miller for nine shares? A. Right.

Q. Certificate No. 2 to Sam Marcus for nine shares. A. Right.

Q. And Certificate No. 3 to Marguerite Kane—that's of Mr. Winne's office, I believe—for two shares. A. I suppose so.

Robert J. Schwartz—for Defendant Mümar Estate—Recalled—Rebuttal—Redirect

Q. Were you present at the issuance of these certificates? A. No, I was not.

Q. That is not what you are referring to when you speak of original issue? A. No.

Mr. Grosman: Now, if your Honor please, I object to this as leading.

(2209) Mr. Brigadier: Well, I certainly have a right on redirect to straighten out the witness.

The Court: Well, if the man wasn't present when the first three certificates were issued, he obviously couldn't be talking about those.

Mr. Grosman: Now, if your Honor please, you heard what he testified to.

The Court: I certainly did.

Mr. Brigadier: But it was very obvious that he was talking about one thing and you were talking about another.

Mr. Grosman: All right, you ask him what he was talking about.

Mr. Brigadier: That is the purpose of redirect examination, to find out what the witness was talking about, and what you were talking about. That is the function of redirect.

Mr. Grosman: All right.

The Court: You were not referring to the first three certificates, were you?

The Witness: No, I was referring, of course, to the ones that I was present at. That's Certificate No.—

Mr. Brigadier: Let me put the question to you in another way.

(2210) The Court: Let him answer it himself.

The Witness: From Certificates 4 onwards was the day I was present, on June 7. These were issued on April 15, 1946.

Robert J. Schwartz—for Defendant Milmar Estate—Recalled—Rebuttal—Recross

The Court: And you had nothing to do with them.
The Witness: I know nothing about those.
The Court: You know nothing about it.
The Witness: What Mr. Winne testified to probably concerned those.

By Mr. Brigadier:

Q. Was your signature on the first three certificates? A. No, I wasn't even present.

Mr. Brigadier: All right. That is all I wanted to know. That is all.

Recross examination by Mr. Grosman:

Q. Now, didn't you say, Mr. Schwartz, that you were present in Mr. Winne's office— A. That's right.
Q. —at the time this corporation was organized? A. No.
Q. Pardon? A. No.
Q. When were you present in his office? (2211) A. I can tell you exactly. The corporation was organized in April, apparently, from these certificates, I am assuming—

The Court: 1946.

A. (continuing) April, '46. I was present in Mr. Winne's office, apparently, on June 7, assuming that this date is correct, and I suppose it is.

The Court: Of the same year.
The Witness: The same year, 46.

By Mr. Grosman:

Q. Didn't you testify previously that you had been present in Mr. Winne's office at the time the company was incorporated? A. I said I was present at the time the stock

certificates were issued to Miller and Marcus. And I say that's correct. That's exactly the time I was there.

Q. Is that what you said before? A. That's what I said before.

Q. Well, now, what stock certificates were issued on June 7, '46.

The Court: Let's not waste a lot of time. Let's look at the record. You are mistaken again. You said you were there when it was incorporated, in Mr. Winne's office, and Mr. Winne wasn't there.

The Witness: Did I say incorporated?

(2212) The Court: Yes, sir.

The Witness: I'm sorry. If I said that, I made an error in speech. I meant I was present when the stock certificates were issued, not when it was incorporated, because I didn't incorporate it. If I said that, I apologize to everybody present.

The Court: All right. And then do you mean that on the occasion when you were there Mr. Winne wasn't there, is that right?

The Witness: That's right.

The Court: That was in June of '46?

The Witness: That's correct.

The Court: All right. Let's get it all straightened out.

By Mr. Grosman:

Q. Now, what happened on June 7 of '46, when you say you were present in Mr. Winne's office? A. Certain stock certificates were issued, which start at No. 4, apparently, and the ones that are dated on June 7.

Q. You are now referring to Certificate No. 4, for 491 shares to William Miller; is that what you are referring to? A. Well, that's one of them.

Robert J. Schwartz—for Defendant Milmar Estate—Recalled—Rebuttal—Recross

The Court: Show them to him.

(2213) Q. Look at it.

(Document handed to the witness.)

A. Apparently 4 wasn't issued, but starting at this particular point, the ones that are dated June 7 were issued.

Q. Will you give me the numbers of the certificates issued on June 7, 1946, and to whom they were issued?

The Court: And how many shares.

Q. And how many shares. A. I don't know which of these were canceled and which weren't as of this date, because there was some confusion about the exact number to be issued. Mr. Hoffman had a list of stock certificates to be issued, and while being issued there was some change in the plan, so I don't know which of these were issued. But Certificate No. 6 is for 125 to Sam Marcus; No. 7 is 91 to Sam Marcus; No. 8 is 300 to Sam Marcus; No. 9 is 100 to Sam Marcus; No. 10 is 116 to William Miller; No. 11 is—

Q. No. 10 is what? A. One hundred sixteen to William Miller; No. 11 is 125 to William Miller; No. 12 is 125 to William Miller; No. 13 is 125 to William Miller; No. 14 is 32 to Robert Schwartz; No. 15 is 93 to Robert Schwartz; No. 16 is (2214) 20 to Al Bierman.

The Court: All issued the same day?

The Witness: All issued June 7.

A. (continuing) Now, that does not take into account Certificate No. 4 for 491 to William Miller, which I don't know whether it was issued or not, because I see it is in the book and it is not signed. So I have no specific recollection. I think that may have been caused by the fact that Mr. Hoffman changed his system of issuing shares while we were in the middle of it.

Robert J. Schwartz—for Defendant Milmar Estate—Recalled—Rebuttal—Recross

Q. Hoffman changed his system? A. Mr. Hoffman had a list of how he wanted the shares issued for some particular reason, I don't know what it was at the time, and while we were starting to issue these—I don't know whether he had a conversation with Mr. Marcus or Miller, but in the middle of it he said, "Now, here is the way I want it." And we had to make some change while we were in the process.

Q. Were those certificates actually issued? A. Yes, they were.

Q. You signed them? A. I signed as secretary.

Q. As secretary? A. That's right.

(2215) Q. When were they marked "canceled" in red ink? A. Oh, the one that was marked "canceled" in red ink—I don't know, it is not in my handwriting. I don't know when that word appeared.

Q. It was never issued, was it, No. 4? A. No, I don't think it was issued. But it is marked—you said "canceled," so I am answering that. And the word "canceled" was written on or about September 14, at the closing, as I recall.

Q. Why was it marked "canceled," it was never issued? A. I am talking about Certificate No. 6 and on.

Q. I am talking about Certificate No. 4. A. Four, I said —I testified to that. I don't know, because I didn't sign that. It is not my handwriting and I don't know when that appeared.

Mr. Brigadier: The Exhibit itself, which you have in front of you, shows those two certificates were never issued, four and five.

The Court: That's right, they are not signed by any officer at all.

Mr. Brigadier: It is true of four and five. I have the photostat in front of me.

Robert J. Schwartz—for Defendant Milmar Estate—Recalled—Rebuttal—Recross

The Witness: My recollection is that the numbering wasn't satisfactory and—

(2216) The Court: Well, they are not signed, so they were never issued anyway. Next question.

By Mr. Grosman:

Q. Well, were these certificates that you have referred to by number— A. The issued ones, you mean?

Q. Yes. Were they outstanding on September 14, '48? A. I have given you my best answer on that.

Q. Well, what is your best answer?

The Court: He doesn't know.

A. I know mine weren't present, but beyond that I have no definite recollection.

Q. You were retained by Mr. Marcus to represent him in this transaction on September 14, '48, is that correct? A. Retained on September 14?

Q. Not on September 14; you had been retained to represent—

The Court: Well, I will answer. He said about six times already that he represented him.

A. Not formally, as such.

Q. What do you mean, not formally; were you there in your capacity as his attorney? A. Sure, but you said was I ever retained by him, and (2217) he never said, "You are hired—"

The Court: You know what he means. Did you represent him at the closing?

The Witness: Sure. Yes. Of course, I have said so about 10 times.

Robert J. Schwartz—for Defendant Milmar Estate—Recalled—Rebuttal—Recross

Q. And were you paid for your services? A. Yes, I think —we got some small fee on this thing.

Q. Yes. And you say that you don't know—you have no recollection of what transpired on that day with respect to the certificates? A. No, I didn't say that at all.

Q. What do you say, with respect to the certificates? A. Just what I said before.

Q. Well, say it again. A. My certificates were missing. Beyond that I have no recollection as to which were or were not present.

Q. Do you know the name of this young man who was present in Winne's office on June 7, '46? A. Of course not. I certainly do not.

Q. Was he a lawyer? A. I believe he was.

Q. Do you know? A. I have no way of knowing. He was present in the (2218) office, and he had the file, and he brought it in when we came. I assumed he was a lawyer.

Q. If Mr. Winne said that after incorporating this company, and issuing the original certificates, he had nothing further to do with it, and the books were taken out of his office, would that be correct or incorrect? A. I see no reason to contradict that, if he says so.

Mr. Grosman: All right. That's all.

Mr. Brigadier: That's all, Mr. Schwartz.

The Court: Step down.

(Witness excused.)

Mr. Brigadier: If your Honor please, my next witness, as I told you, is Judge Lieberman, and he had to go to the synagogue this morning and couldn't be here before two.

The Court: I don't know of a better reason.

Mr. Brigadier: Perhaps the other side has some rebuttal witness with whom we could use this hour,

if they want to, so we don't waste any more time, unless your Honor prefers to adjourn.

The Court: He will be here at 2 o'clock?

Mr. Brigadier: Yes, he is meeting me for lunch, so I am positive. I spoke to him last night again (2219) and he will be ready to testify at 2 o'clock. He will only take five, ten minutes.

The Court: All right. We will recess now and return at 2 o'clock.

(Noon recess.)

AFTERNOON SESSION

Mr. Brigadier: If your Honor please, I reached Theodore Chazin by telephone and with some difficulty, notwithstanding his religious beliefs to the contrary, arranged to have him arrive this afternoon, and he has left, and should be here, I think, within about 30 minutes to make the statement to your Honor with reference to what I spoke to you about this morning.

ABRAHAM LIEBERMAN, recalled as a witness by the defendant, Milmar Estate, in rebuttal, having been previously duly sworn, testified as follows:

Direct examination by Mr. Brigadier:

Q. Judge Lieberman, it has been suggested at some time or other in this case that you had some kind of relationship with Mr. Schwartz of either a business (2220) or social nature. Will you tell us when you first met Mr. Schwartz?

Abraham Lieberman—for Defendant Milmar Estate—Recalled—Rebuttal—Direct

Mr. Grosman: I object to that. It is not redirect.

Mr. Brigadier: It is redirect, because it was brought out through the examination of Mr. Schwartz by Judge Grosman, you will recall—there were a long series of questions as to whether or not they didn't have business relations with each other, and finally Mr. Grosman spoke of the fact that he had once called Judge Lieberman for a reference of a lawyer that he could get to represent a client of his down—I think it was in South Branch, New Jersey. with respect to some liquor permit. I want to establish that there is no relationship between the two.

Mr. Grosman: I will withdraw my objection. Let's get on with it.

Q. When did you first meet Mr. Schwartz? A. Approximately 1947.

Q. And was that in connection with your representation of William Miller? A. It was.

Q. In connection with the negotiations for the new lease, is that right? A. It was.

(2221) Q. Now, from 1947 to September 14, 1948, what contacts did you have with Mr. Schwartz? A. Whatever may have been necessary pertaining to the Riviera and Milmar.

Q. And in what capacity did you have contact with him? A. As lawyers, as attorneys.

Q. You representing who? A. I represented Mr. Miller and he was representing Mr. Marcus.

Q. I see. Now, after September 14, 1948, have you had any contact with Mr. Schwartz? A. Yes.

Q. Will you state on what occasion? A. Several years ago I think he called me, he wanted me to recommend some lawyer down in South Jersey for some liquor license.

Mr. Tepper: I don't like to interrupt, but this is certainly repetitious. This testimony is in the record.

No. 839

FILED
1958
JOHN T. FEY, Clerk

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12073

AL BIERMAN and WILLIAM MILLER,
Plaintiffs-Appellees,

vs.

SAMUEL MARCUS,
Defendant-Appellant and Cross Claimant-Appellant,

and

MILMAR ESTATE, INC., a corporation organized under the rules of the State of New Jersey,
Defendant-Appellee.

AL KEVELSON,
Defendant on Cross Claim-Appellee.

Civil Action (No. 1026-50)

On Appeal from Final Judgment of the United States District Court for the District of New Jersey

Sat Below: Modarelli, U.S.D.J.

APPENDIX TO APPELLANT'S BRIEF

[Volume V—Pages 1601a to 2027a]

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Abraham Lieberman—for Defendant Milmar Estate—Recalled—Rebuttal—Direct

Judge Lieberman has testified almost verbatim—

The Court: Not about this, because he never knew he was accused of being socially intimate with Mr. Schwartz. And I don't know as anyone has established to my satisfaction that they were. Maybe we (2222) are wasting time.

Mr. Brigadier: Except that the suggestion was made through that questioning and I want to bring out directly from Judge Lieberman—I am willing to drop it at this moment.

The Court: That's the only other matter you ever had with him, you referred a lawyer in reference to a liquor permit, or something?

The Witness: That's right. And that was the end of it. Never bothered with him socially or otherwise.

The Court: Did you ever go out dancing with him, or otherwise?

The Witness: No, never.

By Mr. Brigadier:

Q. Judge Lieberman, on September 14, 1948, did Samuel Marcus, or anyone else, deliver to you 625 shares of the stock of Milmar Estates, Inc., that had been issued prior to September 14?

Mr. Grosman: I object to that. It is not redirect. He has already testified.

The Court: That has been answered. He said no.

Mr. Brigadier: I didn't ask him that, I don't think, on the original examination. He said, on (2223) the original examination, that he received no stock at all. But since then Mr. Marcus has specifically testified that he delivered 625 shares to Judge Lieberman, of the old stock. And I think it is proper redirect to have him state.

Abraham Lieberman—for Defendant Milmar Estate—Recalled—Rebuttal—Direct

The Court: Can you pinpoint that one?

Mr. Brigadier: That is all I am going to do, I am going to pinpoint four questions.

The Court: All right, you may answer.

A. He did not.

Q. Was there any stock of the old stock delivered to you that had been issued prior to September 14, 1948? A. None whatsoever.

Q. On that day. A. None whatsoever.

Q. Was there any stock present on September 14, 1948, exhibited to you, that had been issued prior to September 14, 1948? A. None whatsoever.

Q. Now, after the papers were signed on September 14, 1948, did Mr. Marcus in your presence turn to Mr. Miller and request the payment of $50,000 in cash on the $50,000 note? A. He did not.

(2224) Q. And did Mr. Miller offer Mr. Marcus at that point, after the papers were signed, notes of various hues and colors? A. He did not.

Q. Did Mr. Marcus and Mr. Miller, after the papers were signed, leave the room and then come back and inform you that the deal covered by the papers that had been signed was off and that they had made a new deal? A. They did not.

Q. Did Mr. Marcus or Mr. Miller state to you, after the papers had been signed, that Mr. Marcus and Mr. Miller had agreed that instead of the sale of all the stock the sale was to be only of 625 shares, that Marcus was to wipe out the note by returning the note of $50,000, and that Miller was to wipe out his right to acquire any of the remaining stock? A. No such conversation.

Q. Of any kind? A. None whatsoever.

Mr. Brigadier: That's all, Judge Lieberman.

Abraham Lieberman—for Defendant Milmar Estate—Recalled—Rebuttal—Cross

Cross examination by Mr. Grosman:

Q. Now, Judge Lieberman, did you ask for the production of any of the old stock of Milmar Estates? A. I did.

(2225) Q. And the answer you received was what? A. That they had none.

Q. And who gave you that answer? A. Mr. Marcus.

Q. How about Miller, did he say anything? A. Miller never had any stock. He told me he never had any stock.

Q. Did he say anything? A. He said he didn't have any.

Q. All right. A. As far as I know. I remember him saying so.

Q. Was Robert Schwartz present when you made this demand? A. I believe he was.

Q. Did Marcus and Miller leave the room a number of times during the course of the negotiations on September 14, 1948?

Mr. Brigadier: I object to any testimony as to what happened prior to the signing of the papers. I have confined my questions to what happened after the signing, after the signing of the papers.

Mr. Grosman: After the signing?

Mr. Brigadier: After the signing.

Mr. Grosman: Well, he wouldn't have asked for stock, and all that kind of business, after the (2226) signing of the papers.

Mr. Brigadier: You have already questioned him about that. The only other question I asked was whether 625 shares were delivered to him. But otherwise I did not go into the transaction as it occurred prior to September 14, because that has been testified to originally by Judge Lieberman.

Mr. Grosman: I am talking about what transpired on September 14, 1948, during the course of the ne-

gotiations on that day leading up to the signing of the contract. That's what I thought Mr. Brigadier was referring to.

The Court: Are we going to go through all that again, after it has been testified to a dozen times?

Mr. Grosman: That's what I thought had happened. Of course, he went into that again.

Mr. Brigadier: I did not.

The Court: I thought he confined himself strictly to what happened after the contracts were signed. He only asked some specific questions about statements made by Mr. Marcus, which he denies.

Mr. Grosman: Well, let me understand this. May I ask Mr. Brigadier, through your Honor—is Judge Modarelli's understanding of your questions correct?

Mr. Brigadier: Yes.

(2227) Mr. Grosman: That you are limiting your questions to Judge Lieberman as to what transpired on September 14, after the contract was signed?

Mr. Brigadier: That's right, except for the one question which I asked him point blank—did Mr. Marcus deliver to you 625 shares of the old stock?

Mr. Grosman: Was that before?

Mr. Brigadier: I didn't limit that to before or after. But that is the only question I asked that might be before. But as far the transaction itself is concerned, I limited it to what happened after the signing of the papers.

Mr. Grosman: I am not interested in what happened after the signing of the papers.

The Court: We certainly went over everything that happened before, I am sure, innumerable times, with many versions, too, of what happened. Sometimes I wonder if they are all talking about the same closing.

Mr. Grosman: No further questions.

Mr. Brigadier: That is all, Judge Lieberman.

The Court: Step down.

(Witness excused.)

Mr. Brigadier: I wish to offer in evidence the following documents: Certified copies from the file of the Clerk of the United States District Court for the (2228) District of New Jersey in the matter of Bill Miller's Riviera, Inc.—that's the bankruptcy proceeding—consisting of the following: Petition, to which are annexed schedules, the summary of debts and assets, statement of affairs—

Mr. Grosman: A little slower, Mr. Brigadier.

Mr. Brigadier: —statement of executory contracts.

Mr. Grosman: Statement of debts and assets—what is after that, Mr. Brigadier?

Mr. Brigadier: Summary of debts and assets. Let me make sure you have got it all. The first thing I offered was the petition itself, with the schedules annexed. I didn't list all the schedules, they are annexed. Do you want me to list them?

Mr. Grosman: No, you say they are all there. Your word is good.

Mr. Brigadier: The summary of debts and assets. Then there is an Exhibit attached called Statement of Affairs. There is another Exhibit attached called Statement of Executory Contracts. Then there is a copy of—I guess it is a resolution adopted by the Board of Directors of Bill Miller's Riviera. And then there is a waiver of deposit of rent due to landlord as priority claim, signed by Sam Marcus. And apparently (2229) there is another one, waiver of deposit of rent due to landlord as an expense of administration, signed by Sam Marcus, and the certificate attached of the Clerk, William H. Tallyn.

Colloquy

Then, in addition, I have a certified copy, certified to by William H. Tallyn, of what is called the order confirming the arrangement as amended.

I wish to offer those in evidence.

Mr. Grosman: May I ask for what purpose?

Mr. Brigadier: Because there has been a great deal of testimony offered by you in relation to Bill Miller's Riviera and the connection between Samuel Marcus — and Bill Miller's Riviera; and also because this shows Samuel Marcus knew of the list of creditors that was filed in the proceeding, and he is not listed as a creditor in the proceedings; and also that there is an order entered which bars any creditor, listed or unlisted, from taking any action with respect to any claim.

The Court: When was that filed, by the way?

The Clerk: It was filed April 5, 1947.

Mr. Brigadier: That's the final order you are asking about. The other was filed much earlier.

The Court: When was the petition filed? The date of the Jurat will give you an idea.

Mr. Brigadier: The 19th of December, 1946, (2230) is the jurat. So that's probably around that time.

Mr. Grosman: Now, if it is offered for the purpose of showing the fact that a petition of this nature was filed, and all these other Exhibits, I have no objection to them.

If they are offered for the purpose of establishing the fact, I object to them.

Mr. Brigadier: Well, Mr. Marcus testified from the stand that he put in a lot of money, into this, not only did he put in money into Milmer, but he put in a lot of money into Riviera. As a matter of fact, we know there is a suit pending, which is not being tried now, of his claims against Riviera. Since you put in the evidence, and put in a batch of checks and notes, and

everything else, with respect to loans of the Riviera, I want to show that when this thing was filed he was not listed as a creditor, he never made any claim as a creditor, that he appeared in the proceeding and claimed merely to be landlord. It is evidentiary for that purpose.

Mr. Grosman: Of course, there has been no adjudication of this case and the proceedings were dismissed, as I understand it.

Mr. Brigadier: Oh, no, there is an order entered.

(2231) Mr. Grosman: For what?

Mr. Brigadier: Confirming the arrangement.

Mr. Grosman: There has been no adjudication in bankruptcy.

Mr. Brigadier: There is an order which confirms the arrangement, and which adjudicates, as you will read, that all creditors are prohibited and restrained from bringing any actions or prosecuting any suit. It speaks for itself. Do you want me to read it? I will read it to the Court. I just put it in evidence.

Mr. Grosman: The Court can read the order itself.

I don't want to go into the question of whether or not these proceedings are binding on Marcus. I don't know how he fits into this picture, whether he was listed, or whether he wasn't listed, but certainly in this suit these proceedings have no bearing.

Now, in the next suit, brought by Marcus against Riviera, they may have some bearing, I don't know. But certainly they have no bearing in this case, and I object to them.

The Court: These are only debts against the Riviera, aren't they?

Mr. Brigadier: Yes. And he asserted no (2232) debts in this proceeding against Riviera, yet he has testified on the stand in this case that he has not

only loaned money—he put in a batch of checks in evidence as proof of the fact that he loaned money, and that he is still maintaining a case, which is yet to be tried, on the Riviera.

I am offering them simply to affect his credibility.

The Court: For that purpose they will be admitted.

Mr. Grosman: Under the theory of credibility, of course, you can put anything in.

Of course, I say it does not affect his credibility. And I object to them.

The Clerk: DME-68, photostatic copy of bankruptcy proceedings re Bill Miller's Riviera, Inc., certified by the Clerk of the Court the 15th day of September, 1954.

The Court: For the record, the objection is overruled. The Exhibit may be marked.

(Received and marked Exhibit DME-68.)

Mr. Brigadier: Now, if your Honor please, the only other evidence I have to offer is the deposition, the various admissions made by Sam Marcus in the taking of the deposition. Your Honor will recall the other side has reserved the same right. I have a suggestion (2233) which I would like to make, which I think would save everybody time and trouble.

I assume your Honor is going to require us to brief the case. I would suggest, therefore, that as we brief it, we simply set forth in our brief those portions of the depositions that we wish to be made part of the record, each side, and that they be included as part of the record, so that we don't have to take your time sitting here and listening to them. And I suggest that that go for both sides.

The Court: Any objection to that procedure?

Mr. Grosman: No, not on those.

The Court: It will save your time, my time, and everybody else's time.

Mr. Grosman: We have no desire to waste your Honor's time.

The Court: Nor yours. It is just as valuable.

Mr. Grosman: As long as it applies to both sides we have no objection.

The Court: Yes.

Now, do you have any more witnesses, Mr. Brigadier?

Mr. Brigadier: No more, except the statement I want Mr. Chazin to make to confirm what I said to you this morning.

(2234) The Court: Do you have any more witnesses?

Mr. Grosman: Yes, your Honor, we have some witnesses we want to put on.

Now, do I understand that Mr. Brigadier's case is in, Mr. Chazin's case is in?

Mr. Brigadier: On the counts that we have tried. We haven't tried the tort claims.

Mr. Grosman: Well, your Honor, I was under the impression that your Honor was going to rule as to whether or not they were to put in everything at once, so that we don't have to come back here again and go into the question of whether or not we have to put in more rebuttal, and more answering testimony, and all that.

The Court: All the proof that I want now is to be directed towards the contract and whether or not there was inducement by fraudulent means.

Mr. Grosman: Now, the tort claims, you say, have not been litigated?

Mr. Brigadier: I didn't offer the slightest evidence on that.

The Court: You didn't offer any proof on the tortious features at all. We are only concerned with the validity of the contract or its invalidity.

Colloquy

Mr. Grosman: Now, may I register an (2235) objection for the record to this division of the claims? My impression was that on their counterclaim they should put in all their evidence so that we, in turn, might put ours in opposition thereto and not have to try this thing piecemeal.

Of course, your Honor rules to the contrary—

The Court: I rule, that's right.

Mr. Grosman: We are bound by your Honor's ruling.

The Court: Do you want to know in plain English why I am doing this?

Mr. Grosman: Of course, I am glad to know.

The Court: I wouldn't like to tell you in extra-legal language what I am doing. All I want to say at this point is that I feel very sorry for the litigants involved in this case. That is all I want to say now. That goes for both sides. Because if I were to hear all of these claims and counterclaims I don't know when we would get through, if ever, the way it has gone so far on one issue in this case, the validity of a contract.

Mr. Grosman: All right.

The Court: That's the reason I am doing it. Do you have any more proof to offer on the contract?

(2236) Mr. Grosman: Yes, your Honor.

The Court: I thought we had explored every possible facet concerning its validity or invalidity. Maybe we didn't.

Norman Roth, called and sworn for the defendant, Samuel Marcus, in surrebuttal, testified as follows:

The Clerk: May we have your full name and address, please?

Norman Roth—for Defendant Marcus—Surrebuttal—Direct

The Witness: Norman Roth, 531 East 20th Street, New York City.

Direct examination by Mr. Grosman:

Q. Mr. Roth, you are a member of the Bar of the State of New York? A. I am.

Q. And you are licensed to practice in the Federal Court, District of New York? A. Yes, sir.

Q. You are the New York attorney for Mr. Samuel Marcus? A. I am.

Q. Do you know Robert Schwartz? A. I do.

Q. Did Mr. Marcus first consult you about this interpleader suit? (2237) A. He did.

Q. Now, after doing so, did you communicate with Robert Schwartz? A. I did.

Q. For what purpose? A. For the purpose of getting from him his file of papers having bearing upon the litigation.

Q. Did he give you the file? A. He did.

Q. And do you recall approximately when that was? A. I can give you the exact date by referring to my diary, sir.

Q. Have you your diary here? A. I do.

The Court: I sugegst you refer to it. At least we will get one date correct.

Mr. Grosman: Well, he is not a professor, Judge. He is just an ordinary lawyer.

The Court: I am glad he keeps a diary.

Mr. Grosman: And I am not referring to Mr. Brigadier.

Mr. Brigadier: I don't know what you mean by that, Judge. I am lost.

(Comments off the record.)

(2238) (continuing) On January 8, 1951, a Monday.

Norman Roth—for Defendant Marcus—Surrebuttal—Direct

Q. Now, what happened on that day? A. Mr. Marcus and I went to Mr. Schwartz' office. We had a short conversation, at the conclusion of which Mr. Schwartz gave me his file of papers having to do with this Riviera transaction. During the course of the conversation Mr. Schwartz made a telephone call to a firm by the name of Hannoch & Lasser in Newark. He had theretofore suggested to Mr. Marcus and myself that the firm might be interested in representing Mr. Marcus in this litigation. I do not recall whether the appointment was made at the time I was there or he called back later, but I know that an appointment was made on that day for Mr. Marcus and me to see someone in the firm of Hannoch & Lasser.

Q. Now, he gave you the file? A. Yes, sir.

Q. Did you go through that file? A. Partially later that day, partially within two or three days thereafter.

Q. Now, can you tell me whether or not Exhibits DME-5 and DME-22—can you tell me whether Exhibit DM-22 was in that file at the time you received it from Robert Schwartz? A. Yes, sir.

(2239) Q. Now, how many copies of Exhibit DM-22 were in the file? A. One, sir. By that I mean DM-22 itself.

Q. Did you find in that file four or five copies of DM-22? A. I found DM-22 and no other copies, sir.

Q. Now, I show you Exhibit DME-5—it has been offered in evidence by Mr. Brigadier, Mr. Chazin—did you find the original of that or any similar copy of that in the file? A. I do not understand your question, Judge Grosman.

Mr. Brigadier: I don't either, sir. Do you mean did he find one with alterations; isn't that what you want to know? Why don't you ask him? I have no objection.

Mr. Grosman: Well, I don't know.

The Court: I thought you might object that he was leading him.

Mr. Grosman: I didn't want to arouse him.

Q. Did you find in the file, at the time that you received it from Mr. Robert Schwartz, a copy of the contract of September 14, 1948, similar to the Exhibit, DME-5, with these corrections made in the margin, and the insertions in Paragraph 10 of the words "at least 50 per cent" and in Paragraph 5 of the words "up to 50 (2240) per cent"? A. My answer is no. The only counterpart of the agreement was DM-22, with or without corrections, sir.

Q. All right. Now, did you discuss the history of this case at all with Mr. Robert Schwartz? A. Very little. We had only a short discussion.

Q. Can you recollect now what was said by you and by him? A. If I am not mistaken, it was as the result of a conversation before our arrival that Mr. Marcus and I agreed that we would ask very few questions.

Mr. Brigadier: If your Honor please, I object to this. The only basis on which they can get any statement that Mr. Schwartz may have made into evidence —because, remember, Mr. Schwartz is not a party, but a witness—is if they had laid a foundation by first asking Mr. Schwartz on cross whether he had had this conversation with Mr. Roth. These questions were not put to Mr. Schwartz by Judge Grosman.

Since they were not put to him, and no foundation was laid, this would constitute hearsay evidence and would not be evidentiary as such. And I press my objection on that ground.

The Court: Now, just a minute. Did you hear what Mr. Roth started to answer?

(2241) Mr. Brigadier: No. I didn't even listen to the answer, because I am concerned with the question, sir.

The Court: You might have saved a lot of breath.

What did he say? Something about Mr. Marcus and he had agreed that they were going to ask very few questions. Is that right?

The Witness: Yes, sir.

The Court: And I take it you asked very few questions.

The Witness: We did, sir.

By Mr. Grosman:

Q. Now, after you examined the file, did you see Mr. Schwartz again? A. No, sir.

Q. Or speak to him? A. No, sir; not for—I believe my next conversation with him, sir, was on January 18, 1954, in person, and by telephone call shortly before that.

Q. Now, what was said by you to him and by him to you on these two occasions? A. You mean in 1954?

Q. Yes. A. That was with reference to my understanding that he (2242) had exhibited to counsel for Milmar Estate in this action some papers which were—the existence of which was evidently unknown to us. And Mr. Schwartz on those occasions said that—may I refresh my recollection, sir?

Q. If you require it. A. On January 11, 1954, I had called him and he refused to let me see his file of papers. It was as a result of that and I believe a subsequent telephone conversation between Mr. Marcus and Mr. Schwartz that Mr. Marcus and I went to his office on January 18, 1954, and at that time he showed us two or three sheets of paper. I believe it was two.

Mr. Brigadier: Why don't you finish the answer? I have become involved and I ought to be extricated. You said you asked him whether or not he had shown it to counsel on the other side. Don't you think, in fairness to me, I ought to know the answer?

The Witness: I would be glad to answer that, but I was asked what my conversation with him was.

Mr. Brigadier: All right. I just don't want to be left in mid-air on it.

A. (continuing) He said that he had not shown you anything that had not been shown to us.

(2243) Mr. Brigadier: He never showed me the papers and I will testify to it.

The Witness: I am just repeating what Mr. Schwartz told me.

By Mr. Grosman:

Q. You say he showed you the file on your visit to his office with Mr. Marcus, two or three papers? A. Two papers, I believe it is, sir.

Q. Do you recall what they were? A. Yes, sir; those are the papers that have been produced here in connection with the question of the transfer of Mr. Schwartz' stock to Mr. Marcus.

Q. Well, do you recall specifically what they were? A. If you show me the papers, I can identify them, sir.

Mr. Brigadier: They are in evidence.

A. (continuing) One was a handwritten document on yellow foolscap paper, and the other was a typewritten—carbon, as I recall it, sir.

The Court: You have a good memory.

Q. One would be a letter of—

Mr. Grosman: Was it your Exhibit, Mr. Brigadier, or ours.

(2244) (Discussion off the record.)

The Court: So after over three years you had no contact with him at all—

The Witness: None, sir.

The Court: —concerning this case; none at all?

The Witness: None at all, sir.

By Mr. Grosman:

Q. All right. Now, Mr. Roth, may I show you Exhibit DME-52, a photostat, and ask you whether that is one of the letters that was shown to you by Mr. Schwartz? A. The original of this was shown to me by Mr. Schwartz.

Q. Now, how about the date on there, was there a date on there when it was shown to you? A. Yes.

Q. After you received the file from Mr. Schwartz, what did you do with it? A. I studied it for two or three days, sir.

Q. Then? A. I met with Mr. Marcus and went to the office of Hannoch & Lasser with the file.

Q. Did you deliver the file to him? A. At the conclusion of a conference that lasted several hours I left the file with them and got a receipt (2245) from them.

Q. Now, do you have that receipt with you? A. Yes, sir.

Q. Will you produce it, please?

(Document produced by the witness.)

Q. Will you read it, please? A. "January 11 slant line 1951. Received miscellaneous papers in connection with case of Al Bierman and William Miller against Samuel Marcus, et als, signed Aaron Lasser."

Mr. Grosman: Will you take that out of your file so that I may offer it?

(Document handed to counsel.)

Mr. Grosman: I offer that in evidence.

The Court: It may be marked. I hear no objection.

Mr. Brigadier: No objection.

The Clerk: DM-50, receipt dated January 11, 1951.

(Received and marked Exhibit DM-50.)

Q. Now, did Mr. Marcus ever have in his possession the file in this case after you received it from Mr. Schwartz? A. No, sir.

Q. Do you know what happened to the file after (2246) it came in the possession of Hannoch & Lasser? A. Yes, sir.

Q. What? A. It was delivered by Hanoch & Lasser to your office.

Q. Can you tell us whether Mr. Robert Schwartz' attitude toward Mr. Marcus at the time that you called on him, at the time you spoke to him on the telephone, was cooperative or otherwise?

Mr. Brigadier: I object. It calls for a conclusion. He might describe what was said, and what was done, but certainly it is a matter of conclusion as to whether he was cooperative or uncooperative. We each may have our own ideas of what the word means.

The Court: Yes, I guess that is so.

Mr. Grosman: I didn't hear your Honor.

The Court: It would seem that a lawyer ought to be able to tell whether a man's attitude was cooperative or uncooperative, but, strictly speaking, you are right.

You will have to tell us how he behaved, and how he talked, and everything else.

Q. Will you proceed, Mr. Roth? A. I had the distinct feeling that Mr. Schwartz resented my intrusion into any relationship between (2247) Mr. Marcus and himself.

Norman Roth—for Defendant Marcus—Surrebuttal—Cross

Mr. Brigadier: I ask that that be stricken.

The Court: You better tell us why, why you got that distinct feeling.

The Witness: Yes, sir. Because this had been the third situation in which I had, in effect, been substituted for Mr. Schwartz' office, and there were at least two that took place immediately around that time. I wouldn't recall, unless I went through my diary, whether that number may have been larger than three by that time. And in one situation in which Mr. Marcus, as I understood it, became irate with Mr. Schwartz, Mr. Schwartz had recommended to Mr. Marcus a substantial—paying a substantial settlement in a case in the United States District Court for the Southern District of New York; Mr. Marcus had remonstrated with him that he thought his paying a settlement in that case was nonsensical; I was substituted, made a motion for leave to amend the answer to plead the Statute of Frauds. That motion was granted. And as a result thereof I suggested to Mr. Marcus that we settle the case by the payment of a hundred dollars rather than bringing some witnesses from Baltimore. And that offer was accepted by the plaintiff and the case was settled for $100.

Mr. Grosman: Cross examine.

(2248) *Cross examination by Mr. Brigadier:*

Q. I take it the three matters were all matters of Mr. Marcus— A. Yes, sir.

Q. —in which you were substituted in place of Mr. Schwartz, is that right? A. Sundry corporations owned by Mr. Marcus rather than Mr. Marcus individually.

Q. So it wasn't more than one real client that was involved here, the same Mr. Marcus? A. The only client we have had in common, as far as I know.

Mr. Brigadier: No further questions.

The Court: I guess that is all, Mr. Roth.

(Witness excused.)

Mr. Grosman: Now, if your Honor please, much as I dislike to do so, I would like to be sworn and testify as to what happened at a conference—

Mr. Brigadier: Judge Grosman may make a statement, without taking the oath.

Mr. Grosman: I would rather do this thing properly.

Mr. Brigadier: I have no objection to your making a statement from the table, and it being accepted as evidence being given by you under oath.

(2249) Mr. Grosman: That's very nice of Mr. Brigadier, I appreciate the compliment, but I don't know how effective that would be on the record.

The Court: If you think it is best that you make it under oath, sir, you make it under oath.

Mr. Grosman: I would rather do it that way.

ROBERT GROSMAN, called and sworn for the defendant, Samuel Marcus, in surrebuttal, testified as follows:

The Clerk: May we have your address, for the record?

The Witness: 124 Commerce Street, Newark 2, New Jersey.

Direct examination by Mr. Tepper:

Mr. Brigadier: I have no objection to Judge Grosman testifying without questions being put to him.

Mr. Tepper: Under the circumstances there will be no questions and answers, and I think we will let

Judge Grosman make his statement as he chooses, under oath.

The Court: All right, sir. As long as everybody is satisfied, I am.

The Witness: Mr. Marcus, whom I represent, (2250) together with Mr. Tepper, brought this file to me. I couldn't make head or tail of it. I tried to get a story from him and he had considerable difficulty answering questions. And I asked him whether he wouldn't bring his lawyer over, figuring that if anybody should know, it should be the lawyer.

There was an appointment made for Mr. Robert Schwartz to come over to my office. I refreshed my recollection by reference to records, and it was some time in March of 1952, or perhaps the latter part—the last days of April of 1952. An appointment was made. Schwartz didn't keep the appointment.

Marcus called Schwartz from my office. Apparently there was a misunderstanding. Schwartz said that he had been waiting for Mr. Marcus, I think, in the Pennsylvania Railroad station; Marcus understood that he was to come to my office direct.

A second appointment was made for Mr. Schwartz to come to my office, I think some time in the early part of March, the second or third of March of 1952. At the hour designated neither Schwartz nor Marcus appeared. I received a telephone call from Mr. Marcus, which I understood he was making from Mr. Schwartz' office. I may be in error about that, but he told me that Schwartz refused to come over and discuss this matter (2251) with me unless Marcus first gave him an absolution in writing, both to him personally and to his firm of Friedman & Alfange.

I told Marcus, in answer to his query, to go ahead and give it to him, if he did anything wrong that isn't

going to save him. Marcus gave Schwartz these writings—

Mr. Brigadier: Well, now, you don't know that, Judge.

The Witness: Well, Mr. Schwartz admitted it when I questioned him.

Mr. Brigadier: Well, you know, just stick to what you know of your own knowledge.

The Witness: I know it from his testimony, I think on deposition and also on direct.

And Schwartz came over. Now, I had never met Mr. Schwartz before. He came to the office with Marcus. He seemed to be very much wrought up, without saying anything. He seemed to be exorcised.

I said to him, "Mr. Schwartz, I understand that you were the attorney for Mr. Marcus in this transaction. I can't make up my mind what happened in this case. Will you tell me what happened?"

He was very non-commital. And he said—as I recall it, he said Marcus agreed to sell his stock.

(2252) I said, "Well, won't you, in your own words, tell me what happened? Unquestionably, a great deal more than that happened. What is the meaning of this contract? I can't understand it."

And all I could get out of him was, "Marcus agreed to sell his stock."

Well, it very soon became evident to me that the man was not going to cooperate and I let it go at that. I did not ask him to sign any affidavit, as he testified to. I did not suggest to him any answers, or any stories, such as he told here. I merely questioned him to the extent I have indicated and with that—I don't think the man was there more than 20 minutes altogether—he left. And I knew no more after he left than before he came.

Mr. Brigadier: I have no cross. But I ask your Honor to strike from his answer the portion in which he states that after Marcus delivered to him these absolutions that then Schwartz came to his office, because he does not know that of his own knowledge, since he was not present and is relying simply on testimony that Marcus gave that that was what happened. I want that stricken from his answer.

The Court: All right. So we will strike it.

Mr. Brigadier: No cross.

(2253) Mr. Tepper: May I ask Judge Grosman just one question?

By Mr. Tepper:

Q. Judge Grosman, when Mr. Schwartz came to your office did he or did Mr. Marcus at that time deliver to you a release which Marcus had given to Mr. Schwartz, or a copy thereof? A. He gave me two copies, a copy of the so-called release to Mr. Schwartz and a copy of the release to Alfange & Friedman.

The Court: Aren't they in evidence?

The Witness: Our copies are in evidence, your Honor.

The Clerk: The originals are in, too. Both are in.

Q. Now, Judge Grosman, I show you Exhibits DM-37 and DM-38, and ask you whether these are the releases to which you referred in your testimony a few minutes ago? A. They are.

Q. And are you certain, Judge Grosman, that these two Exhibits, or copies of these Exhibits, were given to you by Mr. Schwartz, or Mr. Marcus, on the day that both of them came to your office?

Mr. Brigadier: I object to the question. He didn't say Mr. Schwartz gave them to him.

(2254) A. No, he didn't. Mr. Schwartz didn't give me anything. Mr. Marcus gave me these two—these copies, which are marked in evidence, at the time that he and Schwartz walked into my office, apparently on March 3, 1952. They were handed to me in the presence of Mr. Schwartz by Mr. Marcus, without any comment.

Mr. Tepper: That is all.

Mr. Brigadier: No questions.

(Witness excused.)

Mr. Tepper: May we have a recess of five minutes?

The Court: Yes, sir.

(Short recess.)

Mr. Grosman: Now, if your Honor please, I have Mr. Marcus, who we would put back on in rebuttal, and then we have this handwriting expert who examined these writings that were taken out, but I won't have him here today.

The Court: All right. Let's get through with Marcus first.

Mr. Grosman: Then, of course, we would like to have a ruling from your Honor as to whether or not we are entitled to examine those records prior to September, 1948. Mr. Chazin—

Mr. Brigadier: Why don't you call your (2255) witness? Let's finish. I will call Mr. Chazin.

Mr. Grosman: I am not talking about calling Mr. Chazin. I am talking about the records over at Mr. Kevelson's place.

Mr. Brigadier: I will call Mr. Chazin when that comes, but let's finish with Mr. Marcus. We have an hour yet to go. Maybe we can get through. Maybe your handwriting expert will turn in a report that we won't have to come back. I don't know.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

Mr. Grosman: Are you willing to accept his report?

The Court: Are you willing to accept his report without cross examination of any kind?

Mr. Grosman: If you do, then of course we save a lot of time.

Mr. Brigadier: No. Do you have the report?

Mr. Grosman: If I had a report, I wouldn't ask—

Mr. Brigadier: I say maybe the report may be unfavorable to your contention. I am reasonably certain that it will be. That is why I say we may not have to come back.

SAMUEL MARCUS, recalled as a witness in his own behalf, in surrebuttal, having been previously duly sworn, testified as follows:

(2256) *Direct examination by Mr. Grosman:*

Q. Now, Mr. Marcus, were you present with Mr. Roth when the file was delivered to him by Mr. Schwartz? A. I was.

Q. And was the file examined by you, or opened in your presence? A. It was not.

Q. Well, did Mr. Roth examine the file in your presence? A. Mr. Roth took it with him to his office. I didn't accompany him to his office.

Q. Well, did you ever see that file again? A. The next time I saw the file was when—I think we went out together with Mr. Roth to—the name of this concern—Hannoch & Lasser.

Q. Can you tell us whether or not there were four or five copies of the contract of September 14, '48, DME-5, in that file? A. I don't know, sir. I never looked into the file.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

Q. Did you ever have that file in your possession after it was turned over by Mr. Schwartz to Mr. Roth? A. I never did.

Q. You were present in my office with Mr. Schwartz some time in March of '52? A. I was.

(2257) Q. Was he asked by me, or by anyone else, to sign an affidavit of any kind on that occasion? A. He was not.

Q. Was any suggestion made to him as to what he was expected to testify to? A. None whatsoever.

Q. How long were you and Mr. Schwartz in my office on that occasion? A. I would say it would be somewhere between 15 minutes to a half hour, no longer than a half hour and not less than 15 minutes.

Q. Now, there has been testimony here as to two letters given by you to Alfange & Friedman, and to Robert Schwartz. They are Exhibits DM—

Mr. Brigadier: I might say this witness has testified completely about it and that I called Mr. Schwartz in rebuttal of his testimony. So now what do we do, go over it again?

Mr. Grosman: No, I am not going to go over it again—

The Court: I don't know what he is going to ask him, so I can't rule.

Mr. Grosman: —I am going to ask him when and in whose presence he gave me those copies.

Q. (continuing)—DM-37 and DM-38. Look at (2258) them and tell me whether you gave me those copies; if so, when and in whose presence? A. Yes, there are the copies which I had signed for Mr. Schwartz. And when I came into your office with Mr. Schwartz I said to you, "Judge Grosman, these are the letters that Mr. Schwartz wanted me to sign."

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

Q. And you gave me those letters? A. Yes, sir; I did.
Q. In his presence? A. In his presence.

Mr. Grosman: Now, your Honor, I served upon Mr. Brigadier at the last session we were here this notice to produce that he described to your Honor.

The Court: I have a copy.

Mr. Grosman: I think you have it—to produce the orders for the tabs at the Riviera Restaurant, and I now ask him to produce the original of those orders.

Mr. Brigadier: I am sorry. I was being shown something in the deposition.

The Court: Will you read it back to him, Mr. Bremer, please.

(Record read.)

Mr. Brigadier: I do not have them, and I do not produce them. And at this point they are entirely immaterial and irrelevant. They have nothing to do, by (2259) way of rebuttal of this case.

Are we starting the case all over again at this stage? They put in their case of fraud, or whatever they would call their case of fraud. I put in my rebuttal. As I understand it, surrebuttal is to meet the evidence that I produced, sir. The only evidence that I produced on rebuttal has been the testimony of Robert Schwartz, William Miiler, Al Lieberman and the handwriting expert. What has this get to do, remotely, with the tsetimony given by these four witnesses?

Mr. Grosman: Now, your Honor will recall that—almost to the point where your Honor lost patience—we have been asking from the very beginning of this case to be permitted to examine the books and records of Milmar, and the books and records of the Riviera, in order to establish our case, as we are rightly entitled to do under the new Rules.

In spite of the many fine words as spoken by Mr. Brigadier, he has resisted us to the utmost in our efforts to examine the records of Milmar and the records of the Riviera.

During the recess your Honor said that we might examine the records of the Riviera which had been turned over by Mr. Hoffman to Mr. Kevelson. We did so for one day. Then apparently the other side saw fit to deny us (2260) further access to those records.

Mr. Brigadier: Let's find out right now whether that is true. Mr. Chazin is here.

Mr. Grosman: Wait a minute, please. You will get your chance.

Mr. Brigadier: You made that statement this morning, too.

Mr. Grosman: Mr. Brigadier, you keep complaining that I annoy you—you don't annoy me, but I would like to talk to the Court.

Mr. Brigadier: I am sorry. You are right.

Mr. Grosman: Now, during the vacation, and during the limited time at our disposal when we—maybe unfortunately—were permitted to examine these records, Mr. Marcus found orders given by the Riviera to the Whitney Duplicating Check Company for tabs.

Now, he says that they had duplicate tabs. You will remember that Mr. Miller said, in no equivocal terms —no, they never had any duplicate tabs. We want to establish that.

Of course, I admit Mr. Brigadier is right, this is strictly not rebuttal, but it is the only way we can get it in, because we only had access to the records during the vacation period. Couldn't put it in before that.

(2261) Mr. Brigadier: In the first place, they had this evidence on Tuesday before they rested. They were asked point blank whether they rested their case

on fraud, so that I would know whether or not I was to call witnesses to meet the issue. I called the witnesses to meet the issues as they offered them. They had served on me this notice to produce.

I do not produce it, to begin with. What has this got to do at this point with Marcus? Is Marcus going to be the expert to tell us what the Whitney people did? Have they got a witness from Whitney to put on the stand at this point, or is Marcus going to say, "I went through the files and I found this in the files"? I say at this stage this is going to open the door all over again to retrial of this whole case. If this was in good faith, sir, wouldn't they have been prepared to do this on Tuesday and gone ahead with it as part of their original case?

The Court: They could have done it a long time ago because—

Mr. Brigadier: Eons ago.

The Court: —Mr. Marcus made this charge a long time ago.

Mr. Brigadier: For five years he has been (2262) making this charge.

The Court: The minute he saw these records should have been the time to produce.

Mr. Brigadier: But instead they rested their case.

The Court: But you wait until Tuesday morning at 10 o'clock, when we are getting right near the end of the trial.

Mr. Grosman: Well, now, if your Honor please, they were putting on their witnesses. I didn't want to bring in—of course, I don't know just how this thing fits in, because we couldn't produce this evidence until we had examined the records in Mr. Kevelson's possession.

The Court: Let's be frank about it. When did you go into Kevelson's place of business to examine these records?

Mr. Brigadier: February 23, sir. Let Mr. Chazin tell you now.

The Court: I just asked a simple question. Do you want to take over?

Mr. Brigadier: I'm sorry.

Mr. Grosman: We will ask Marcus. He will tell us when he went in there.

The Witness: I don't have the exact date (2263) right now, although I could ascertain the exact date. I had two accountants with me at the time and they will have the record of the date. I don't have the exact date. It was a few days after we were given permission.

By Mr. Grosman:

Q. How long after the last hearing? I mean the hearing back in February.

Mr. Brigadier: Before the witness answers the question, sir, I would like him to be admonished that he is saying something that is not true. The evidence will show that we only recessed on Wednesday, that on Wednsday they went down and had the examination, and on the next day—

The Court: Give me the date when we recessed Maybe it will refresh—

Mr. Brigadier: No, we met for two days thereafter, after the examination, sir. The examination was on February 23. We did not recess until the 25th.

The Court: When did we recess?

The Clerk: These are the February dates.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

The Court: We sat on February 17 and then there was a recess until the 24th. Was it during that period of time, Washington's Birthday?

The Witness: I don't recall, but I can get (2264) the exact date when I went to see those records. I don't have it in my possession at this moment.

The Court: Let's put it to you this way. It is now April 14. This notice was served April 12. Was it before March 12? That's a month.

The Witness: Yes. Mr. Chazin would know the exact date.

The Court: Yes, he does. You admit that it's over a month ago?

Mr. Grosman: Well, now, that was during the recess. I didn't want to bring this case up before your Honor specially, in view of the fact—

The Court: No, but you could have served him with the notice to produce the very documents you are asking him to produce now.

Mr. Grosman: I don't understand that it is because of the lateness of the notice that they can't produce the documents.

Mr. Brigadier: I object on the ground that you rested your case on Tuesday. This is a part of your affirmative case.

The Court: Just a minute. That is not so important. In the interests of justice I can open a case any time, as you know.

Mr. Brigadier: This is in relation to what (2265) happened for the whole month before.

Mr. Grosman: If your Honor please, I was going to suggest that in the interests of justice, and to assist you in making a proper disposition of this case, I think whether it is in order, whether it is out of order—so much out of order has been done in this case—that

you ought to permit us to put in whatever evidence may throw any light upon the real issues in this case.

Now, we had to go over to New York, we had to get the photostats. And they weren't too cooperative, you know, the Whitney people. They don't want to become involved in this thing. And, of course, we couldn't ask—

The Court: How many are there? You only seem to have a few there.

Mr. Grosman: There are only a few. There are five all together.

The Court: What do you propose to prove by this?

Mr. Grosman: I want to show that they had duplicate tabs, and that they ordered duplicate tabs, until Marcus got out of this outfit.

The Court: How is that opening the whole case?

(2266) Mr. Brigadier: Because I would then have to recall Mr. Miller, and would have to recall everybody—

The Court: Miller is right here.

Mr. Brigadier: —to prove whether or not they used duplicate tabs.

The Court: Mr. Miller has already said they didn't so he doesn't have to be recalled at all.

Mr. Brigadier: All right. Then at this point, if they are going to prove it the proper way of proving it would be to call somebody from Whitney to prove it, wouldn't it? Is this the way to prove it? I am trying to show you that they don't do anything at all by way of preparation of evidence. They expect you, and me, and everybody else to help them to put their evidence in.

The Court: Wait a minute. Are the original orders in those files? Is that what you are telling me?

Mr. Grosman: Mr. Marcus claims that he saw them in there.

The Witness: One.

Mr. Grosman: One.

The Court: One original order?

The Witness: One original bill, that's right.

The Court: Do you know where it is? Do (2267) you think you could find it?

The Witness: It was in the records when we looked that day, amongst the paid bills.

Mr. Grosman: Based upon that, of course, he got the lead, he went over to Whitney Duplicating Check Company. All of which took time.

The Court: Of course, you will have to bring Whitney over. Mr. Brigadier is right about that.

Mr. Grosman: Well, I don't know about that, your Honor. We say we saw this one order in the file, a paid bill, in their file, among their records.

The Witness: A voucher for it, also. A paid voucher.

The Court: That's one.

Mr. Grosman: All right. That ought to be enough to disprove Miller's testimony that he didn't have duplicate slips.

Mr. Brigadier: It doesn't prove anything yet. You have been saying it so far.

The Court: All right. Now, will you step down a minute? Put Chazin on, please.

(Witness temporarily excused.)

Mr. Brigadier: Mr. Theodore Chazin, will you take the stand, please?

Mr. Grosman: I don't insist that Mr. Chazin (2268) be sworn.

The Court: I just want to hear his statement.

Mr. Brigadier: I want him sworn.

Mr. Grosman: Let me make this statement on the record, in fairness to Mr. Chazin. I am perfectly

willing to take his word, without oath. If they want to put him on, I have no objection. I can't object.

The Court: Well, you insisted on being put under oath.

Mr. Grosman: Yes, I did.

THEODORE CHAZIN, called as a witness by the defendant, Milmar Estate, in rebuttal, having been duly sworn, testified as follows:

The Clerk: Your address for the record, Mr. Chazin?

The Witness: 30 Journal Square, Jersey City.

Direct examination by Mr. Brigadier:

Q. Mr. Chazin, did you attend the examination that was conducted of the records of Bill Miller's Riviera in the cartons pursuant to the order of the Court? A. I did.

Q. On what date did that examination take place? (2269) A. February 23, 1955.

Q. Do you have any record in front of you that confirms that date? A. I have my official Lawyer's Diary, under the date of February 23, 11 a.m., at 411 Communipaw Avenue, Jersey City. That's where it was held, and that's where I was. And I met Mr. Marcus and his two accountants.

Q. Was Mr. Marcus there to begin with? A. He was. He was there with two accountants.

Q. What time did he arrive? A. I got there a few minutes after eleven. He was already waiting with the two accountants.

Q. How long did they stay? A. They stayed till close to 5 o'clock, and until Mr. Marcus—at one time he left

the room, he telephoned Mr. Tepper's office—I don't know who he spoke to there, whether Mr. Tepper or someone else; he left for Newark; he came back from Newark; he stayed some more; he and his accountants wrote all day long, whatever they wanted to; and finally he said to the two accountants, "All right, boys, you can go back," or words to that effect. He said, "I am going out to Newark again." And he left. And then a few minutes after that they left. That was a little before five.

Q. Did anyone tell them they had to leave? (2270) A. No, I was the only one there with them from 11 o'clock on until they left. And they took their own good time about leaving. And it wasn't until Mr. Marcus said what he did that they—he left, finally, and they left.

Q. Did they at that time say to you that they would require another or a continued examination? A. They said nothing of the kind to me.

Q. Did Marcus say anything of the kind to you on that day at any time? A. He did not.

Q. Now, when did you next hear from Mr. Marcus—or did your office hear from Mr. Marcus? A. I didn't hear, but I found a message in my message book on February 28.

Q. That's five days later? A. That's right.

Q. And what was the message that you found in your message book? A. Here it is. I will read it to you.

"1:45 p.m."—that's 1:45; it doesn't say the "p.m." but that is p.m.—"Samuel Marcus called. Said Mr. Tepper and Judge Grosman told him to call you. He says he was supposed to get photostatic copy of bank book and he wants to make another appointment to examine (2271) the balance of the books. Call him at Sacramento 2-5837."

Q. And did he ever call again? A. I have no record—I looked at my book. I have no record of another call.

Theodore Chazin—for Defendant Milmar Estate—Rebuttal—Direct

The Court: You were supposed to call him at Sacramento something.

Mr. Brigadier:

Q. But you didn't call him, is that right? A. No, sir.

Q. And he didn't call again? A. No, sir; I have no record of any other call.

Q. But you did communicate with me? A. That's right.

Q. As a result of which I wrote the letter to Judge Grosman dated March 7? A. That's correct.

Q. Now, actually, we continued hearings here for two days after that examination took place; is that not so? A. To the best of my recollection, it is.

Q. On the 24th and the 25th, when Robert Schwartz testified. A. Yes, sir.

Q. And on those days were you present here, on the last two days before we recessed for the six-week (2272) interval? A. I was.

Q. On those days did either Mr. Marcus or Judge Grosman or Mr. Tepper, or anyone on that side, approach you and suggest that they would like to have a continuation of the examination? A. No, sir.

Q. Now, I call your attention to the directions of the Court pursuant to which this examination was being conducted. You had those directions in front of you, did you not, at the time; you had procured, I think, a copy of them? A. Yes, I had them.

Q. And isn't it a fact that the Court had directed them to examine to see whether they could find the books of Bill Miller's Riviera?

The Court: I have it right here. What page is it on?

Mr. Brigadier: I only have the excerpt here that he got from the stenographer for the examination.

Theodore Chazin—for Defendant Milmar Estate—Rebuttal—Cross

The Court: What is the first question there?

Mr. Brigadier: February 17, 1955, and it starts—see, they were only excerpts that we got from the stenographer for the purpose of this examination, to find out what it was that you had ordered, so we would (2273) be guided accordingly. And in the excerpt all that it says is to look for the books of original entry, or the sheets of original entry.

But, as I said, I gave instructions when I received the message from Mr. Chazin, to let them look at anything that was in the cartons as long as it was prior to September 14. So that actually they never made any application.

Mr. Grosman: Are you through with the witness?

By Mr. Brigadier:

Q. Did they find any books of original entry while you were there, other than what we put in evidence, of Bill Miller's Riviera? A. No, sir.

Mr. Brigadier: That is all.

Cross examination by Mr. Grosman:

Q. Now, Mr. Chazin, you were present during the entire time that this examination was conducted? A. I never left the room for an instant.

Q. You made it your business to see exactly what these people were doing, did you not? A. As far as I could. There were three of them writing at the same time.

Q. Yes. They did examine documents of original entry, did they not—bills, vouchers, checks, things of (2274) that sort? A. They examined everything that was in the cartons, and in other things there, yes.

Q. Well, were they items of original entry? A. They were bills, vouchers—I think so.

Theodore Chazin—for Defendant Milmar Estate—Rebuttal—Cross

Q. Now, was there anything said by the Court that this examination had to be terminated in one day or two days?

The Court: I can answer that. No.

A. You will have to look at the record. I didn't—

The Court: No.

Mr. Grosman: I want to know what his understanding of it was.

A. My understanding was to let them look as long as they wanted to. And if they wanted to say there all night, I would have been there with them. They quit, I didn't.

Q. Well, did you expect these people to remain there all night? A. As long as they wanted to. I wasn't telling them how long to stay.

Q. You mean on this one occasion? A. No, I don't. If they wanted to come back—if they had said something about it, they would have said something. But nobody said anything. They stayed, they (2275) looked through everything. They wrote what they wanted. And then he said, "All right, boys. You can go now." And they went.

Q. Now, what was your objection five days later, as you say, when this call came in from Marcus stating that he wanted to go back and examine the records some more; what was your objection then— A. I referred—

Q. —to permitting him and his accountants to continue the examination? A. I found this message and didn't speak personally with Mr. Marcus. I then referred the matter to Mr. Brigadier and he took it up from there.

Q. Well, did you tell Mr. Brigadier—is it your recollection that you told Mr. Brigadier that they could only—Marcus and his man could only examine these books for one day? A. I didn't discuss that with Mr. Brigadier.

Q. And that you felt that they had had their day and that was all there was to it? A. I told him exactly what

I told here in court, that they looked through everything, the three of them were writing, and when they appeared to be finished Mr. Marcus said to his accountants, "Now you can go, boys." And he went and they went.

(2276) Q. Now, you recall Mr. Brigadier showing you a letter which I wrote to him respecting your refusal to permit Mr. Marcus to continue the examination? A. I think there was a letter that you wrote, but I don't recall what it was about. It could have been about what you say.

Q. It was pertaining to this subject. A. It could have been. I don't recall.

Q. And did you then still persist that they had had their opportunity to examine the records and you wouldn't permit them to do so any further? A. I don't recall what the letter was. From the time that I got this message I left the matter to Mr. Brigadier.

Q. Now, are the records still there in Mr. Kevelson's office? A. As far as I know. The last time I saw them they were there. And that was the day that we were there.

Q. As far as you know, Mr. Kevelson, or no one else connected with your side of the case, has been embarrassed by this so-called delay?

Mr. Brigadier: This calls for a clear conclusion. How does he know whether they are embarrassed or not? I object to that.

Mr. Grosman: I want to show that they haven't (2277) been injured in any way. The records are there. They are simply in dead storage.

Mr. Brigadier: That is a matter of argument. That's not a matter of questioning Mr. Chazin.

The Court: It is not what he thinks about it that counts, it is what I think about it, about doing things in a timely way.

Any more questions of Mr. Chazin?

Mr. Grosman: No, your Honor.

Mr. Brigadier: No more, Mr. Chazin.

(Witness excused.)

Mr. Brigadier: Judge, do you want that page reference?

The Court: I have it right here. The only thing we talked about that time was books of original entry. That's all I find through this whole transcript about the situation.

Mr. Grosman: Well, we knew, your Honor, that the books weren't there, but we wanted the records. If I limited my request merely to books, I think it was perfectly clear that what we wanted to see was what was in those cartons.

The Court: No, I believe what you wanted to see was the books of original entry, because Mr. Dobkin said he couldn't do anything unless he saw the (2278) books of original entry. That's how it all came up. And I thought that Mr. Dobkin, being an accountant, was entitled to see the books of original entry.

Now, at this late date, when we are almost through, you want to go browsing through 20 cartons of all kinds of books, records, receipts, letters—looking and looking and looking—constantly in the hope that you will find something.

Mr. Grosman: We did find something.

The Court: Because nobody is kidding me about what the purpose of all this is. When you don't have it, you go digging and digging, trying to find it.

Now, my question is: When does it stop?

Mr. Grosman: Well, if they had permitted us—

The Court: I admit it. I don't know why they didn't let you go through during that long vacation period. You could just as well have let them go

through another day and another day and another day.

Mr. Grosman: I thought we would go from day to day until we were through.

The Court: I think if your man had expressed such a wish, Judge, it would have been done. And from what Mr. Chazin tells me, he got the impression they (2279) were through. And then he probably became irritated when it is revived again. If Mr. Marcus had said—or the accountants—"Now, we can't go through all this today, we will require another day," I am sure they would have accommodated you. I am positive.

Mr. Grosman: They didn't do it when I wrote a letter and called their attention to the fact.

The Court: Well, it is like opening up old wounds. Everybody becomes irritated.

We have two problems, then; one, whether you should be permitted again to go into those cartons, exploring, finding; and the other is about this Whitney Duplicating Check Company, and the notice to produce.

Well, as to one—I don't know what to do about this Whitney business. Although, since there are so few involved, I don't know why you can't turn the originals over to them, for whatever good they will do them. I had an idea I was going to look at thousands and thousands of small tabs. But I see it isn't that at all. They are order forms, is that it?

Mr. Grosman: We want to show what they ordered.

The Court: That I will allow.

Mr. Grosman: All right.

The Court: The other will be denied, not (2280) timely made.

Mr. Tepper: Is the denial with reference to a further examination?

The Court: Yes, sir; not timely made.

Mr. Tepper: May I then make a proffer, for the record, with respect to that? We intended to prove

that as a result of the examination, which was begun under the agreement between counsel and the instructions of the Court, Mr. Marcus, in the company of two accountants, went to—

The Court: You don't have to say that. That is all in the record.

Mr. Tepper: —and there found certain records from which they made notations.

Mr. Brigadier: I object to this procedure.

Mr. Tepper: We intended to prove—

Mr. Brigadier: That is not an offer of proof.

Mr. Tepper: I am making an offer of proof, proffer, what we intended to prove through these records and which we are now being precluded from doing. And I think it is—

The Court: You are not being precluded from doing anything, except to go browsing in those records again. Now don't start getting me worked up (2281) again.

Mr. Tepper: Your Honor, I have no desire of getting you worked up—

The Court: I am not stopping you from doing anything, except going through there. If you have found things in there that you want to use, you go right ahead and put it on that stand and I will hear it. But you are not going to go browsing again.

Mr. Tepper: Aren't these orders which we found in the records, aren't these a beginning point from which we are entitled now to ask your Honor to enlarge upon your orders?

We are asking your Honor now—we say to your Honor, as we have said time and time again, we have to look at these records. Your Honor has said, "You will have to make a better showing before I will permit you to do it." I have asked your Honor time and time again, "Does that mean if we make a better showing

that your Honor will then enlarge upon your orders?"

The Court: I told you very distinctly—I can't repeat it word for word—if you found anything when you went through those records that indicated to this Court clearly that there was fraud involved that I would permit you to go further.

Mr. Tepper: Well, we have evidence of fraud. (2282) We are trying to prove this evidence of fraud through these orders which were made by the defendant—

The Court: You know, you have made so many offers that sound like they are going to be big bombshells and in the end they turn out to be little firecrackers. Don't you think that I am not observant. I heard things of what you were going to show and I am still waiting for some of it.

Mr. Tepper: Well, I respectfully submit that we have shown sufficient, in my judgment—

The Court: Many things that I thought were coming out here, the way they were blown up in the beginning, haven't turned out that way at all.

Mr. Tepper: I am sure your Honor hasn't predetermined that fact.

Now, all I say to your Honor is that we are trying now, as a result of this, to go into these records, which Mr. Chazin has admitted on the stand are in existence and in the establishment of Mr. Kevelson.

Mr. Hoffman on the stand—and I must at this point point out to your Honor that your order and their offer came not from any application to examine books, it came from the testimony of Mr. Hoffman, who testified that he sent certain cartons down to Kevelson, supervised their going down, that in there were a lot of records, (2283) and that they were still there.

The Court: That is not the way that came about. I just looked. It came about after Dobkin got through.

Mr. Tepper: Yes, but it was as a result of Mr. Hoffman's testimony.

The Court: Mustn't we have some semblance of order in the trial of a case, some degree of efficiency, or do we jump from one thing to another that suits the purpose of the litigants? You have had over six weeks, at least, to have gone through those records. The minute that Judge Grosman found out—and he found out long ago—that they weren't going to let you do it, you could have made an application then.

Now you wait and wait until the bitter end. Then you call me up one day while I am in the throes of all kinds of pain—and you called me up at the end of a long day when I am hearing a patent case.

(Discussion off the record.)

Mr. Tepper: Now, I apologize to your Honor, and I was wrong in making that telephone call to you. But what I am saying to you now is this. They cannot say that we are on a fishing expedition. We have concrete proof here of the ordering of duplicate tabs. (2284) We have evidence wh ch we want to introduce—

The Court: Let me see those orders.

Mr. Tepper: We have evidence that we want to introduce on the part of Miss Bergler, that she was over to New York and saw the original orders in the hands of Whitney Duplicating Check Company.

Mr. Grosman: Only three of those call for duplicating. '46 and '47, I think, your Honor—'48.

Mr. Tepper: There is one duplicate order slip here which provides for an order of 50,000 tabs for the Riviera Restaurant and provides "and repeat," which means duplicates of the 50,000.

Mr. Brigadier: I don't know whether it means that.

The Court: Apparently this is a legitimate busi-

ness. It is known as the Whitney Duplicating Check Company.

Mr. Tepper: Of course they are a legitimate business.

The Court: Let me find out what this is supposed to be all about, then.

Mr. Brigadier: Isn't that the normal way to prove a case, to call a witness? Why didn't they subpoena somebody from Whitney? If they were able to get duplicates, they could serve a subpoena, couldn't (2285) they?

Mr. Tepper: Well, we are offering the evidence that these orders were made. Let them deny that they made the orders with the Whitney Company and we will proceed from that point.

The Court: They can't very well deny it, in view of this. I am sure you didn't make this up.

Mr. Tepper: They can't deny the fact that on that very bill there, there is stated, "Express and called for." In other words, a portion of these tabs were called for by the customer and the rest of them were shipped.

Mr. Brigadier: What does that mean?

Mr. Tepper: What it means, Mr. Brigadier, will be developed if we are permitted to go forward with our proof.

Mr. Brigadier: This is some stage in which to pull up this and say, "This is proof of fraud, on which we were first going to prove the fraud, which we charged five years ago in an affidavit."

Mr. Tepper: This proves the fact better than the record of the bankruptcy which Mr. Brigadier tried to introduce to prove the fact. The fact that somebody made a statement in schedules doesn't prove the fact. It is a record, yes, but it doesn't prove the fact.

(2286) The Court: It has evidentiary value.

Mr. Tepper: This proves the fact.

Mr. Brigadier: That logic escapes me.

The Court: Well, I can't help you much, because I don't know what the purpose of duplicate checks is in this business of nightclubs.

Mr. Grosman: They are not duplicates, they are repeats.

The Court: You mean the same numbers are repeated?

Mr. Tepper: Yes, sir.

Mr. Grosman: That is what it says on there.

The Court: Now you are starting to jell with me.

Mr. Tepper: That is what it says, "50,000 and repeat."

The Court: In other words, repeat the same numbers again.

Mr. Tepper: That's exactly what it says.

The Court: Well, we could save a lot of time. Maybe Mr. Brigadier will take this up with Mr. Miller right now and see what he knows about that.

Mr. Brigadier: I am not going to take up anything at this point. Sir, are you receiving them in evidence?

(2287) The Court: No, I can't receive them in evidence.

Mr. Tepper: Isn't it strange that Mr. Brigadier will not ask Mr. Miller now, who is in the courtroom, what is meant by—

Mr. Brigadier: I am trying my client's case. And you are not going to tell me how to try it.

Mr. Tepper: Well, you can tell that to the Court, but not to me.

The Court: He has told it to me now.

Mr. Brigadier: I am not going to make out their case, sir. I have done so much already for them. I brought into court their lawyer.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

The Court: Don't do any more for them.

Mr. Brigadier: I brought their lawyer into this court.

The Court: You may offer such proof as you want concerning those.

Mr. Grosman: Now we call for these records, which are in the possession, we say, of the other side, and they failed to produce them, and under the Rule of Law we are entitled to introduce secondary evidence.

Mr. Brigadier: According to Marcus' own statement, the only one in our possession was one. That is all he saw.

(2288) Mr. Grosman: He saw one and then of course somebody—

Mr. Brigadier: They went through the 20 cartons.

Mr. Grosman: —someone got panicky and wouldn't let him see any more.

Mr. Brigadier: Now, there is no proof of that.

Mr. Grosman: That is my inference.

The Court: Maybe one is enough to prove the point you want to make. Get the duplicate of the one he saw and go ahead.

Mr. Grosman: Mr. Marcus.

SAMUEL MARCUS, resumed the stand.

Direct examination (continue) by Mr. Grosman:

Q. Mr. Marcus, in your examination of the records at Mr. Kevelson's place did you find a voucher to the Whitney Duplicating Check Company for restaurant checks, bar checks? A. Yes, I did.

Q. Now, do you know what voucher—what date that was? A. Yes, I have a record of it right here.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

The Court: Here is something that might help—May 23, 1946.

(2289) The Witness: That is what I copied off the bill.

The Court: Maybe you have the bill that corresponds.

The Witness: Yes, we have. I want to see the check voucher that paid for that bill.

Q. What bill did you see there? A. I saw the bill of May 23, 1946.

Q. I show you this photostatic copy of the bill, May 23, 1946. Did you see the original of that? A. I did.

Q. In the possession of Kevelson? A. Among the paid bills there of 1946. There wasn't many there, but I found that one amongst them.

Mr. Grosman: I offer this in evidence and ask that it be marked.

The Court: Show it to Mr. Brigadier.

(Document handed to counsel.)

The Court: You said you only saw one while you were browsing around?

The Witness: I am looking for the paid voucher number.

Q. In payment of this bill? A. I have got the paid voucher number, the paid voucher number on that.

(2290) Mr. Brigadier: This is the one you say you saw?

The Witness: That's right.

The Court: There is his memorandum right there.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

Mr. Brigadier: He has a memorandum of the one he saw and they don't jibe. So what are you going to do about that?

The Court: This is dated May 23, 1946. It seems to corroborate Mr. Marcus' memorandum. Lawyers can be careless sometimes.

The Witness: Here it is, I believe. It is voucher No. 1397.

Mr. Brigadier: Yes, that is the one Mr. Chazin has.

The Witness: Then there is one 82194, $720, Whitney Duplicating Check Company, 406 West 31st Street.

Mr. Brigadier: Were there two that you found, or one? You said there was one.

Mr. Grosman: Please. May I finish with this witness and then you may have him to your heart's content.

May I have this marked? This is the bill—photostat of the bill that Mr. Marcus said he saw in the (2291) possession of Mr. Kevelson.

The Court: $720, is that what it is?

The Witness: That's right, $720.

The Court: It is offered in evidence. Any objection?

Mr. Brigadier: I object.

The Court: It may be marked.

Mr. Brigadier: I don't think it is relevant, material or competent.

The Court: Well, I will find out. If it isn't, I will disregard it. There was a statement made by Mr. Miller, pointedly, that there was no such thing as duplicate checks used. My memory is quite vivid on that.

Mr. Brigadier: That doesn't say that.

The Court: I know it doesn't. I will find out what that is.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

The Clerk: DM-51, photostatic copy of bill from Whitney Duplicating Check Company.

(Received and marked Exhibit DM-51.)

By Mr. Grosman:

Q. Now, which of the vouchers which you saw in the possession of Mr. Kevelson on this examination that you made do you say was in payment of this Exhibit? A. I think—it was a duplicate to a voucher on a (2292) special kind of typewriter, and it says voucher No. 1397, and it had No. 82194 alongside of it. And I think the date was 5/3/46. I believe that's the date.

The Court: And the amount?

The Witness: $720.

The Court: Well, if it isn't that one, it is quite a coincidence.

Q. Five what? A. $720.

Q. The date. A. The date I have got marked here is 5-3. I may have made a mistake in copying it. I have got it here, 5-3-46.

Q. What is the number alongside? A. There are two numbers here, 82194 and there is voucher No. 1397.

Mr. Grosman: Now, may I call your Honor's attention to Exhibit DM-51, that it has on it, "Our order No. 82194."

The Court: It seems to corroborate it.

Q. Now, did you check with the Whitney Duplicating Check Company? A. I did.

Q. And did you obtain from them any more orders placed by Bill Miller's Riviera for restaurant and bar (2293) checks? A. I did.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

Q. I show you a bill for order No. 85953, dated June 10, 1947; is that a photostatic copy of a bill? A. The Whitney Company—

Mr. Brigadier: I object. This is not the way to prove it. There is no proof that these items from here on are in our possession. According to the witness' testimony, the only one he found was the first one, that was received in evidence, and therefore the proper way of proving these is to call somebody from Whitney to prove it and not this man's hearsay testimony of what he heard from Whitney.

The Court: Isn't that so? I permitted the one to go in that he said he found in their files.

Mr. Grosman: If your Honor please, of course we called for the production of all their bills, and all their orders for checks. We told them if they didn't produce the orders we would offer secondary proof.

Now, you realize the difficulty we are up against here. In spite of their many protestations, they throw every obstacle in our way. They placed the orders. There is no reason why they shouldn't admit it. We are in a court of equity here. We have no jury.

(2294) The Court: Well, frankly, I don't see the purpose of showing me all of them, because I am not interested in all of them. What I want to find out is what the object is of ordering duplicate checks. I don't want to be under a suspicion that may not be justified.

Mr. Grosman: Well, there may be an honest explanation for it. I don't know.

The Court: That's what I say. If there is one, it will go for this and all the others.

Mr. Brigadier: I withdraw my objection. Let all of these bills go in.

Colloquy

Mr. Grosman: All right. I offer in evidence the bill I have mentioned, bill for order No. 898[illegible], dated August 10, 1948; bill for order No. 99235, dated May 31, 1951; bill for order No. 96209, dated July 26, 1950.

Mr. Brigadier: What can '50, '51 and '52 remotely have to do with this case?

Mr. Grosman: Except to show, your Honor—if I may be permitted to say so—the change in tactics on the part of these people after Marcus got out— September, '48. Then there were no more orders for checks "and repeats." The only time there were orders for checks "and repeats" was '46, '47 and '48.

(2295) The Court: That is the only object of offering those after '48?

Mr. Grosman: Yes, your Honor.

The Court: All right.

The Clerk: DM-52, series of four photostatic copies of bills.

(Received and marked Exhibit DM-52.)

Mr. Brigadier: If your Honor please, I have to request an adjournment at this point, because I start teaching at 4:30. I can just barely make it.

The Court: Anything further from Mr. Marcus now?

Mr. Grosman: Sir?

The Court: Any more from Mr. Marcus?

Mr. Grosman: Well, there is a little more, not too much. I don't want to embarrass Mr. Brigadier.

Mr. Brigadier: I can just leave and my associates can take care of it during my absence.

The Court: I would like to finish with Mr. Marcus if we can finish soon. I don't want to stay until 5 o'clock, either.

Mr. Grosman: We can't finish soon, it will take an hour or so.

William Miller—for Defendant Milmar Estate—Recalled—Rebuttal—Direct

The Court: Oh. Step down, Mr. Marcus.

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(commencing at 2304-19)

Mr. Brigadier: I will send Mr. Margulies to teach in my place.

May I put Mr. Miller on now?

The Court: Yes, please.

WILLIAM MILLER, recalled as a witness, in rebuttal, having been previously duly sworn, testified as follows:

(2305) *Direct examination by Mr. Brigadier:*

Q. Mr. Miller, I call to your attention the Exhibits DM-51 and DM-52—where is the one that says "repeat"? All right. I direct your attention to the item, "one hundred thousand special restaurant checks, 4¼ by 9½ inches, printed on 9-D stock in blue and white, with stubs at bottom, 1 to 50,000 and repeat."

Will you explain what the meaning of that is? A. Yes, I will. The meaning of this is when these checks are ordered —Mr. Marcus is my partner in this deal, and when these checks are ordered we sit down and say, "How are we going to order these checks with Whitney Duplicating Company?"

When you duplicate a check, your Honor, you would never go to Whitney Duplicating Company, because it is right on your order. So if anyone wants to come and read your order, you are never going to have a duplicate check. This does not mean duplication. This means that you want to go up to fifty thousand numbers, then you are going to have another set ready. You don't know how fast—it is a

new business. You don't know how fast checks are going to go. You figure you are going to a hundred thousand people.

So your accountant, Sam Marcus, and myself get together and say, "How do you want them?" We order them (2306) 1 to 50,000, we hold them on the side, and we order them again, 1 to 50,000. We use them up, 1 to 50,000, and then start all over again, and you keep it within that group of numbers.

Now, a man when he duplicates a check never goes to Whitney Duplicating Company. Anybody who duplicates checks goes to—takes one of your checks, takes it to another printer, and has this check duplicated, because the check—the purpose of a duplicate check, I might say, is if you want to take out a check, you take a check from a different thing, nobody knows about it, and stick it in, in its place. You understand? So the thing would be a check of a duplicate that looks exactly like it, and then use the duplicate on a customer, and then pull it out and put in the original and mark it "void." That would be a method of duplicating a check.

When you order checks on record, a man goes into the record.

Now, Sam Marcus was my partner in the Embassy, and if I got to Whitney Duplicating Company I will prove that he—give me one day—that he and I ordered the checks for the Embassy the same way. And this is nothing that we didn't do as long as he and I were partners.

When we went into the deal, and later, like any other time, we found out it isn't necessary, that 1 to (2307) 50,000 lasts a year, or something like that, a little longer, maybe, so we said, "Why order them and keep them all around the place?"

Furthermore, on my word of honor, your Honor, this man went to the man who was in charge of these checks

and offered him $25,000 for him to lie and say that he put duplicate checks in there. And the man turned it down and refused. And I fired this man from the Embassy Club for being dishonest, when I called him. And that's the witness they have been looking for and can't get.

The Court: As I understand it, then, when you say "duplicate" you mean you make a set of checks from 1 to 50,000?

The Witness: Correct.

The Court: Then you make another set from 1 to 50,000?

The Witness: That's correct, your Honor.

The Court: Is that standard practice?

The Witness: Yes, it is.

The Court: In the nightclub business?

The Witness: Yes, it is, your Honor. Many, many, many places I will go—you will find over and over again, and if you—

The Court: You answered my question.

The Witness: Yes, it is, your Honor.

(2308) May I go further, your Honor, and explain a little more? You see, if you have from 1 to 50,000 and the government comes in and finds your checks, and if you use the same checks for duplication, in your next batch of checks you would be missing checks. You couldn't go according to your record. You must remember, at the Riviera you have got seven checkers and you have got to check your checker. When you give him a batch of checks—the head checker takes the checks. You have got from 1, let's say, to 1,000. Now, every one of those checks must be there or you can't check your business. You don't know where you are. They could rob you.

So, if you take out 10 checks in the next batch, you are not going to have any checks. They are going to

say—1 is missing, 5 is missing, 8 is missing, 10 is missing. It would be the most ridiculous thing that ever happened. That's why I say we have no duplicate checks.

The Court: All right. That's enough for me. Anything further you want to ask?

Mr. Brigadier: I have no further questions.

Cross examination by Mr. Grosman:

Q. How many checks a year did you use down at the Riviera? (2309) A. It would be awfully hard for me to say, because I never handled—

The Court: He asked you a simple question. Give him a simple answer.

The Witness: I will.

Q. Now, you have given the Judge a very illuminating statement as to how checks are duplicated in nightclubs for the purpose, I assume, of defrauding, is that right? A. Yes, it is.

Q. First of all, may I ask you how you know so much about it? A. Because it is a very known practice throughout—a lot of people who use duplicates and they know how it is done. It is no secret. This is my business, and there are a few things I know, because we have to watch checkers, that they don't bring in duplicate checks. Because a checker can go out and have your checks duplicated, if he can get one, and he can rob you. You have got seven people that handle checks, and when you are running a business you have got to know every part of what happens with that check till it goes to the head cashier. So you have got to watch your checker as much as anyone else,—

Q. Let me ask you—(2310) A. —that he don't duplicate checks.

William Miller—for Defendant Milmar Estate—Recalled—Recalled—Cross

Q. The bill of the Whitney Duplicating Check Company, marked DM-51, calls for tabs, or restaurant checks, certain size, 1 to 50,000? A. Right.

Q. And repeat? A. Right.

Q. Does that mean that there were two sets of checks? A. That means that there were—there wasn't two sets—

The Court: Why don't you wait till he finishes the question? You don't even know what he is going to ask you.

Q. Were there two separate sets of checks, 1 to 50,000? A. What do you mean, were there two sets of checks?

Q. Two distinct batches of checks, numbered— A. One to 50,000?

Q. Yes. A. And then another set from 1 to 50,000?

Q. Yes, and what was the purpose of these two sets of checks? A. No reason whatsoever. You just put them on—1 to 50,000, then you have another set, so you start again (2311) from 1 to 50,000. You make up your deal, how far you are going to go with your checks. Very few people go over 50,000 checks, because it takes almost a year to use them up.

Q. Well, why didn't you continue the numbers; instead of 1 to 50,000, why not 1 to 100,000? A. Because that's the way we decided to do it. That's the way Mr. Marcus, and myself, and the accountant, and the checkers said, "This is the way we will handle it. We will keep it from 1 to 50, and order another batch from 1 to 50."

Q. For what purpose? A. So that we would run out of one we would start all over again.

Q. How would you avoid confusion among these checks, if you had two sets of checks numbered exactly alike? A. This way. When you have to go back to your checks—when the govern ent comes in and checks your books, they

know that you ordered a hundred thousand checks from Whitney Duplicating Company. So they look for a hundred thousand checks, whether it reads from 1 to 50,000, or 50,000 to 100, they know that you ordered 100,000 checks.

The Court: All right, all right. They want to see 100,000 checks. I understand that.

(2312) Q. Now, you always would order checks numbered 1 to 50,000? A. I don't know how many times we did it, or where we did it. But I know this order—I want Mr. Marcus to come on this stand and swear that he wasn't there when these checks were ordered, the way this was.

Q. Let me ask you, was this method agreed on, you say—A. Yes.

Q. —between Marcus, and your accountant, and yourself? A. That's correct. And the Whitney Duplicating Company, we asked them what method they use, and they said this is the best way to handle them, 1 to 50, and repeat.

Q. And you always, in all subsequent orders ordered checks from 1 to 50,000? A. No, later we found out it wasn't necessary, that we didn't have to keep that many, perhaps, and decided to just order them once at a time.

Q. Now, on June 10, 1947, did you order checks—withdraw that—from 50,001 to 100,000 and repeat 50,001 to 100,000, as shown by this bill, No. 85953? A. That's correct, 50,000 to 100,000, repeat, the same way.

(2313) Q. The same numbers? A. Yes. 1947.

Q. Yes. And then on August 10, 1948, did you again order from the same company checks to be numbered 1 to 50,000 and repeat? A. That's correct. That's the order there of the checks for '48—

The Court: Don't repeat it.

William Miller—for Defendant Milmar Estate—Recalled—Recalled—Cross

Q. That's order No. 89867? A. Right.

Q. Now, subsequent to Marcus'—or subsequent to the agreement— A. Let me look at these. I never saw these before.

The Court: Well, did you order them, or did somebody else?

The Witness: No, I never ordered these checks. I never—

The Court: All right. You answered.

The Witness: No, these things were ordered by the checkers—

The Court: By Hoffman?

The Witness: By Hoffman, and also by a fellow called Harold Marder, who was our head checker.

The Court: All right.

Q. You knew nothing about it? (2314) A. I didn't know in what rotation. I know how we ordered them. I was there at the meeting with Marcus.

Q. You say that you agreed to order the checks— A. This is the way we would handle them, yes.

Q. Now, after September 14, 1948, you discontinued ordering checks in that manner, did you not? A. No, we did not. In 1948 we still ordered checks, when Marcus was there, and when Marcus wasn't there, we still used this same thing, the same type of checks.

Mr. Grosman: Now let me see what we have got here.

The Court: Oh, yes.

Q. Now, in 1950 you didn't ask for a repeat on those checks, did you, as shown by this bill No. 96209? A. I don't know if we changed it.

Q. I am talking about the numbers. A. I know what the—we may have changed the check and went into a different type of a check, which happens very often, too.

Your Honor, anything I am saying from now on, as to how—the number and how they were ordered, I really don't know.

The Court: You didn't order them.

The Witness: I never ordered a check, your Honor, never ordered a check in my life.

(2315) *By Mr. Grosman*:

Q. Well, weren't you interested in the checking arrangement? A. No, I left it in the hands of a fellow called Harold Marder, who was the head checker, and he had a key to the room, and whenever we needed checks, we knew that they were in perfect order. We had them listed on the shelf. I had the key to the room. Nobody could ever get into the room until I opened the door. Then we checked from 1 to whatever he needed, take them down, give them to the head cashier. And when they are used up, take the checks out again, open it up, give him the rest. Otherwise, we had no control.

Q. Now, is it true that after 1948 you stopped ordering duplicate checks? A. I don't know.

Q. Look at your bills there. Aren't they your bills, '50 and '51?

Mr. Brigadier: He still doesn't know, Judge Grosman.

Mr. Grosman: Please.

The Witness: Let me look.

Mr. Brigadier: I think that the answer is he doesn't know, whatever the bills may show.

Mr. Grosman: Now Mr. Brigadier wants to (2316) testify. I welcome his testimony.

William Miller—for Defendant Milmar Estate—Recalled—Recalled—Cross

A. I still say that I don't know, that I never ordered these checks. And it all depends how fast they went, and what we needed, according to the thing, because these checks, if you notice, run a lot of money—$720—and we probably figured there is no sense—

The Court: You go from one thing to another like Alice in Wonderland.

The Witness: I'm sorry, your Honor.

The Court: You never know where you are going to end up, because of that.

Q. Is Marder in the courtroom now? A. No, he is not.

Q. Do you know where he is now? A. No, I do not. I haven't talked to Marder in four years.

Q. But you do say that you, and Marcus, and Hoffman agreed on that procedure. A. I do say that anything that was done—

The Court: Don't repeat it. You said it before.

The Witness: Yes.

The Court: You, Marcus and Hoffman agreed on that.

The Witness: Right.

(2317) Q. Now, do you agree, Mr. Miller, that the bills of the Whitney Duplicating Company for the years 1950 and '51 were bills sent to Bill Miller's Riviera for checks? A. Yes, they were.

Q. Bar checks and restaurant checks? A. Yes, they were.

Mr. Grosman: All right. That is all I had to ask him on this subject.

Mr. Brigadier: That is all, Mr. Miller.

(Witness excused.)

Harry Puck—for Defendant Milmar Estate—Rebuttal—Direct

Mr. Brigadier: Do I understand that we adjourn now till April 26?

The Court: That's right, Tuesday, April 26.

(Whereupon, the hearing was adjourned to be resumed Tuesday, April 26, 1955.)

(2317a) Newark, N. J., Tuesday, April 26, 1955

(Hearing resumed pursuant to adjournment.)

(Appearances as previously noted.)

Mr. Brigadier: If your Honor please, I would like to call Mr. Puck of the Whitney Duplicating Check Company. Remember, we took that testimony out of turn and Mr. Tepper tells me has no objection.

Harry Puck, called and sworn for the defendant, Milmar Estate, in rebuttal, testified as follows:

The Clerk: May we have your full name and address?

The Witness: Harry Puck, P-u-c-k.

The Clerk: And your address for the record?

The Witness: Business address?

The Clerk: Business address.

The Witness: 406 West 31st Street, New York 1.

Direct examination by Mr. Brigadier:

Q. Mr. Puck, by whom are you employed? A. The Whitney Duplicating Company.

Q. At what address? (2318) A. 406 West 31st Street, New York 1.

Harry Puck—for Defendant Milmar Estate—Rebuttal—Direct

Q. How long have you been employed by the Whitney Duplicating Check Company? A. Twelve years.

Q. In what capacity are you now employed by them? A. Sales manager.

Q. How long have you been employed in that capacity? A. Twelve years.

Q. Did you on occasion obtain orders for tabs or checks from Bill Miller's Riviera? A. Yes, sir.

Q. And did you also obtain orders from the Embassy Club? A. Yes, sir.

Q. I show you a copy of an invoice and ask you whether that is a copy of an invoice, of your records of the Whitney Duplicating Check Company, for a sale to the Embassy Club dated October 14, 1946?

Mr. Grosman: I object to that. We are not concerned with the Embassy Club.

Mr. Brigadier: We are, if your Honor please, for this reason. Exhibit DME-40, which I would like to hand up to your Honor, to refresh your Honor's recollection, (2319) because there have been so many Exhibits in this case, you will recall is the agreement in April, 1946, between William Miller and Sam Marcus whereby they agreed that Samuel Marcus is to take over the running of the Embassy.

The Court: Oh, yes. I will allow it.

Mr. Brigadier: And this is after that date.

Mr. Grosman: Now, if your Honor please, if you are going to open up the subject, we will have to answer it. And you say we have got to finish today.

The Court: I wish you would finish today.

Mr. Grosman: I want to finish today, but if they are going to open this whole new subject—

Mr. Brigadier: You opened the subject by offering, after the case was over, these bills, which show orders

"repeat." I want to show that Marcus, at the Embassy, after he took over—the same order, sir, "1 to 25,000 and repeat," and I am going to have Mr. Puck explain that this was nothing out of the ordinary, that this was done by a number of different people, including Marcus running the Embassy.

I think it is certainly evidentiary for that purpose, because he claims fraud. Fraud involves reliance, sir.

Mr. Grosman: Your Honor, in our presentation of the testimony we referred only to the specific orders (2320) for Bill Miller's Riviera. Now, if they want to show that Marcus ordered something for the Embassy Club, which was not referred to on the direct testimony, they must make this man their own witness. They are opening up a whole new subject and we will have to answer it.

Mr. Brigadier: It is not a new subject. That paper is already in evidence that I handed to your Honor, which showed what the arrangement was.

The Court: We start it right in the way we left off. I am supposed to draw a conclusion, as I take it, from the evidence that was offered that there was something phony about duplicating checks, something fraudulent that would bear out that these plaintiffs, or Miller and the rest of them, had a fraudulent intent of some kind.

Now you wish me to understand that if they can show that Marcus did the same thing, and knew exactly the purpose of it, that that is not evidential, is that right?

Mr. Grosman: In connection with the testimony given on direct.

The Court: Well, on direct there was nothing said about the Embassy Club, that is true.

Mr. Grosman: That is the point I make.

Colloquy

The Court: All right, sir, if you insist, I (2321) will have to sustain the objection.

Mr. Brigadier: But, sir, this is my witness who I am calling to offset their contention of fraud, and I want to show—and I think I have a perfect right to show—that Marcus himself knew that checks were being ordered this way, because he himself had ordered them that way. And my next question to Mr. Puck will be—are there others that do it; and why is it done? And he is going to tell you why it is done. So I certainly think it is evidentiary for that purpose, especially in view of the document already in evidence, signed by Marcus, that after April, 1946, he takes over the running of the Embassy Club.

The Court: Couldn't that be shown by showing what happened in the Riviera, and then you can ask him these general questions? Why do we specifically have to refer to the Embassy Club?

Mr. Brigadier: Simply to show that Mr. Marcus couldn't claim that there was any kind of a reliance, of any kind, of fraud, if he himself knew that this was what was customarily done, and did it himself.

If your Honor feels I should not go into it, I am not going to press it any further.

The Court: I don't think it is necessary, I have heard it all, anyway. That's like a jury hearing (2322) testimony and saying, "Disregard all that testimony," after they hear it.

Mr. Grosman: Now, may I ask, if your Honor please, that the remarks made by Mr. Brigadier, his whole statement that he made there, which is not evidential, be stricken from the record.

Mr. Brigadier: Oh, no.

The Court: That is only a proffer of testimony. He told you what he intended to do.

Mr. Grosman: May I also say for the record, you will recall that Mr. Miller testified in no uncertain terms that he never ordered duplicate tabs.

Mr. Brigadier: He did not testify in no uncertain terms. On the contrary, he testified that this was the way it was set up by Hoffman, Marcus and himself, to order them 1 to 50,000 and repeat. The testimony itself will show. We have a transcript here.

The Court: It is a good thing we have.

Mr. Grosman: In his original testimony that is what he said.

Mr. Brigadier: The transcript will show.

The Court: Well, if he said it, sir, you will point it out to me at the right time, when the time comes.

By Mr. Brigadier:

(2323) Q. Now, Mr. Puck, in the course of your connection with the Whitney Company, and in the taking of orders for checks, have there been other occasions on which you received from other customers orders for checks from your company? A. I didn't quite understand that.

Q. Have there been occasions—

The Court: Just a minute. Let him read it. You are going to do enough talking.

(Question read.)

Mr. Brigadier: I want to finish that.

Q. I meant orders in which it was provided that it was to run from one digit to another series, and repeat. A. Yes, sir.

Mr. Grosman: I object to that, what he got from others.

The Court: If it is the custom of the trade, I will hear it.

Mr. Grosman: There is nothing about custom in the trade.

Mr. Brigadier: Let me develop it. Do you want me to do it all in one question?

The Court: If you are going to start like that, we are never going to finish this case, but never.

(2324) Mr. Grosman: I'm sorry. In the interests of my client I can't permit him to ask a question of this sort.

The Court: He will develop that it is the custom. Mr. Brigadier knows his business, too.

Mr. Grosman: I object to it.

The Court: Overruled.

By Mr. Brigadier:

Q. What was your answer? A. Yes, that I have received other orders.

Q. And have there been such orders from many customers?

Mr. Grosman: The same objection.

The Court: The same ruling.

A. They happen once in a while.

Q. And do you know, from your connection with the trade, as to what the reason is why orders are made in that way? A. Yes, sir.

Mr. Grosman: I object to the custom of the trade until they qualify him as an expert.

Mr. Brigadier: Well, for 12 years he has been selling such checks. I think that should qualify him. He is the sales manager of one of the leading duplicating check companies in the country.

Harry Puck—for Defendant Milmar Estate—Rebuttal—Direct

(2325) Mr. Grosman: There has been no such testimony, your Honor, that he is an expert. He sells tabs.

The Court: Expert on what? What do you mean? What kind of an expert?

Mr. Grosman: On the practice in the restaurant business, in the entertainment and food business.

The Court: Are you familiar with the practice in the restuarant business and in the entertainment business?

The Witness: Yes, sir.

The Court: In this ordering of duplicate tabs?

The Witness: Yes, sir.

The Court: Do you know the purpose of it?

The Witness: Yes, sir.

The Court: You may answer.

By Mr. Brigadier:

Q. As a matter of fact, you were called as an expert, were you not, in a case involving E. M. Loew?

Mr. Grosman: I object to that as immaterial.

Mr. Brigadier: If you want me to bring it in—

Mr. Grosman: I don't want you to do anything—

The Court: I will allow it.

Mr. Grosman: —except to try the case properly.

Q. Now, what are the reasons why checks are (2326) ordered in this manner? A. One reason could be—

Mr. Grosman: I object to what it could be.

The Court: Not "could be." What are the reasons, if you know; if you don't know, just so state.

A. One reason is that by ordering a hundred thousand checks you get a better price than on 50,000. So that they

order a hundred thousand, numbered 1 to 50,000 and repeat.

Q. Any other reason? A. The other reason might be—the other reason is that they haven't enough room to store a hundred thousand checks. We print a hundred thousand checks and hold 50,000 checks, delivering 50,000.

Q. You would have that same problem if the digits ran from 1 to 100,000, wouldn't you? A. Yes.

Q. So that wouldn't make any difference in ordering them 1 to 50 "and repeat," the storage problem wouldn't make any difference, would it? A. No, the matter of price enters into that.

Q. Now, any other reason? A. The other reason that I might offer is that they don't want the waiters to transform higher numbers, they would rather work from—this doesn't happen just between (2327) 1 to 50 and repeat, it also happens 1 to 25 and repeat. It can happen 1 to 10 and repeat.

Q. You mean there are various number that are taken? A. That's correct.

Q. You said something about waiters. I don't think you finished it. A. The waiter has to write his order on a waiter pad, and a captain's order pad, and then he has to have on that pad the number of the check that that order involves. And they try to keep down the numbers as low as they can, so they haven't got to work with nine hundred and ninety-nine thousand up to a hundred thousand.

Q. Now to go back to the other point, there are those who order repeats, even in smaller digits, is that right? A. Yes, sir.

Q. What is the smallest in your experience in which they are ordered "and repeat"? A. One to 10,000 and repeat, I'd say.

Q. And, of course, there are those that order in at the higher figure than 50,000? A. They are also ordered in a million checks, 1 to 100,000 five times.

Harry Puck—for Defendant Milmar Estate—Rebuttal—Direct

Q. Repeat five times? (2328) A. Ten times.

Q. Repeat 10 times, 1 to 100,000 repeat 10 times. A. That's right.

Q. Mr. Puck, do you know whether your records are ever examined by the agents of the Internal Revenue Department? A. Yes, sir; I do know.

Q. Are they open to them? A. Yes, sir.

Q. And is it common knowledge to your customers that your records are open to the Internal Revenue Department?

Mr. Grosman: Now, I object to that.

The Court: If he knows. Do you know?

Mr. Grosman: The records are open to the Internal Revenue Department, regardless of anything.

The Court: Yours, and mine, and the Riviera.

Mr. Brigadier: May I be heard for a moment, if your Honor please. There was a lengthy speech that Mr. Tepper delivered himself of—they talk about my making evidence in this case—remember the lengthy speech about why you will find that on one of these bills, the best proof of the fraud was that part of it was delivered, and the rest they were going to call for on subsequent occasions, and all that kind of business.

(2329) I think if the inference of anything—and, don't forget, the first bill they put in evidence is in 1946, long before there is any talk about buying out Marcus' interest. The talk about buying out Marcus' interest starts in 1948, according to Marcus' own testimony, in July of 1948.

Mr. Grosman: Now, are we going to sum up here?

Mr. Brigadier: Wait a minute. I want to be heard on this.

Therefore, the obvious inference to be drawn is that if there is anyone to be defrauded—the only purpose for doing this, in 1946 and '47, would be to defraud

whom? The Federal government. Would there be any other basis?

Now, if it is a matter of common knowledge that their records are open to inspection by the Federal government, and that that is what is done, wouldn't it be an absurd thing to ask you to draw an inference of fraud on that basis?

Mr. Tepper: Excuse me. I think since my name is mentioned that I should say this. In the first place, I think that definitely Mr. Brigadier has been summing up here. This witness has testified that there are many reasons why—several reasons why these tabs (2.30) could have been ordered to a certain quantity "and repeat."

The inference is that one of those reasons could be to defraud either the government, or to defraud Marcus, or to defraud management.

Now, if we want to sum up, let's sum up. This man's testimony can be taken for whatever it may be worth, but it should not be implemented by Mr. Brigadier's statement, which is without foundation.

The Court: What statement is without foundation?

Mr. Tepper: The fact that I made the statement that the purpose was for this, that and the other thing. It is for you to determine the reason and the purposes of the order as it was.

And while we are on the subject, Mr. Brigadier said nothing about the order of 1950. It is the conduct here that counts—in 1950 when Mr. Marcus was shaken out of the deal through fraudulent representations that they didn't order "and repeat." So from their own records it appears that that is not the custom. Here it is, right in evidence.

The Court: Now, can you find what question was objected to after all those speeches?

Harry Puck—for Defendant Milmar Estate—Rebuttal—Cross

(Question read as follows: "And is it common (2331) knowledge to your customers that your records are open to the Internal Revenue Department?")

The Court: The objection is overruled. You may answer.

A. It is not common practice.

The Court: No, is it common knowledge?

By Mr. Brigadier:

Q. Is it common knowledge among your customers that your records are open to the Internal Revenue office for examination? A. I would say yes. I would say yes.

Mr. Brigadier: No further questions.

Cross examination by Mr. Grosman:

Q. How do you know, Mr. Puck, that it is common knowledge among your customers that your records are open to the Internal Revenue Bureau, or the income tax authorities? A. Because in the past I have had certain customers ask me if the revenue people have ever been down to our place, and I have said yes. What I call common knowledge might be three instances or four instances, six instances.

Q. How many customers have you got? A. Thousands.

Q. Did Miller ever ask you about that? A. No, sir.

(2332) Q. Did any of Miller's attorneys ever ask you about that? A. No, sir.

Q. Now, you say that it is common practice among your customers to order tabs "and repeat"? A. I don't get the interpretation of "common."

The Court: Suppose you put it "frequently." Do they do it frequently?

The Witness: I would say they might do it once. I am hazarding a guess—once out of 50 orders. I am hazarding a guess.

Harry Puck—for Defendant Milmar Estate—Rebuttal—Cross

The Court: That's a rough guess?
The Witness: That's a rough guess.

By Mr. Grosman:

Q. Now, what is the meaning of an order such as this of June 10, 1947, Bill Miller's Riviera, restaurant, wherein they order tabs No. 50,001 up to 100,000 "and repeat," 50,001 to 100,000. What does that mean, "repeat"? Repeat the numbers? A. No, it means that an order—fifty thousand to one hundred thousand—it means that an order for a hundred thousand checks has been placed, which it specifies up here, to be numbered 50,001 to a hundred thousand, and 50,001 to a hundred thousand.

Q. So that you have a duplication, do you? A. Yes, sir.

(2333) Q. Of two sets of tabs, each numbered 50,001 to 100,000? A. Correct.

Q. Each exactly alike? A. Correct.

Q. Now, does that often happen among your customers, that these orders are placed in this way? A. My answer is the same as it was before. I'd say maybe one out of 50. It could be one out of 60, or one out of 70.

Q. And you say that it could be done for the reason that they don't want all of the tabs at once, some of them are stored with you? A. Correct.

Q. Why should they have two sets of tabs, numbered exactly alike? A. I wouldn't know the answer to that.

Q. You don't know the answer to that? A. No, sir.

Q. Could it be to defraud the government? A. It never occurred to me that it could be to defraud the government.

Q. Well, you know this business, you know the custom in the restaurant business, and all that, and it never occurred to you that that might be done to defraud (2334) the government by the substitution of one check for another, but numbered exactly alike? A. No. And may I add to that?

Q. Yes. A. I get orders that have no numbers on them. I am not going to—

Q. I am not talking about that type of order. A. I understand. But I am just trying to point out the variance as to the use of checks. I don't question the customers as to how or why he wants checks numbered a certain way.

Q. You don't care, do you? A. It isn't a matter of not caring. I don't question how he runs his business.

Q. If they order and pay for it, you sell it to them? A. That's correct.

Q. Now, these tabs indicated on order No. 85047 you have told us are numbered exactly alike, in duplicate; colored alike? A. Does it specify any change of color?

Q. You look at the order and you tell me.

(Document handed to the witness.)

A. No, they are the same color.

Q. Exactly the same color. (2335) A. (Nods.)

Q. So by looking at these tabs you couldn't tell—no one could tell whether they came out of the first batch or out of the second batch, is that correct? A. I couldn't tell—you say I couldn't tell.

Q. You couldn't tell? A. No. That's correct.

Q. Could anybody else tell? A. The way they could tell is if they had used in the place—if they had used up the first—

Q. The man who actually did the —made out the checks? A. The issuing of checks, from the office.

Q. Otherwise you couldn't tell? A. No.

Q. A revenue agent couldn't tell, could he? A. The difference between—

Q. Yes A. —coming up from the first one to 50,000, aid the second?

Q. That's right. A. No.

Q. Now, can you tell me, please, by looking at these five orders—or, rather, let me ask you this. I show you what

purports to be five orders placed with your (2336) company. Can you tell me whether these were actually placed with your company? A. From these papers?

Q. Yes. A. No, but from the records in the office it could be—

Q. You look at these, please. A. —ascertained.

Q. Is that your billhead? A. Yes, sir.

Q. Is there any doubt in your mind that these orders were placed with your company by Bill Miller's Riviera? A. There is no doubt in my mind except that they were placed.

Q. You mean except that they were placed? A. That these orders were placed with my company.

Q. You are satisfied of that. A. Yes.

Q. Now, will you look at order No. 81092; that is for what, how many? A. That's for a hundred thousand restaurant checks and a hundred thousand bar checks.

Q. And repeat? A. One to 50,000 and repeat, the restaurant checks. (2337) And the bar checks is 1 to 100,000.

Q. Without— A. With no repeat.

Q. Now, I show you bill No. 85047, June 10, 1947. That's for a hundred thousand tabs, and repeat 50 to 100,000, right? A. A hundred thousand checks, 50 to 100,000, and repeat 50 to 100,000, correct.

Q. That is also true of invoice No. 89867? A. A hundred thousand, 1 to 50,000 and repeat. That's correct.

Q. That is dated August 10, '48? A. Correct.

Q. Now, I show you invoice dated July 26, 1950, No. 10695; what is that for? A. That is for a hundred thousand checks numbered 1 to 100,000.

Q. No repeat? A. No, sir.

Q. And I show you this last invoice, dated May 31, 1951, No. 13942; what is that for? A. That is for a hundred thousand bar checks numbered 1 to 100,000, and 5,000 officer's checks, numbered 1 to 5,000.

Q. No repeat? (2338) A. No, sir.

Q. Do you know why it is that the first three invoices are for repeats, the last two are not for repeats? A. No, sir; I do not.

Mr. Grosman: May I offer these?

The Clerk: You have offered the photostats.

Mr. Grosman: I see. May I have the photostats so that I may refer to the Exhibit numbers?

(Documents handed to counsel.)

Mr. Grosman: Will you agree, Mr. Brigadier, that the photostats have been marked in evidence?

Mr. Brigadier: If you say so, I do.

Mr. Grosman: I will check them.

Mr. Brigadier: I will take your statement.

By Mr. Grosman:

Q. Now, Mr. Puck, you told us of a number of reasons because of which orders such as I have shown you, for repeats might be placed with your company? A. Yes, sir.

Q. Do you know the reason why Bill Miller's Riviera Restaurant placed the repeat orders with you? A. No, sir; I do not.

Q. You haven't the faintest notion? A. No, sir; not the faintest.

(2339) Mr. Grosman: That is all.

Mr. Brigadier: That is all, Mr. Puck. Thank you.

(Witness excused.)

Mr. Grosman: May I say this? The orders, or the invoices that I showed the witness are already in evidence marked DM-51 and 52.

Are you through, Mr. Brigadier?

Mr. Brigadier: Yes.

Mr. Grosman: Mrs. Maginn.

Adeline Maginn—for Defendant Marcus—Recalled—Surrebuttal—Direct

ADELINE MAGINN, recalled as a witness by the defendant, Samuel Marcus, in surrebuttal, having been previously duly sworn, testified as follows:

The Clerk: May we have your name and address, please?

The Witness: Adeline Maginn, 33 Maldon Street, Malverne, Long Island.

Direct examination by Mr. Grosman:

Q. Mrs. Magin, I show you a photostatic copy of a letter written on the stationery, Milmar Estate, Inc., dated November 20, 1947, and ask you to look at it and tell me whether you ever saw the original of that? A. I typed this letter.

Q. At whose request? A. Mr. Schwartz.

(2340) Mr. Grosman: I offer it in evidence.

Mr. Brigadier: May I see it?

(Document handed to counsel.)

Mr. Brigadier: I object to it going into evidence for the obvious reason that it is completely incompetent. It is also irrelevant. It is a letter addressed by Milmar Estates to Commissioner George Gatz, and has nothing whatsoever to do, as your Honor will see, to the issues in this case.

The Court: Who is Commissioner George Gatz?

Mr. Grosman: Liquor Commissioner of New York, I think.

Mr. Brigadier: It is dated November, 1947, and hasn't the remotest relation to the issues in the case.

Mr. Grosman: It shows, contrary to the testimony of Mr. Schwartz—

Mr. Brigadier: Oh, if that is the reason, it is certainly not evidentiary, because they should have laid the foundation before offering this kind of a letter.

If this is being offered to impeach Mr. Schwartz as a witness, then Mr. Schwartz should have been asked on cross examination—did he ever write such a letter? This can't be sprung now without having questioned him at all and without his being in court.

(2341) Mr. Grosman: We don't have to do that. He testified that, as I remember it, Marcus went into this nightclub business. We want to show that over his own signature he represented that Marcus went into this Milmar thing as a real estate venture. Why can't we do that?

Mr. Brigadier: It still wouldn't be evidentiary.

The Court: Of course, it is easy to say now that he said he went into the nightclub business. Am I supposed to remember thousands of bits of testimony? Why wasn't it produced when he was here? I don't know whether he said it or not. I don't think you do, either.

Mr. Brigadier: I am positive he didn't.

Mr. Grosman: Well, Miller certainly said it.

Mr. Brigadier: But this is being offered to impeach the credibility of a witness whose foundation you didn't even remotely lay in asking the witness whether he had ever written such a letter.

Mr. Grosman: We are in a court of equity. We are not bound by the strict rule of evidence.

Mr. Brigadier: That is a new one to me, that the Rules of Evidence are different in equity than they are at law.

Mr. Grosman: I take it that you are supposed (2342) to know everything, but I don't agree with you.

Mr. Brigadier: Let's not get into that.

Mr. Grosman: Well, you said it was new to you.

Mr. Brigadier: It is.

The Court: What has Commissioner George Gatz of the New York State Liquor Authority to do with anything in New Jersey?

Adeline Maginn—for Defendant Marcus—Recalled—Surrebuttal—Direct

Mr. Grosman: Nothing, except the representation was made to him by the corporation, over the signature of Mr. Schwartz, that Marcus went into this venture as a real estate venture, that he didn't go into the nightclub business.

The Court: I see no harm in marking it in evidence. You have got a lot of—I don't want to characterize it—Exhibits. I see no harm in putting it in.

Mr. Brigadier: I don't, but I want the record to note my objection.

The Court: It may be marked.

The Clerk: DM-53, photostatic copy of a letter dated November 20, 1947, marked in evidence.

(Received and marked Exhibit DM-53.)

By Mr. Grosman:

Q. How long were you in the employ of Mr. Marcus? (2343) A. About 12 years.

Q. Did you ever know him to do any typewriting? A. No, never.

Q. Do you know whether he can operate a typewriter? A. He never operated a typewriter in all the years I was with him.

Mr. Grosman: That is all. Cross examination.

Mr. Brigadier: No questions, Mrs. Maginn.

The Court: You never saw him operate a typewriter, madam?

The Witness: Never did.

The Court: And you were with him 12 years?

The Witness: Twelve years.

The Court: Not even with one finger?

The Witness: Not even a half finger.

The Court: Thank you.

(Witness excused.)

Mr. Grosman: Mr. Tytell.

Martin K. Tytell—for Defendant Marcus—Surrebuttal—Direct

MARTIN K. TYTELL, called and sworn for the defendant, Samuel Marcus, in surrebuttal, testified as follows:

The Clerk: May we have your full name and address?

The Witness: Martin K. Tytell, T-y-t-e-l-l, 3031 Scenic Place, Riverdale 63, New York. That's my (2344) residence.

The Court: And your place of business?

The Witness: My place of business is 123 Fulton Street, New York 38, New York.

Direct examination by Mr. Grosman:

Q. Now, what is your occupation, Mr. Tytell? A. I am a typewriter type specialist; I am an examiner of questioned typewritten documents; I am a designer and builder of special purpose typewriters.

Q. How much space do your office and laboratory occupy? A. Two full floors, approximately 8,000 square feet.

Q. And how long have you been at this address? A. Seventeen years.

Q. How long have you been associated with typewriters? A. Twenty-seven years.

Q. Can you give this Court your general educational background? A. I am a graduate of St. Johns University, where I received a B.S. degree; I have done post-graduate work at N.Y.U., where I will receive a Master's Degree this June; I have taken special courses at Brooklyn Polytechnic Institute, Wagner College, Hunter College, and City College; and the Army sent me to special courses to Yale (2345) University and the Library of Congress.

The Court: Is that St. Johns of Brooklyn?

The Witness: St. Johns of Brooklyn, sir.

Q. Have you made a special study of the examination of disputed typewritten documents? A. I have.

Martin K. Tytell—for Defendant Marcus—Surrebuttal—Direct

Q. What has this special study consisted of? A. The thesis subject for my Master's Degree was the identification of questioned documents. I have made a special study of the identification and analysis of anonymous letters through internal evidence. I have compiled one of the largest collections of type in the world, over two million type, covering 145 different languages and all technical keyboards.

I have personally taken off specimens of thousands of typewriters and created a file for the purpose of determining the make and the typewriter behaviorism of typewriters from the time they are manufactured to the time they are destroyed.

I visited all the typewriter manufacturing plants in the United States. I have attended various seminars given by learned societies on the identification of questioned typewritten documents. I have collected all the books that are in existence on the subject that were obtainable.

(2346) Q. Have you ever written any articles for publication on the subject? A. Yes, I have.

Q. What? A. One of my articles appeared in True Magazine, and one of my articles recently appeared in a book, both in England and in this country, along with stories by Somerset Maugham, Pearl Buck, Ernest Hemingway, entitled World's Greatest Spy Stories.

The Court: Spy stories?

The Witness: Yes. It is the story about my connection with the Hiss case, how I worked in the Alger Hiss case.

Q. Do you have the necessary special instruments for the examination of questioned documents? A. Yes, I do. I have a most complete and modern lab. I have a light stereoscopic microscope. I have all sorts of magnifying glasses, infra red, ultra violet, opaque projector, comparitors, micrometers, overlay glasses.

Martin K. Tytell—for Defendant Marcus—Surrebuttal—Direct

Q. Will you mention a few of your recent cases in which you testified in court? A. The Al Capp-Ham Fisher Congressional Committee investigation.

Mr. Brigadier: I object to that. That is not in answer to the question. You were asked in what courts (2347) you testified. That is not a court. I ask that it be stricken out, if your Honor please.

Mr. Grosman: All right. I will consent to it.

Mr. Brigadier: I have a reason for this.

Q. All right. Go ahead. A. What was your question?

The Court: What courts have you testified in?

Q. What court cases? A. The courts I have testified in?

Q. Yes. A. In this state I testified before Judge Stanton in the New Jersey Superior Court, Chancery Division, September 15, 1953. And in New York State I testified before the Supreme Court in Mineola, in 1950.

Q. How about the Federal Court, have you testified in the Federal Court? A. No, I merely submitted affidavits. The nature of most of my work is consultations. Most of my cases are settled out of court when I present my findings.

Q. Now, have you testified before any congressional committees? A. The F.C.C. refused to have me testify on the basis that they were not a judicial body, but they accepted (2348) my report and ruled in favor of the evidence I submitted.

The Court: That is not a congressional committee. You mean the Federal Communications Commission?

The Witness: Yes.

The Court: Did you ever testify before a congressional committee?

The Witness: I did not.

Martin K. Tytell—for Defendant Marcus—Surrebuttal—Direct

Q. Well, did you have anything to do with the case of the United States versus Alger Hiss? A. Yes.

Q. What? A. I was engaged to prove that two typewriters could be made to type alike. And I submitted affidavits, which were, in turn, submitted before Judge Goddard, that I had done this job. This was an application for a new trial on newly discovered evidence.

The Court: Is that the famous Woodstock typewriter?

The Witness: That's right, sir.

Q. Are you ever consulted by other experts and government agencies? A. Yes, I am. I am consulted regularly by the New York City Police Department, New York State Police Lab, Canadian Mounted Police, and the local agent in charge of the U. S. Treasury, Identification of Documents.

(2349) Q. Were you in the armed forces? A. I was, during World War II.

Q. For how long? A. Four years and seven months.

Q. What were your duties in the armed forces? A. I was in charge of the Typewriter Division of the Translation Branch of the Adjutant General's Office.

Q. Were you assigned to any special projects? A. Yes, on two occasions I was discharged from the Army and assigned to making up special machines. Because of the secrecy and urgency I was put in civilian clothes. And made up special machines for the United States Naval Academy, the various Intelligence services, Office of Strategic Services, the allied governments and the Office of War Information.

Q. What special projects involving typewriters are you now engaged in? A. I am at present setting up the exhibit for the I.B.M. Company, Thomas Watson, Jr., at the

Franklin Institute in Philadelphia. I am preparing and writing a history of the exhibit, showing the development of the technical progress of typewriters from 1873 right through the present.

I also build the special typewriters to teach the one-hand people how to type, that are being used in the (2350) various clinics for rehabilitation throughout the country; I am making machines for the television industry, used in prompting. We have just recently completed some special typewriters for President Eisenhower, for speeches. Last week I built—the first time in this country—two Azerbaijani typewriters, the first time it had ever been done in this country.

The Court: What is that, please?

The Witness: Azerbaijani is a language used just above Armenia. It is in the Russian sector. In 1922—

Mr. Brigadier: It is part of the Soviet Union, isn't it?

The Witness: May I explain? There are two parts of Azerbaijani, there is a Persian sector and a Russian sector. It is divided in two parts; one is under the influence of Persia and one is under the influence of Russia. This is a crucial spot right now and our Intelligence Department are spreading propaganda in that area.

In 1922 Kemal Pasha outlawed the old Turkish keyboard, the old Turkish language, and they adopted Latin. In 1940 the Latin was changed to Cyrillac. Cyrillac is the orthography in which Russian is written. And now for the first time we have gotten around to writing this (2351) thing in the original Russian, and I had to do the research—was in a great hurry—to find out what special symbols to use.

You see, the Russian alphabet has 32 characters and Azerbaijani requires 36.

Mr. Brigadier: I would suggest, your Honor, that it is very interesting, but that, at least, we keep it off the record.

Mr. Tepper: You asked for it.

The Witness: You asked me that question.

Mr. Brigadier: I didn't your lawyer asked it.

The Court: I asked it. I was interested. I had never heard of it. I thought I had heard of every language.

The Witness: I have also studied linguistic science, and I am qualified to—

Mr. Brigadier: I withdraw it.

The Court: All right. That was very interesting.

Mr. Brigadier: I think a limit should be drawn.

(Discussion off the record.)

The Court: Apparently he is very well qualified.

Mr. Brigadier: Oh, I want to examine him on (2352) the voir dire, sir. I ask leave to do so.

The Court: Do you?

Mr. Brigadier: Yes.

Mr. Grosman: All right. I want to ask about these documents, DM—

Mr. Brigadier: Before you do, I want to examine him on the voir dire.

Mr. Grosman: May I state that I am now about to examine the witness on the questioned documents, DME-50 and DME-51. Now, if you want to examine him, you go right ahead.

The Court: The documents about which their expert, Murphy, testified?

Mr. Grosman: Yes, your Honor.

Examination by Mr. Brigadier:

Q. Mr. Tytell, are you a member of the American Society of Questioned Document Examiners? A. The American Society of Questioned Document Examiners—

Martin K. Tytell—for Defendant Marcus—Surrebuttal—Preliminary Cross

Q. Are you a member?

The Court: Yes or no.

A. No, I am not.

Q. Have you ever made application to the Society for membership? A. I have not.

(2353) Q. Mr. Tytell, in the Hiss case you say you didn't testify, but you furnished an affidavit, is that right? A. That is correct.

Q. It was the affidavit that Alger Hiss used in his application for a new trial, is that right? A. That's right.

Q. It was the affidavit in connection with which there was offered to the Federal Judge a typewriter which you built, right? A. Right.

Q. It being your contention that you could duplicate it, the typewriter that the federal government had put in evidence as part of its case against Alger Hiss, is that right? A. Correct, sir.

Q. And it was on that basis that the application was made for a new trial, right? A. Right.

Q. And the application was made solely on that basis, was it not? A. Right.

Q. And the application was denied, was it not? A. Right.

Q. Now, let's talk about your testimony in court. (2354) You say you have testified—that you have a questioned document examiner for how long? A. Professionally?

Q. Yes. A. About six years.

Q. That would take us back to about 1949, right? A. Right.

Q. And in that six-year time you have only testified twice— A. That is correct.

Q. —in court? A. That is correct.

Q. Once, you say, before Judge Stanton on September 15, 1953? A. That is right.

Q. Was that in connection with the case that arose—that Mr. Glauberman had brought an injunction suit be-

fore Judge Stanton? A. I don't know if it was an injunction suit, it was a case in which—

Q. Were you called there by Mr. Glauberman? A. I was.

Q. Do you remember in what connection it was that you were called? A. Yes, to establish the authenticity of certain (2355) typewritten documents.

Q. Checks, were they? A. No, just typewritten documents. I have nothing to do with checks. I just testify on typewriting, not handwriting.

Q. Do you recall what the case was? A. Yes, Mr. Osborn presented facts to prove that certain letters were not typewritten at the date they say they were typewritten on, and I presented facts to show that they were typewritten at the time they were by means of statistical analysis and the deterioration of the typewriter.

Q. What was the name of that case? A. Maison Entekahab versus Gross and Gross.

Q. And you testified in behalf of Gross and Gross in the matter? A. That is correct.

Q. And what was the nature of the action, do you recall? A. The Grosses claimed that they had canceled a contract by mailing a cancellation. The plaintiffs claimed they had never received this cancellation, and, in fact, this cancellation had never been sent out. And they employed Osborn to show that they could not have been typed at the time the carbon copy and the other dates (2356) were dated.

Q. Now, the second case that you referred to—oh, this one was September 15, 1953, is that right? A. That's right.

Q. The second case was an earlier case, in 1950? A. That's right.

Q. Where you testified in New York State. A. That is correct.

Martin K. Tytell—for Defendant Marcus—Surrebuttal—Preliminary Cross

Q. In Mineola? A. In Mineola, in the Supreme Court.

Q. What kind of a case was that? A. This was a case involving a typewritten note. I established the fact—

Q. In what court? A. In the Supreme Court of Mineola. The Supreme Court.

Q. Were there any other experts who testified besides yourself? A. No, Mr. Osborn was consulted.

Q. But he did not testify? A. He did not testify.

The Court: You mean a promissory note, to pay money?

The Witness: This man had died, and after this man had died, the note was put into the bank, and (2357) I presented facts to show that the bank typed the F.H.A. number, and the date at the same time, it was done on one typing.

The Court: A promissory note.

The Witness: A promissory note.

By Mr. Brigadier:

Q. Do you know Mr. Osborn? A. Yes.

Q. Do you know Mr. Murphy? A. Yes. Mr. Murphy has called on us several times for information for his lab files. We supply the specimens.

Q. Do you know whether Mr. Murphy is a member of the American Society of Questioned Document Examiners? A. I don't know whether he is a member or not. I know that Mr. Osborn is.

Q. You know that Mr. Osborn is. A. Yes.

Mr. Brigadier: All right. Proceed.

The Witness: I am a member of the International Association for the Identification—

The Court: See, that is even bigger.

Mr. Brigadier: That he testified only on two occasions in six years seems rather unusual, to put it conservatively, as a questioned document expert.

(2358) The Witness: I have handled approximately a hundred cases in the last five years, and I have testified only twice because when I present the thing the other side settles, after they read my material.

Mr. Brigadier: That is obvious nonsense.

The Witness: I can prove it, sir.

The Court: You don't have to prove it here. I think you are qualified. We will take a five minute recess.

(Short recess.)

Mr. Brigadier: There are just a few questions I omitted to ask him. I will make it very brief.

By Mr. Brigadier:

Q. Mr. Tytell, you said that you have become an examiner of questioned typewritten documents in the last six years, is that right? A. I have been examining documents for the last 20 years. I am in this typewriter business for 27 years, but I have received fees—I guess that is what makes you professional—the last six years people have been paying me money, good money, to give an opinion.

Q. Prior to that time they didn't pay you any money. A. I was doing it for free. I didn't know any better.

Q. Prior to that time were you engaged also in (2359) the manufacture of typewriters? A. The conversion and creation of special purpose typewriters, yes.

Q. And you are listed in the New York Telephone Directory, are you not? A. Yes, surely.

Q. And you are listed in the classified book, as well? A. Yes.

Q. Now, in the classified you are not listed as a questioned document examiner at all, are you? A. Of course I am.

Martin K. Tytell—for Defendant Marcus—Surrebuttal—Preliminary Cross

Q. In the classified? A. Yes.

Mr. Brigadier: Where is Theodore Chazin? Do you have that list that you gave me from the directory? Maybe I have got it wrong.

The Witness: If I am not there, I have been paying them for nothing.

By Mr. Brigadier:

Q. In the classified aren't you listed as Specialist, foreign language machines, Tytell Typewriter Company, Inc.? A. Yes, I am in the typewriter business, but, in addition, I am also identifying typewriters. I have the biggest ad (2360) of all the experts, if that is the basis, in the Manhattan Classified—

Q. Just answer my question. A. Yes, I am listed. You picked the wrong one.

Q. I am perfectly willing to let you go to certain limits, but just try to answer my question. You say you are listed in the classified? A. I am, sir.

Q. As a questioned title examiner? A. Right.

Q. Now, in the directory itself you are listed as follows, are you not: Tytell, Martin Kenneth, Questioned Documents, 123 Fulton Street, right? A. Right.

Q. Beekman 3-53[illegible]. A. Right.

Q. Tytell, Martin Kenneth, Typewriters, 123 Fulton, Cortland 7-2388. A. Right.

Q. Now, what does that mean: Tytell, Martin Kenneth, Typewriters; do you manufacture typewriters? A. I am a typewriter specialist.

Q. Well, what does it mean? A. I sell typewriters, I build them, I convert them.

Q. You have an entry in the directory—Tytell, (2361) Martin Kenneth, Typewriters—what is that supposed to say? A. For every ad you have in the classified—

Q. Will you please answer? A. Well, let me explain it, sir. For every ad you have in the Red Book, you get a free listing. I got that for nothing, so I put it in. It means nothing, that I am in the typewriter business. But I am listed in the Red Book.

The Court: You are not a regular typewriter manufacturer only special purpose typewriters?

The Witness: Just special purpose typewriters.

By Mr. Brigadier:

Q. And you are also listed as Tytell Typewriter Co., Inc.? A. Right.

Q. At the same address? A. That's right.

Q. And that also is for the manufacture of special purpose typewriters, is that right? A. That's right.

Q. Just one other question. You suggested that the reason you haven't testified as an expert is that invariably your advice is taken? A. That's right. And I can substantiate that.

(2362) Q. But it was not taken by the federal government in the Hiss case, was it? A. Judge Stanton remarked upon that. The same objection was raised to me in that case, that Judge Goddard may have decided that this trial was not one of experimental nature, why hadn't this evidence been presented before? Who knows just on what they decided? It was just one of those things.

The Court: That's right. It could have been presented before.

The Witness: That's right.

The Court: You were available before to do it, and it should have been presented at the trial.

Mr. Brigadier: Except that that did not appear in Judge Goddard's opinion.

Martin K. Tytell—for Defendant Marcus—Surrebuttal—Preliminary Cross

The Court: That definitely appeared in Judge Goddard's opinion.

Q. That that was the basis of it? A. That's right. He said—he asked the other side to try to establish any knowledge at all that Chambers had had access to knowledge of doing the kind of work that Tytell did.

Q. You are not answering my question. Did Judge Goddard, in his opinion, in denying the new trial, rule that the reason he was denying it is that this evidence (2363) was available at the time of the original trial? A. No, that is not so. I merely quoted—

Q. That is the question I asked you. A. I merely quoted Judge Stanton.

Would you want me to bring up the Red Book, the Classified Red Book, and show you my ad? I mean, does that mean anything?

Q. You say you have been consulted by the New York City police? A. That's right.

Q. In what matter were you consulted by the New York police? A. Mr. Murphy, who is with the New York City Police lab, called at my place on several occasions to pick up specimens of typewriters for use in their files. The man who is replacing Mr. Murphy is James Osterberg. James Osterberg is the author of the book An Introduction to Criminalistics—

Q. Let's not go into that. A. But O'Hara—well, you asked me—

Q. Just a minute. You answer my question.

The Court: Were you consulted directly or indirectly by the New York Police Department?

The Witness: Through their representative, Mr. Murphy. And now through Mr. Osterberg.

Martin K. Tytell—for Defendant Marcus—Surrebuttal—Preliminary Cross

(2364) *By Mr. Brigadier:*

Q. Did you ever furnish any opinion to the New York City police on any questioned typewritten document? A. Not to the New York City police. I merely give them specimens. But the New York State police—

Q. Just answer my question. Did you furnish any opinions— A. No, I did not.

Q. Did you furnish any opinion to the New York State police on any questioned typewritten document? A. Yes, I just solved a case for them about a month ago. It was done on the foreign typewriter.

The Court: The answer is yes?
The Witness: Yes.

Q. And in what matter did you furnish an opinion to the New York State police on a questioned typewritten document? A. I determined for them that a certain document presented only a month ago was done on the Continental portable typewriter, so they could go out and look for a Continental portable, and finding that, with the man who did the anonymous letter, they would have the person.

Q. Maybe I didn't word the question specifically. Have you ever furnished—

(2365) The Court: Wait. He said an anonymous letter.

Mr. Brigadier: No. My question is whether he is going to testify about where he made a comparison and furnished an opinion as to whether something is genuine or not.

Q. Have you ever furnished an opinion to the New York City police, or the New York State police, as to the genuineness of any questioned typewritten document? A. The

Martin K. Tytell—for Defendant Marcus—Surrebuttal—Direct

New York State police called upon me only when they can't decide a simple matter, as to whether a document is—

Q. Would you answer my question? Did you ever furnish any opinion to the New York City police or the New York State police as to the genuineness or authenticity of any questioned typewritten document? A. No, I did not.

Mr. Brigadier: That is all. No further questions.

Direct examination by Mr. Grosman (continued):

Q. What happened in the Stanton case? A. In the Stanton case, Judge Stanton evidently believed me, because Gross and Gross got the decision.

The Court: Are they the lawyers, Gross and Gross?

(2366) The Witness: Gross and Gross are attorneys. They also were engaged in an export business.

Mr. Brigadier: Did he base his opinion on your testimony?

The Witness: The entire case at issue was whether this contract—yes. There was an issue whether this contract had been cancelled or not.

Mr. Brigadier: Did any other expert testify in that case?

The Witness: Mr. Osborn.

Mr. Grosman: For whom?

The Witness: For the opposition, for Maison Entekahab.

By Mr. Grosman:

Q. Now, you have been asked whether or not you belong to some society with this man Osborn. What is the name of the society? A. I believe it is the American Society for Questioned Document Examiners.

Mr. Brigadier: Don't you know?

The Witness: I am not too familiar with the name.

By Mr. Grosman:

Q. You don't profess to be an expert on questioned documents, do you? (2367) A. Only when they pertain to the identification of typewriting.

The Court: In other words, you don't go in for handwriting?

The Witness: No. This is a life study in itself. A man cannot, in my opinion, tell everything about—

The Court: All right. Now we found it out.

The Witness: If, in my lifetime, I will accomplish knowing all about typewriters I will feel I have successfully done what I started out to do.

The Court: That is a very laudable purpose.

Mr. Grosman: Now, I don't know whether your Honor is interested in knowing how you get into this questioned documents society, or if you can get in—

The Court: I don't care, no, any more than I question a lawyer if he doesn't belong to the American Bar Association. He doesn't have to; if he is licensed to practice law, he is a lawyer.

Mr. Tepper: We wanted to show that it is just like being on a lawyer's list. That is what we wanted to show. We wanted to show that they take one from an area, and if they have the one, it is—

Mr. Brigadier: Now, wait a minute.

The Court: Strike that out. I am not (2368) interested in whether he belongs to it or not.

By Mr. Grosman:

Q. Now, I show you three documents that have been marked in evidence here, DME-2, DME-50 and DME-51.

Were you asked to make an examination of those documents? A. I was.

Q. And did you do so? A. I did.

Q. Now, did you read Mr. Murphy's testimony?

Mr. Brigadier: I object to the question. It is completely irrelevant whether or not he read Mr. Murphy's testimony.

The Court: He is testifying as an expert. He will give his own testimony.

Mr. Grosman: All right.

Q. When and where did you first see these documents? A. On April 12, 1955, at the office of Samuel Marcus.

Q. What problem was presented to you at the time in connection with these documents? A. Mr. Marcus presented one problem to me. Could I identify DME-2 as having been typewritten on the typewriter that typewrote DME-50 and DME-51.

Q. And what was your answer? A. On April 13, the following night, I came back and (2369) told him I could not tell whether the same typewriter had typewritten the three documents, whereupon Mr. Marcus paid me and I was sort of discharged.

Q. Now, were you asked to make a further study of the documents? A. A week later Mr. Marcus called me back and he asked me to establish, or identify, two further things, the typist that did—no, the question was: Did the typist that typed DME-50 and 51 also typewrite DME-2; and did the author and dictater—and was the author and dictater of DME-50 and 51 the same as DME-2.

Q. At what conclusion did you arrive?

Mr. Brigadier: What do you mean, author?

The Witness: The author.

Mr. Brigadier: What do you mean, the person who dictated it?

The Witness: The author.

Mr. Grosman: Now, may I—

Mr. Brigadier: Wait a minute. I object to the question. Is he going to be an expert on who dictated? Is this what he is going to be permitted to testify to, something that you have to decide?

Mr. Grosman: May we have an objection, if Mr. Brigadier thinks the question is improper?

Mr. Brigadier: Will you repeat that to me? (2370) Maybe I didn't hear it correctly.

(Record read as follows: "A week later Mr. Marcus called me back and he asked me to establish, or identify, two further things, the typist that did—no, the question was: Did the typist that typed DME-50 and 51 also typewrite DME-2; and did the author and dictater—and was the author and dictater of DME-50 and 51 the same as DME-2?")

Mr. Brigadier: Well, I certainly object that he is not qualified, and I can't conceive of any human being qualified as an expert on who dictated a particular letter. I never heard of this. This is the most fantastic testimony I have ever heard offered.

Mr. Grosman: Everything is fantastic in this case, your Honor. Now, I didn't qualify him on the subject of his ability to identify authorship. I would like to do that now.

By Mr. Grosman:

Q. Can you tell us, Mr. Tytell, what your qualifications are for determining the authorship of a typewritten letter? A. For the last five years I have made a detailed study of internal evidence. We receive a lot of anonymous typewritten letter cases from management. One of the most

famous ones, which is confidential, but I can tell (2371) you about without mentioning names, was given to me by one of the members of Eisenhower's Cabinet, the nature of which was so secret they wouldn't give it to the FBI.

Mr. Brigadier: Maybe for security reasons you ought not to be talking about it now.

The Witness: I won't give you the—well, I will explain it to you.

A. (Continuing) Now, to determine who wrote this material anonymously—well, I can tell you how I went about it. Very fortunately, the paper happened to have a certain watermark. I checked with the mill who made this paper and I found that this mill had a distributor in Ohio. I checked with the distributor and I found that they had a stationery store that received this thing exclusively, very fortunately. They had three stores. I then checked with each of the stores. And we pinned the thing down to an office—this w a member of the Cabinet—that he had over there.

Mr. Grosman: Don't mention any names.

The Witness: I won't mention any names.

Mr. Brigadier: Is he now qualifying as a detective?

The Witness: No, no—

The Court: Why don't you give him a chance to answer how he can tell who the author of an instrument (2372) is? Then you can object, if you are not satisfied that he is qualified.

A. (Continuing) In this case I could not identify the typewriter, because several typewriters were used, but we identified the paper going geographically. So we narrowed down the office.

Then by means of internal evidence—people speak in a certain way. The method of speaking and writing is the

same as fingerprints, or your face, or your handwriting, or your signature. There is nothing new about internal evidence. The works of Shakespeare have been established as from that of his contemporaries by means of internal evidence.

For example, Macbeth, Chapter 4, Section 1, the famous witch scene, was done by Middleton. And the authorities agree on that.

In the courts throughout the land they have accepted internal evidence. In fact, there is one case right now where a man wrote a suicide note—and this is out in Los Angeles; I will give you that case—and by the internal evidence, the way this man wrote this note, they found out the man did not write it, but the fellow—in fact, the man was just indicted—indictment, October 6, 1954, first degree murder, California, Bart Caritatibo was indicted on two charges of murder based on (2373) the internal evidence contained in the suicide note, which led to the investigation of the will.

This indictment was based on the testimony of Sherwood Morrill, document examiner connected with the State Bureau of Criminal Identification and Investigation in Sacramento, California.

In the Baltimore & Ohio Railroad case I testified before the National Labor Relations Board. An anonymous note was sent to the railroad in which a man was called an epileptic, a drunkard, and unless this man was immediately discharged the railroad was going to have a tremendous accident. I was able to prove than an official in the union had written this, who wanted this man's job. The official said he was being persecuted because of union connections. And I established by internal evidence conclusively—

The Court: Who wrote that letter.

Martin K. Tytell—for Defendant Marcus—Surrebuttal—Direct

A. (Continuing) Who wrote that letter. The National Labor Relations Board agreed with me and the man was discharged, strictly on internal evidence.

(Discussion off the record.)

A. (Continuing) My contribution to the science of identification, when I die, I think will rest upon my ability to establish certain basic factors in internal evidence about anonymous letters. And I spent about six (2374) months on this for my thesis.

I am able, by scientific deduction—this is not a matter of a priori reasoning, where you suspect somebody, but without suspecting anybody, sometimes three people are equally suspect, but to go through their method of writing, their method of punctuation, and there is no other conclusion can be arrived at, scientifically.

The Court: All right.

Mr. Brigadier: Now, may I be heard, if your Honor please?

The Court: Yes, sir.

Mr. Brigadier: I object not only on the ground that he has not established himself as an expert qualified to testify on who dictated the letter, but there is a complete lack of evidence upon which any question directed to this witness can be based. All we know from the record is this, that William Miller testified that the questioned Exhibit was brought to him by Samuel Marcus. There isn't the slightest evidence from our side that Samuel Marcus dictated the letter, or who prepared the letter. There is simply the evidence that Samuel Marcus brought the letter to him.

On Samuel Marcus' side there is, one, a denial by Samuel Marcus that he dictated the letter; and, two, a denial by Mrs. Maginn that she typed the letter.

(2375) So that, therefore, there is no basis upon which this witness can be asked the question, without first excluding the possibility that someone else drew this letter on behalf of Samuel Marcus, because our case rested on the assumption that Samuel Marcus brought this letter in.

Mr. Grosman: Now, if your Honor please, the inference they sought to create throughout all this lengthy trial concerning this Exhibit, this unsigned Exhibit, was that Marcus presented that as the basis for the contract, the basis of the negotiations, and that, inferentially, he must have typed it—or dictated it.

Now, we are prepared to show that he not only didn't type it, that he didn't dictate it, because, as the witness says, the language is not that of Samuel Marcus.

The Court: You didn't need him for me to conclude that, I concluded that a long time ago, that it is not the language of Samuel Marcus.

Mr. Grosman: All right, if your Honor has concluded that, we require no further proof.

The Court: Maybe that is not enough. Maybe I have no right to conclude anything—

Mr. Grosman: All right.

(2376) The Court: —on a questioned document. I will allow the testimony. The objection is overruled.

By Mr. Grosman:

Q. All right. Go ahead. A. The basis of my conclusion, as I stated, was threefold, first, that the document did not necessarily originate on the typewriter used in preparing the standards, DME-50 and DME-51; second, that the questioned document, DME-2, was definitely not typed by the

same operator who typed the standards, DME-50 and DME-51; and, third, that the questioned document, DME-2, was not composed and dictated by the same individual who participated in the preparation of the standards.

Q. Now, let's take the first point you made, Mr. Tytell. What do you mean by the statement "did not necessarily originate on the typewriter used in preparing the standards"? A. If you will pass out the Exhibits—these are two-time blowups, sir, that I have made. This is about one and a half times, so it will be easy for the Court to follow. And I have got them all numbered. And you can see just how I arrived at my deductions, and see if you can get the same conclusion that I have reached.

It is all based upon the ability to see certain things that I think you will see as well as I see and (2377) reach the interpretation.

The typewriter used to write the questioned document was a Royal manufactured between 1922 and 1945.

The Court: Which document are you referring to now?

The Witness: The document DME-50 and the document DME-51.

Mr. Brigadier: You said the questioned document. Do you mean DME-2?

The Witness: DME-2, yes.

A (Continuing) —was a Royal typewriter manufactured between 1922 and 1945.

The typewriter used for the standards, DME-50 and DME-51, was also a Royal typewriter manufactured between 1922 and 1945.

But beyond that point no further identification can be made. These documents might have been typed on any one of a million elite typewriters found in business establishments anywhere.

Martin K. Tytell—for Defendant Marcus—Surrebuttal—Direct

Q. Do you mean "million" literally, or is it a figure of speech? A. I mean it literally. The typewriter was manufactured between 1922 and 1945. In 1922 the Royal serial number was about 600,000, in 1945 it was about 3,037,000, about three million machines manufactured during that period. (2378) According to the World Statistics, about 35 per cent there were elites, so I would say there were approximately a million typewriters that could have done DME-2.

Q. Now, it has been testified in this court that the machine in question was manufactured between 1945 and 1950. Is this an error in fact? A. This is an error in fact.

Your Honor, can I illustrate how I arrived at that, sir?

Q. Yes, you tell us how you arrived at that. A. Let me have those boards and I will explain.

(Handed to witness.)

A. On the left side you have the category of design falling from 1922 to 1945 and on the right side the category of 1945 to 1950. I call your attention to the "g"—you will observe the spacing in the 1922 to 1945 "g" the top oval has a horizontal width which is approximately half the horizontal dimension of the lower oval. This is the traditional small top "g" of the elite font used in the Royal 1922 to 1945 category.

On the 1945 to '50 "g"—the small "g"—the spacing between the top and bottom oval is equal to one-half the vertical dimension of the lower oval. The top oval is about one and a half the size of the top oval of the '22 to '45 category.

(2379) On the "a" in the 1922 to '45 the lower left—no, the lower enclosure strikes the right side high, about a point two-thirds of the height of the letter. The left side of the top also turns down appreciably to form a narrow gap.

Martin K. Tytell—for Defendant Marcus—Surrebuttal—Direct

The 1945 to '50 small "a" is a high-topped "a". The top stroke is arched high above the lower enclosure. It does not curve down much on the left, so that the left gap is wider than the "a" on the left. The current Royals use this new class of "a" at the present time.

On the "t"—the '22 to '45 "t" is an unbalanced crossing, longer to the right, extending to the right side just slightly longer than on the left. The "t" crossing extends to the outer edge of the bottom curve. If we draw a line, as I have done in this case here, you see that this outer curve meets the "t" crossing.

The Court: He is pointing to the one on the left.
The Witness: The left, the '22 to '45.

A. (Continuing) Now, the '45 to '50, the crossing is balanced and short. The cross bar extends the same amount to the right as to the left of the vertical staff and the right edge of the cross bar does not reach as far to the right as the bottom curve.

To prove that this is not only my opinion, I have (2380) a book here that I could substantiate the same findings, if I can have it—

The Court: The Royal people?

The Witness: No, sir. I checked with the Royal people. I was up there for three hours. They called Hartford and verified my findings. The reason I went to such thorough extent is because I wanted to be sure —disagreeing with another expert—I was on the right track.

A. (Continuing) This book is by Paul L. Kirk. Paul L. Kirk is Professor of Criminalistics at the University of California, Berkeley, California. In my opinion, he is the outstanding authority alive today on the identification through chemistry. He has written several well-known books on the subject.

The Court: He is the one Dr. Shephard just retained?

The Witness: That's right. That's the man.

A. (Continuing) Now, he shows the same example here, sir. I am quoting from page 464. He has it broken down into different categories.

Category 3 he calls Office Machines, '22 to '45; and Category 4, 1945 to '50.

Now, if we take Category 3 we go down to the "g", we see the small upper oval; No. 4, you can see the large (2381) oval.

If we go down to the next letter, the letter "a", we have the same thing. You will notice the way it is closed.

And if we take the letter "t" you have the same thing, right here. Notice it is equidistant—the crossing is equidistant on the '22 to '45.

And, further, I went to actual typewriters and I took off specimens.

We can enter this in evidence, if you please. This is the "g"—letter half the size, one and a half times. The same thing with the "a". And the same thing with the "t".

There are about a dozen letters which differentiate these two categories, but rather than burden the record I feel that these three will suffice; also the three easiest ones to catch on a quick glance. It doesn't require any specialized training of type identification.

Mr. Grosman: Now, your Honor, may I at this time offer in evidence this material that this witness has testified from?

The Court: Yes, sir.

The Clerk: DM-54, blowup, Royal elite typewriter specimens, 1922-'45 series and 1945-'50 series.

(Received and marked Exhibit DM-54.)

(2382) Mr. Brigadier: Is the witness going to try this case? Is he an expert and also the lawyer?

The Witness: I'm sorry.

Mr. Brigadier. I think it's about time he was restricted to the position of the witness.

Mr. Grosman: That is all he is. He knows he is a witness.

The Clerk: DM-55, blowup of letter dated August 26, 1948.

(Received and marked Exhibit DM-55.)

The Clerk: DM-56, blowup of letter dated June 30, 1947.

(Received and marked Exhibit DM-56.)

The Clerk: DM-57, blowup of letter dated March 26, 1948.

(Received and marked Exhibit DM-57.)

The Court: Now, there is a sample here which he has of the actual typewritten letters from the typewriters in the periods that he mentioned.

Mr. Grosman: May I offer those in evidence?

Mr. Brigadier: Those are what?

The Court: The actual typewriter samples, right from the typewriters, showing the difference between these letters on the typewriter.

Mr. Grosman: Do you want to see this?

(2383) Mr. Brigadier: Yes, I don't know what it is.

The Witness: May I explain?

The Court: You know what it is. I said it is actually taken from the typewriters for the two periods showing the distinction in letters.

Mr. Brigadier: I didn't understand you. I thought you said the typewriter in question. I wondered how we could have the typewriter in question.

The Court: I didn't mention the word "questioned."

Mr. Brigadier: Then I misunderstood you.

These are from the official samples that he used, is that it, of typewriters manufactured during that period?

The Witness: This is merely to show the basis for my conclusion, that this typewriter that did DM-50 and DM-51—

Mr. Brigadier: Just answer my question. Did these come from typewriters which you checked that were manufactured during this period?

The Witness: That's correct, to show the difference—

Mr. Brigadier: I have no objection.

The Clerk: Typewriting sample will be marked DM-58.

(2384) (Received and marked Exhibit DM-58.)

By Mr. Grosman:

Q. Now, you are positive in your determination as to the dates of the manufacture of the typewriters? A. Absolutely positive.

Q. Now, what makes you say that no further identification can be made? A. The questioned document, DME-2, is a very poor carbon copy. From the appearance of the questioned document, the carbon has obliterated the distinctive characteristics of the machine, preventing a scientific determination for purposes of machine identification. Beyond merely naming the manufacturer and class of type which produced the document, no identification can be made. The writing through successive sheets of carbon

paper has so obscured and blurred and spread the characters that no defects in type could be visible, nor could any distinguishing characteristics in the alignment of the letters be identified.

There is no basis for the conclusion that the questioned document was produced on the identical machine which produced the standards, DME-50 and DME-51.

Q. Now, can you further substantiate your statement that carbon paper will obliterate identifying features to prevent individual machine identification? (2385) A. Yes, from patterns which are clearly established by examining the two standards, DME-50 and DME-51, such patterns, for the purpose of identification, could not be established from the carbon copy, DME-2.

If I may illustrate what I mean by that. This glass was made for me about six years ago by Mr. Nicholls in Nutley, New Jersey. He is the man who made the bombsight—

> Mr. Brigadier: Now are we going to have to receive testimony about Mr. Nicholls?
>
> The Court: No, because then we will have to start cluttering the record up with the glass and the like. If you refer to the glass we have got to have that marked in evidence.
>
> The Witness: All right.

A. (Continuing) Well, the entire basis for my conclusion—

> Mr. Brigadier: If you are going to use a glass, use it.
>
> The Witness: But I have to explain what this glass is, what it does and so on.

Q. Don't tell us who made it, tell us what— A. This is a precise measurement instrument, absolutely precise, to one ten-thousandth of an inch. When I take this glass and I carefully lay the thing over DME-50, or DME-51, which is an original typing, I form a definite pattern.

(2386) Now, this is elite type. This type is 12 letters to the inch, horizontally. Let us imagine every one of these things fitting into a little square. That is what this is, little squares.

Now, the method of identification is that if this letter fits squarely in this box, rests on this base line, it would be a perfect letter. But when it deviates to the right, left, above or below, or tilts, or slants, it's a defect.

When this typewriter left the factory, it was a normal typewriter. We now judge it as it is now today.

I use this to determine the pattern. I can put this on here, which is DME-50, I can put it on DME-51, but when I put the thing on DME-2 I can make no scientific determination of any of the defects. I am, therefore, scientifically unable to determine whether this was done on the same typewriter as did the DME-51 and DME-50.

The Court: And this is known as a precise measuring glass, is that right?

The Witness: Right, an overlay glass with elite scale. There are a complete set of these things, to measure angles, and distances, and measure whether the typewriter has been taken out of the typewriter and reinserted, but always using just this one glass out of the set to merely show the alignment pattern—that this (2387) carbon cannot be determined by means of this overlay glass.

Q. Now, have you told us how you arrived at your conclusions which you have given here this morning, with respect to the shape and size of the various letters? A. Yes, I pointed out the dates, and I have pointed out my inability to identify the carbon copy, DME-2.

Q. In your judgment, could the questioned document, the carbon copy, DME-2, could that be identified, could the ma-

chine on which that was written be identified by any known method, or by any methods known to you? A. There are certain established standard methods by which typewriters—

The Court: Why don't you say yes or no first?

Q. Your answer is what? A. It could not be identified.

Q. You don't think anybody could identify it? A. Not scientifically.

Q. Now, is punctuation accepted as a determinative factor in identification? A. It definitely is, on mechanical evidence as well as internal evidence. In fact, there is a famous will case—

The Court: You answered it. Don't volunteer (2388) information.

Q. To your knowledge, has punctuation been accepted as a determinative factor in any particular court cases? A. Yes, there is a well-known will case, which I will cite.

Q. What is the name of it? A. The James W. Conger Estate case, Cleveland, Ohio, 1927. Conger was a self-taught typist and left no space after commas and periods, while the claimed papers alleged to have been written by him were all correctly spaced. This case was decided merely on the basis of such a difference in punctuation.

And the Martin Highwayman case, Ogden, Utah. The incorrect use of the apostrophe is a characteristic— resulted in the conviction to a life sentence.

I would like to add that old man Osborn was aware of these things and in his book he spends a chapter on internal evidence.

Mr. Brigadier: I ask that that be stricken. That has not been asked for. This is a volunteered statement.

The man is now testifying as an authority on what cases hold. I don't know—to what extent is this man to be permitted to testify? He is now citing what cases hold. That is a matter of law, what cases hold.

(2389) The Court: You can question him about where he gets his information, and the basis of his knowledge.

Mr. Brigadier: I thought experts testified as to matters of expert opinion.

By Mr. Grossman:

Q. Now, you further testified, Mr. Tytell, that a person who composed and dictated these questioned documents is not the same individual who composed and dictated the standard prepared by Sam Marcus.

Mr. Brigadier: I object to the question, unless you are doing it accidentally. You are referring to "questioned documents." Of the three, there is only one that is questioned. Am I right?

The Court: As I understand it, DME-2 is questioned.

Mr. Brigadier: So it is singular. I don't know what else you are involving in that question. Is it an accident?

Mr. Grosman: No, it isn't. He had to have some comarison. He couldn't just take that one document, DME-2, and reach a conclusion.

Mr. Brigadier: But, Judge, you don't understand me. The other two are the standards. They are not questioned documents.

Mr. Grosman: All right.

(2390) Mr. Brigadier: Are you referring to something else? That is what I want to make sure.

Mr. Grosman: I am referring to the material that the witness had before him at the time he made his examination and the time he reached his conclusion.

Mr. Brigadier: Then it was just a slip of the tongue and I didn't know.

Mr. Grosman: If you want me to use the singular instead of the plural—

Mr. Brigadier: Yes, because I don't know when you are trying to spring something. I have to watch it. There has been a lot of stuff sprung here and I have to watch it.

Mr. Grosman: By this time I know Mr. Brigadier. I know he doesn't mean anything—

Mr. Brigadier: I do mean it, because that is the way this whole thing has been done. This should all have been part of their original case. They wait until after their case is closed and then do it afterwards.

Mr. Grosman: We couldn't do it until you put this man Murphy on to testify that these documents originated on Mr. Marcus' typewriter, or something to that effect. We are now contradicting Mr. Murphy. We couldn't do it until he testified.

The Court: Do you know what the question was (2391) now?

The Witness: Would you repeat the question?

(Question read as follows: "Now, you further testified, Mr. Tytell, that a person who composed and dictated these questioned documents is not the same individual who composed and dictated the standards prepared by Sam Marcus.")

Mr. Brigadier: With the understanding that you mean singular, I have no objection. I didn't know what you were driving at. A. I did.

By Mr. Grosman:

Q. Now, how did you come to that conclusion? A. I examined about 500 letters dictated by Mr. Marcus.

Mr. Brigadier: Oh, now, if your Honor please—

The Court: Don't you think now that—

Mr. Brigadier: —we first have to have in evidence what he examined, and proof that it was done by Mr. Marcus. What is this going to open the door to, another 500 letters that I am going to have to question about? As a matter of fact, we don't even have at this point in the record proof of the real dictation of the standards, all that we have is proof that Marcus signed these standards.

(2392) Mr. Grosman: Now, I don't understand that we have to bring the 500 letters in. We didn't bring the typewriter in. I think he ought to be permitted to say how he arrived at this.

The Court: This is the first time I have heard it objected to, Mr. Brigadier, what an expert did to arrive at a conclusion. I have heard them testify here that they examined a thousand samples of something. I never heard the lawyer say that he has got to bring the thousand in.

Mr. Brigadier: Then how can I cross examine?

The Court: I don't know. I never had a lawyer do it before. Maybe you are a better lawyer than all I have had in this court.

The Witness: I brought samples with me.

Mr. Brigadier: Just let my objection be noted on the record, if your Honor please.

The Court: I shall overrule the objection.

By Mr. Grosman:

Q. Go ahead. A. I have samples with me. I took hand-

fuls, after I read the thing, in case anybody wanted to see my basis of conclusion, which I can give to the Judge.

The Court: Don't volunteer so much information, just answer the questions, please.

(2393) The Witness: All right.

A. The known standards composed and dictated by Sam Marcus, in my opinion, are written in an easy flowing, almost conversational style. Apparently Mr. Marcus is accustomed to dictating correspondence.

The Court: And plenty, too.

A. (Continuing) His style is clear, easily understandable, lucid and direct.

On the other hand, the questioned document is written in a legalistic language which is difficult for a lay person to understand at first reading. I had to read Q.E.D.—DME-2 through twice before I was able to understand what this was all about, whereas, on all of Mr. Marcus' material you just read it once and it is understandable.

He uses colloquial free expressions, such as "as you know," "you mentioned over the telephone"—that's in his documents here. They are relaxed, natural phrasing.

In the questioned document you have "the undersigned does hereby," "the state of affairs that prevail." If Mr. Marcus had dictated the questioned document, it probably would have been written something like this, "Al Bierman is offering to buy your shares of Milmar," not, "The undersigned, Al Bierman, does hereby offer to (2394) purchase all of your shares in Milmar Estates."

It is my opinion that the legalistic phrasing is not the habitual mode of expression of Mr. Marcus.

Q. Now, is this analysis of internal evidence an accepted procedure in document examination? A. Yes, it is. I mentioned Act IV, Scene I, of Macbeth, and—

Mr. Brigadier: I object. There is no further question.

The Court: He is volunteering again. Can't you keep it short and don't volunteer?

The Witness: I am sorry.

The Court: The next question.

By Mr. Grosman:

Q. Now, in any event, you concluded that the questioned document did not originate with the person who dictated DME-50 or 51? A. That is my conclusion.

Q. Nor was it typed by the typist who typed these documents? A. That is my conclusion.

Mr. Grosman: Cross examination.

The Court: Some of the original Exhibits, Mr. Brigadier, are up here on the bench.

Mr. Brigadier: I am looking for the letter (2395) that Mr. Marcus wrote Mr. Winne. Remember, the one that I read and couldn't make any sense of. I want to find out how lucid he finds this letter to be. But the clerk says he doesn't think we put it into evidence.

I have the copy. Mr. Winne walked off with the original. You have objected to it going into evidence and I offered it on the ground that it affected his credibility. Your Honor ruled that it was admissible for that purpose, and apparently I slipped up and did not hand it to the clerk.

Cross examination by Mr. Brigadier:

Q. I show you a letter that Mr. Marcus wrote to Winne & Banta, dated August 14, 1947. Will you read the second paragraph of that letter and tell me if this is the kind of

lucid, clear style of Samuel Marcus that you have been finding in these 500 letters that were handed to you? A. "You advise that this money is owed to you by me. This is incorrect. The money is owed to you by Bill Miller's Riviera and this demand should be made from Bill Miller's Riviera."

This is typical of the language—

Q. Finish the paragraph. A. I finished the paragraph. You told me to read the second paragraph.

(2396) Q. No, this is the paragraph I pointed to, beginning, "You are no doubt—" A. That's the third paragraph. You said the second.

Q. All right. The error is mine. The third paragraph. A. "You are no doubt in constant touch with that organization having lately represented them in some litigation and I do not see any reason for your addressing demand for payment to me at this time when he is fully capable of taking care of his bills. I did advise you at one time that I would see to it that your bills were paid. But it is rather peculiar form at this time to demand payment to you from a person who owes you money and who is your client."

Q. Do you think that is clear and lucid? A. This paragraph further establishes the fact—

Q. Just answer my question. A. I want to explain.

Mr. Grosman: Let him answer.

Q. Does that appear clear and lucid to you—"to demand payment to you from a person who owes you money and who is your own client," that is lucid to you? A. Colloquial expressions are being used here.

Q. That is lucid? A. Yes.

(2397) Q. That is all I want to know. A. And I can show—

Martin K. Tytell—for Defendant Marcus—Surrebuttal—Cross

Q. That is all I want to know, if this is lucid. And you say it is lucid.

Mr. Grosman: Is that in evidence?

Mr. Brigadier: I would like to put this in, in view of the fact that Mr. Winne apparently carried off the original. And I represent to your Honor that this is a copy that Mr. Winne furnished me of the letter that he had here with him.

The Court: All right.

Mr. Brigadier: I thought I had marked it into evidence originally.

The Court: Had we marked it for identification?

The Clerk: No, sir; we hadn't marked it at all.

Mr. Brigadier: You had ruled that it was admissible—and I don't know where I slipped up—and I didn't put it in.

The Court: With this mass of documents I can understand how it happened.

The Clerk: DME-69, copy of letter dated August 14, 1947, from Fotoshop, Inc., to Winne & Banta.

(Received and marked Exhibit DME-69.)

The Court: Do I understand the gist of your (2398) testimony is that some people write as they speak, is that right?

The Witness: That's right. In fact, if you wish me to, I could show examples.

The Court: No. That's what I understood you to say.

The Witness: Yes, that's correct.

The Court: Because I know people who do write like that. And I know people who speak very loosely and write beautiful English letters.

The Witness: But even if they do, there is still less difference between the way they speak and the

way they write than there would be between two other individuals. You can still match them up.

The Court: Yes, that I can understand.

By Mr. Brigadier:

Q. Do I understand that DME-50 and DME-51 you testified were typed on the same typewriter? A. That's right.

Q. Now, I understand that as to DME-2 your testimony is that it was the same type of typewriter, right? A. Right.

Q. The same kind—or whatever the word is that you used. (2399) A. The same make, yes.

Q. The same make. A. Right.

Q. The make being Royal? A. Yes.

Q. The same model? A. Yes.

Q. The model being what? A. K.H.M.

Q. The same kind of type? A. Yes, elite type, the letter "e" in the center of the type.

Q. And that is the reason you cannot state, and you are not stating whether or not it was DME-2—DME-2 is on the same typewriter as the standards is because it is a carbon copy? A. A poor carbon copy.

Q. That's your testimony, right? A. Right, sir.

Mr. Brigadier: That is all. I have no further questions.

Redirect examination by Mr. Grosman:

Q. Now, what were you going to say with respect to the third paragraph in this letter, DME-69? A. That this paragraph is definitely representative (2400) of the style of Mr. Marcus. I could show you the same usage in oral testimony.

For example, he says here, "This demand should be made from Bill Miller." He mixes up some of his clauses.

May I refer to a number specifically?

Mr. Brigadier: There is no dispute that Samuel Marcus wrote this. Can you show it in the standards, as you used it, is what we are talking about. This is not in dispute.

The Court: They don't deny that. He just wants to know whether that letter, that Exhibit, DME-69, represents the style which you attributed to Mr. Marcus in the standards.

Mr. Brigadier: As being lucid and clear.

The Witness: There is one sentence here, which is unfair to reach a conclusion, because we are picking out one or two phrases out of context, and maybe—

Mr. Brigadier: I don't think this witness should be permitted to testify to whether it is fair or not.

Mr. Grosman: Now, if your Honor please—

The Court: Just a minute. What was the question I asked him?

(Record read as follows: "—DME-69 represents the style which you attributed to Mr. Marcus in the (2401) standards?")

The Court: That's all. Yes or no?

The Witness: Yes.

The Court: That's all I asked you.

Mr. Grosman: That's all.

Mr. Brigadier: No further questions.

(Witness excused.)

The Court: Suppose we adjourn now and return at a quarter of two?

(Noon recess.)

Colloquy

AFTERNOON SESSION

Mr. Grosman: I would like to call Mr. Marcus, both on direct, your Honor, for the purpose of showing what he discovered in his examination of the cartons in Mr. Kevelson's place, and also on rebuttal.

Mr. Brigadier: If your Honor please, I will object to any evidence of Mr. Marcus on direct. Mr. Marcus has been on the stand now four different times now on direct examination. How often are they to be permitted to reopen their case. My client, Miller, has (2402) gone back to Las Vegas; Bierman is gone.

The time to have called him was when they were here. It seems to me there ought to be an end as to how many times this should be done.

The Court: I hope there will be an end to it some time, some day, some week, some month and some year.

Mr. Grosman: Now, of course, we had nothing to do with Mr. Miller going back to Las Vegas. You remember that he was interrupted in order to put Mr. Miller on.

Mr. Brigadier: But you had rested your direct case.

Mr. Grosman: No, I had not.

Mr. Brigadier: You were offering Marcus only on rebut al.

Mr. Grosman: No, I hadn't. Of course, we couldn't give any testimony as to what he found in the examination of the cartons in Mr. Kevelson's office. That was done during the recess period.

The Court: We haven't had any testimony as yet as to what they found in the cartons?

Mr. Grosman: I think he started to give some testimony at the time he was interrupted in order to put Mr. Miller on, in order to get back to his $90,000 a week show.

Colloquy

(2403) Mr. Brigadier: That is not what the record shows at all. The record will show that the plaintiff—after the investigation of the books, the records, after we came back from the six weeks interval—announced that they rested their case.

Then I said, "All right. I will put in my rebuttal evidence."

Then they asked to reopen for the purpose of showing the fact that they had found the Whitney duplicates, if you recall. And I objected on the ground that they had rested their case.

And your Honor said to me, "Well, that is the basis of your objection, I am going to let them reopen to put in the Whitney duplicates."

Then they rested again. Now we are back again to a reopening of their case. It means that I am going to have to go out again to get other witnesses.

The Court: No. The minutes of April 12, 1955, of the Clerk of this Court show that the defendant Marcus rests.

Mr. Grosman: Now, if your Honor please, may we ask the stenographer to read his minutes, because I checked with him this morning, and we did not rest our case.

The Court: I made a note in longhand that (2404) Mr. Marcus was interrupted.

Mr. Brigadier: But that was about the Whitney Duplicating checks. Now he has announced that he wants to go back to direct, as well as rebuttal. And that is what I am objecting to.

I have no objection to rebuttal. I am objecting to his reopening the case for any direct evidence, which will necessitate my bringing back my witnesses, perhaps, to negate what he is going to say.

Mr. Grosman: Do your notes indicate—

The Court: All I have in my notes is that Mr. Marcus was interrupted and would be recalled.

Mr. Grosman: Yes, because I didn't remember—Mr. Brigadier says this thing has been going on and off, like the Lord knows what, so I asked the stenographer to read back to me what happened at the conclusion of the last hearing. He told me—

Mr. Brigadier: We are talking of two different things.

The Court: As I understood it, the last time Mr. Marcus was put on the stand was in rebuttal.

Mr. Brigadier: That's right.

The Court: But the direct case was all in, and that you had rested. And the clerk's minutes so indicate. He just gave me an abstract of them, on April 12.

(2405) The Clerk: The last hearing date was April 14.

The Court: That's right. Mr. Marcus was on April 14 and was withdrawn.

Mr. Brigadier: And he testified what he had found in Whitney, and also about the file that he got with Roth from Schwartz' office, and also in rebuttal about the release slips that had been signed, you know, that he brought them to Judge Grosman.

The Court: Why am I asked now to reopen the direct, for what purpose?

Mr. Grosman: I want to question him as to what he found in the records contained in the cartons at Mr. Kevelson's office.

The Court: The last time he went there?

Mr. Grosman: Yes.

Mr. Brigadier: Which was before he rested, which was February 23.

Mr. Grosman: You remember, Mr. Chazin took the stand and he testified about a lot of argument back and forth.

Colloquy

Mr. Brigadier: But your Honor ruled on that.

The Court: Well, he hasn't been there since, has he?

Mr. Brigadier: No.

The Court: This is still going to be about (2406) what he found the first time he went there?

Mr. Grosman: That's all.

The Court: No, I will not allow it.

Mr. Grosman: All right.

I make a proffer of the evidence and your Honor can rule it out.

The Court: That's right, I will, because otherwise we are going to start this case all over, for another three months.

Mr. Grosman: Now, may I state what I would like to prove?

The Court: You may, and I will rule.

Mr. Grosman: That he received the '46, '47 and '48 figures from Hoffman showing gross income, and that he wants to contradict the testimony of Mr. Hoffman in that regard; that he received figures from Hoffman of the total expense, and he wants to contradict that; that he received from Hoffman figures of total income—I am now speaking about the Riviera—and he wished to contradict that; that he wishes to offer evidence as to the payroll of the Riviera during the years 1946 and '47, which information he didn't have previously; that he wishes to offer the testimony as to the cost of the entertainment of the Riviera during the years '46 and '47; that he wishes to offer testimony with respect to (2407) the figure of $753,000 testified to by Mr. Hoffman as the gross income of the Riviera in 1946, and how he arrived at his conclusion with respect thereto; that he wishes to offer evidence as the entire expense of the Riviera for the year 1946 the nature of the

expenditure for that year, the source from which he obtained those figures; the number of weeks that the Riviera operated during the years '46 and '48; the cost of the food and liquor for the 26 period the Riviera operated in '48; the total of the following items of the Riviera for the years '46 and '48: Entertainment, overhead, bands, chorus girls, general operating expense, food and liquor; he wishes to testify as to the figures given by Mr. Hoffman as to the loss of $90,000, reported by Mr. Hoffman for the year 1946; testimony as to the correctness of Mr. Moffman's statement as to receipts and losses for the fiscal year 1947 of the Riviera.

Now, all of these computations and figures, testimony that Mr. Marcus wishes to offer, was obtained by him from his examination of the records in the possession of Mr. Kevelson and goes to the charge—general charge of fraud, and, of course, lays the groundwork for the testimony of accountants, expert accountants, to back his figures up.

Mr. Brigadier: May I just be heard very (2408) briefly, your Honor?

The Court: Yes, sir.

Mr. Brigadier: As I listened to Judge Grosman I thought for a moment I was listening to some other case than the one we had tried, because I assumed, from what he was reading, that Hoffman had testified here as a witness.

Your Honor recalls that Hoffman has not testified as a witness in this case, except on one narrow issue, namely, where the books are from 1946 to 1948 that are missing.

What happened was that Judge Grosman offered in evidence, as his evidence, the testimony given by Mr. Hoffman before the Condemnation Commissioners, and

read to your Honor only a small portion thereof, which would indicate that Hoffman had testified that there were great profits.

During the luncheon recess we examined that transcript which he produced, and which we saw for the first time, and discovered to our great amazement that he had not read to you the various pages on which Hoffman had testified there were losses; there was gross income, but losses.

Now, after he has put in his evidence, and after he has rested the case—don't forget, he put this evidence (2409) in long prior to February 23—on February 23 this man made this investigation. He knew all of this from February 23 to April 12.

On April 12 he announced that he rests his case. Now he wishes to put in evidence, which I contend he couldn't have put in even on February 23, because what he is seeking to do is impeach his own evidence. He offered the Hoffman evidence. We didn't offer it. If he offered it, he is bound by what he offers; or if he considers that he wasn't bound, he should at that time have offered whatever evidence he could have. Certainly up until April 12 he had all the opportunity in the world, since he admits that he got this information on February 23.

The Court: Do you object?

Mr. Brigadier: Yes, I do.

The Court: Before I rule on it, I want this on the record.

I am firmly convinced in this case that there are certain people who never want this case to end, for reasons of their own. I can suspect why they don't want it to end, because I haven't been around courts since 1922 for nothing, and I think I know all the tricks of the trade, and I discern one here that I don't care to discuss.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

If I were to permit this, we would go on for weeks and weeks, and I could call the rest of my calendar off (2410) for the rest of the year.

The objection is sustained.

Mr. Grosman: May I have my exception noted?

The Court: You certainly may.

Mr. Grosman: All right. I will go on with the rebuttal, then, your Honor.

The Court: Yes, sir. I thought this one day was going to conclude the case.

Mr. Grosman: I thought so, too, your Honor.

The Court: Well, it never will, the way it is going. But it is going to end very soon. Maybe I will make a reversible error and you can go all through it again before another judge, and let him enjoy it. There must be a time when a judge can say, "I heard enough to decide this case." I am sure it comes in every trial.

Samuel Marcus, resumed the stand, in surrebuttal.

Direct examination by Mr. Grosman:

Q. Now, Mr. Marcus, did you and William Miller and Mr. Hoffman ever sit down and discuss the matter of ordering duplicate tabs for Bill Miller's Riviera? A. I did not.

Q. Did you know that such tabs had been ordered, in duplicate? (2411) A. I did not.

Q. Not in duplicate, but in "repeats." A. I had no knowledge of it whatsoever.

Q. Now, Robert Schwartz testified that in or about September of 1948 you were very short of money and that you urged this deal to go through for the sale of the Milmar stock; was that so? A. It is not.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

Q. Now, was Mr. Schwartz, Robert Schwartz, on a retainer with you in September, '48? A. He was.

Q. And how long thereafter did he continue to be on retainer with you as your attorney? A. I believe until March, 1950.

Q. Have you anything to prove that? A. I do.

Q. What have you got? A. You have the record of all the bills and payments. Which ones do you want, the last one?

Q. The last ones, after September, '48. A. Here is the last bill, from June, '49, to March, 1950. After September, '48?

Q. Yes. A. Here is from September, '48, to May, '49.

Q. Let me have it.

(2412) (Document handed to counsel.)

Q. Now, these are checks to Alfange & Friedman; and was that Mr. Robert Schwartz' firm at that time? A. That's correct.

Q. Is this a resume of the amount you paid him? A. It is.

Q. From August, '48, to May, '49? A. That's correct.

Q. Plus disbursements? That's right.

Mr. Grosman: I offer these in evidence as a batch.

Mr. Brigadier: Does that include the bills, Judge, that he received from Alfange & Friedman?

Mr. Grosman: I don't know. There are the checks that he paid them.

Mr. Brigadier: He may have paid them for services years before. I am asking whether the bills are here.

Mr. Grosman: He says as per services rendered after September 14, '48.

Mr. Brigadier: I object to the self-serving declarations attached to the Exhibit, which are statements prepared by Fotoshop, which have nothing to do with

Alfange & Friedman, of where they have listed the moneys (2413) that they might have paid. That's self-serving.

What would be evidentiary would be the checks, and any bills he received from Alfange & Friedman.

The Court: I think that he has got a good one right here, if I can see right. Here is a good one here, "As per retainer," the billhead of Alfange & Friedman.

Mr. Brigadier: That is what I am asking for, Judge.

What is the top one?

Mr. Grosman: That is a resume of some sort.

The Witness: That isn't my preparation, that's Schwartz' preparation.

Mr. Brigadier: All right. I withdraw the objection.

By Mr. Grosman:

Q. Is this the bill submitted to you by Alfange & Friedman, Mr. Robert Schwartz' firm, on May 1, 1949, for the items represented by these checks? A. Yes, sir; it is.

Q. Who prepared this statement entitled "Fotoshop"? A. Mr. Robert Schwartz brought this to me at the time when this whole thing was straightened out with him.

The Court: You had him on a monthly retainer, is that right?

(2414) The Witness: A monthly retainer; yes, sir.

Mr. Brigadier: You offer them and I will look at them. I want to check something.

Mr. Grosman: Mark these.

The Clerk: DM-59, series of documents and checks.

(Received and marked Exhibit DM-59.)

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

By Mr. Grosman:

Q. Now, I show you another batch of checks and notes to the order of—strike that—notes, no checks to the order of Alfange & Friedman, for the period commencing June, '49, and ending March, 1950, and a disbursement of a hundred and thirty-six forty-four, totaling in all two thousand one hundred thirty-six forty-four, and ask you whether or not these notes were given in pursuance of this bill and if the notes were paid? A. They were.

Q. For services rendered to you during this period? A. That's correct.

Mr. Brigadier: May I see that, Judge?

Mr. Grosman: Yes.

(Documents handed to counsel.)

Q. Now, did you dispute any of these bills? (2415) A. There was one bill I disputed.

The Clerk: DM-60, series of documents and notes.

(Received and marked Exhibit DM-60.)

A. (continuing) I am in error. I didn't dispute any of those bills.

Q. What did you dispute? A. I disputed a bill here in March, '48, where he arbitrarily increased my retainer from $150 a month to $250 a month, and I objected to it, and we agreed upon $200 a month, which was acceptable, and billed at that particular basis from there on, from August, '48, on.

The Court: Did he raise it without consulting you?

The Witness: Without consulting me. Merely said they weren't getting enough money, and he jumped it up here—April has a hundred and fifty, and jumped it up in May to $250.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

The Court: You had a perfect right to object.

Mr. Grosman: I offer these in evidence.

The Clerk: Series of checks and documents will be marked DM-61.

(Received and marked Exhibit DM-61.)

Q. Now, Mr. Schwartz has testified that he made you some small charge for services rendered to you on (2416) September 14, '48; what did he charge you?

Mr. Brigadier: I don't remember Mr. Schwartz saying it was a small charge, Judge; do you recall it?

Mr. Grosman: That's my recollection.

Mr. Brigadier: I am not going to make any objection, but I don't remember his saying that.

Mr. Grosman: Well, all right.

Q. Now, what did he charge you and what did you pay him for his services to you in the preparation of this contract of September 14, '48, and the services incidental thereto? A. $1,000.

Q. Now, is this the check you paid him? A. Yes, sir; it is.

Q. And it cleared through the bank and was paid? A. Yes, sir; it was.

Mr. Grosman: I offer in evidence, your Honor, a check to the order of Alfange & Friedman, dated September 28, 1948.

The Clerk: DM-62, check.

(Received and marked Exhibit DM-62.)

The Court: That fee was confined exclusively to the services rendered in connection with this deal of September, 1948, is that right?

The Witness: Yes, sir; that's correct.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

(2417) Q. Now, was there some dispute between you and Mr. Winne with respect to the bill submitted for the incorporation of Milmar Estate, Inc.? A. No dispute whatsoever, with reference to Milmar.

Q. Well, what, Riviera? A. Yes. Mr. Winne sent me a bill for payment of the Riviera Corporation, and I told Mr. Winne that I had nothing to do with the Riviera Corporation, I wasn't going to pay him personally for Riviera obligations. I had paid him for my Milmar bill.

Q. Do you remember the amount of that bill, for the Riviera? A. Well, I don't know the Riviera bill, no. The Milmar bill, I believe, was $685, I believe, for the incorporation of Milmar.

Q. You paid that? A. We paid that, yes.

Q. Now, do you recall a conversation with Bill Miller wherein you told him—or, did you tell Miller that if Schimmel would reduce the amortization payments to Milmar you would reduce the rent to the Riviera? A. Yes, I had a conversation with Mr. Miller pertaining to that.

Q. Did you tell him that? A. Yes, Mr. Miller—

(2418) Q. All right, just— A. Yes, I did.

Q. Were you shown the bankruptcy schedules in the bankruptcy application of the Riviera? A. I was not.

Q. How did you come to sign the summary schedules of debts and assets? A. Mr. Hoffman came over to my office one day, some time around the time when these papers were signed, and he had two papers—he told me that they were having a lot of difficulty with the creditors, that if I would agree to waive immediate payment of the rent; it would be a big help for them to make a satisfactory settlement with the creditors, and would I go along with Bill and help Bill along on that. And he took out a paper out of his pocket, a summary of debts—of liabilities and assets, which I jotted the figures down at that time, I be-

lieve it showed $180,000 with of liabilities and $27,000 in assets.

He said to me, "Sam, things are pretty bad over there." He says, "Help Bill Miller along as much as you can, sign this waiver here of rent, and we will be able to get by with our creditors."

I signed the two papers he gave me—I believe it was two papers he gave me to sign, waiving immediate (2419) payment of rent, or something, I don't recall. He left me no copies of the papers whatsoever.

Q. Now, you filed an income tax return for the year 1948? A. I did.

Q. And did you set up in that income tax return the number of shares of Milmar that you sold? A. I did.

Q. You have that income tax return with you? A. I do.

Q. Where is it? A. Mr. Leichtman has it right here.

Q. How many shares of stock of Milmar Estate, Inc., did you report having sold in '48?

Mr. Brigadier: I object, if your Honor please. This is purely a self-serving declaration. This is something he dealt with, not with us, his report to the federal government. No man can make a report to the federal government and then offer it in evidence on behalf of himself. It can be offered in evidence to contradict him, impeach him, or affect his credibility, but he certainly can't use his own action as evidence for himself as against others.

The Court: Isn't he supposed to file a truthful statement.?

(2420) Mr. Brigadier: Yes, but suppose he didn't. How could it possibly be evidence against us? He is not dealing with us, he is dealing with the federal government. It is pure hearsay as far as we are concerned.

We can use it to affect his credibility, because it would constitute admissions against him.

But when he offers it, it is self-serving declarations. And a man could theoretically anticipate anything and put it into an income tax return.

The Court: What year is this?

Mr. Grosman: 1948. That is the year of the great contract.

The Court: You mean the report for the year 1948.

Mr. Grosman: Yes, your Honor. Filed, of course, in 1949.

The Court: Yes.

Mr. Grosman: Now, you will remember, Judge, that all throughout—if they haven't been saying it, they have been inferring it—that Mr. Marcus' claim to the stock—to 625 shares of stock remaining in his possession was an afterthought, that he cooked this up after all this examination on deposition, and so forth; and after he learned that this property was going to be condemned.

(2421) We want to show you, to corroborate his story, that for the year 1948, long before there was any talk of this litigation, he reported to the government that he had sold only 625 shares of Milmar stock.

Now, if it doesn't do anything else, it corroborates his story as to what he actually sold.

Mr. Brigadier: In the first place, the evidence would not be a question to him, but would be the income tax return, and you started to question him as to what he had put in that return.

In the second place, I object to the return on the ground that it is hearsay, as far as we are concerned. In the first place, this is not filed until March of 1949. We don't know what reasons, and what tricks, Mr. Marcus may have had up his sleeve. We know, for

example, that he put loans on books that were never there; that he may have decided to use these loans for whatever advantage, taxwise, he could get out of them in March, 1949.

That is the evil of allowing this kind of evidence in, which is a self-serving declaration. It doesn't prove anything in relation to us.

The Court: Does it?

Mr. Grosman: Well, I think, your Honor, in a court where we have no jury that anything that would (2422) corroborate his testimony ought to be admissible.

Now, the presumption is that he is not going to lie to the federal government.

Mr. Brigadier: Is there such a presumption in law? I don't know of any.

Mr. Grosman: I think it is presumed that the average man makes an honest return.

The Court: I guess that is a reasonable presumption.

In other words, I am not to let this in upon the theory that already, by March 15, 1949, when apparently nobody knew about this trial, that it was going to come up later, that this man already had started to plot, "how can I chowder that deal up and make trouble?"

Mr. Brigadier: No, what I am saying is that by March, 1949, he might have had his own tax reasons for setting up things the way he would want them set up. I don't know what is in that return. I have never seen it. I am just saying that there are reasons for rules of evidence, and one of the rules—I don't want to belabor it, you know it—is this very danger, that a man should not be able to use self-serving declarations.

The Court: I shall allow it, subject to being stricken, if I am shown that I am absolutely wrong in letting it in. Can you show me?

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

(2423) Mr. Brigadier: My objection may be noted?

The Court: Yes, I will strike it out. I don't know of any better testimony that could be offered to try to corroborate something, unless this man is a fiend incarnate, that he thinks way ahead of time what he is going to do five years later.

Mr. Brigadier: Is the whole return here?

Mr. Grosman: These are the work sheets of the accountant.

Mr. Brigadier: I am not taking the work sheets of any accountant. I am certainly going to object to that.

Mr. Grosman: All right.

The Court: It has got to be shown on the return.

By Mr. Grosman:

Q. Now, Mr. Marcus, is this a copy of your complete return?

(Document handed to the witness.)

A. Yes, sir; this is a duplicate which Mr. Dobkin gave me.

Q. Who prepared that document? A. Mr. Herman Dobkin, certified public accountant.

Q. Is he the gentleman who was here for a little while? (2424) A. Yes, sir; that's correct.

Q. And all the schedules are on here? A. I guess all the—let's see. Frankly, I don't know what is on there. I haven't examined it too closely.

Q. Take a look. A. Yes, stock of Milmar Estates.

Q. All right. Are all the schedules—is this complete? A. That's correct; yes, sir.

Mr. Brigadier: May I see it before it is marked in evidence, Judge Grosman?

Mr. Grosman: Surely.

(Document handed to counsel.)

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

Mr. Brigadier: Where did you point to, Mr. Marcus? I can't seem to find—just let me see what you pointed to?

The Witness: There is stock of Milmar Estates, ten forty-eight.

Mr. Brigadier: I just want to see the line he pointed to, that's all. I have a right to look at the document.

Mr. Grosman: Al right. I have no objection. We are not going to stand on ceremony. We are not going to fool the Judge here.

Mr. Brigadier: If your Honor please, did you (2425) understand that it was represented that his contained the number of shares that were sold, six twenty-five?

The Court: Yes.

Mr. Brigadier: Well, I don't see it. Is it somewhere—anywhere on this return?

Mr. Grosman: He says so.

Mr. Brigadier: Either I don't see it—where on this return does it say 625 shares of stock?

Mr. Grosman: May we put that in evidence first?

Mr. Brigadier: I think the Court should know for what purpose he is allowed—

The Court: If it isn't going to be helpful, why put it in?

The Witness: It doesn't show the six twenty-five on here, sir, but my work sheets and my accountant's work sheets will show that.

Mr. Brigadier: Oh, the accountant's work sheets will show it.

All it shows is, "Stock, Milmar, 125,000, capital gain." I certainly thought that he testified that it said 625 shares. And that is what Judge Grosman got up and made a speech about.

Mr. Grosman: That's what I said.

The Court: It doesn't say that here at all. (2426) It just show the capital gain.

Mr. Brigadier: We could have saved a lot of time and trouble.

The Court: No, sir; it doesn't mention any number of shares.

By Mr. Grosman:

Q. Are these the work sheets; did you prepare these? A. These are the work sheets which I work up every year, the end of the year, and supply them to Mr. Dobkin, who, from these—from my work sheets he gets up the data for the tax.

Q. Does that show the number of shares? A. Yes, sir; it does.

Q. Where? A. "Sold 625 shares, approximate cost, $54,115."

Q. Price? A. Approximate cost, $54,115.

Q. What did you list them at? A. Oh, cost, $97,410.32.

Mr. Grosman: I would like to offer these in evidence.

Mr. Brigadier: I object to those work sheets. That certainly is a self-serving declaration. It is not annexed to the income tax return. The schedules would (2427) normally be annexed to the income tax return, but show which the figures are and how they were derived, and none of it is shown in that return.

How far is he to be allowed to go?

The Court: Well, there is no doubt but that that is a self-serving declaration, even admitting that all its contents are true, and may be true, I don't know.

Mr. Grosman: Well, these are the sheets from which the return was prepared and I offer them.

Mr. Brigadier: I object.

Mr. Grosman: Of course, I will bring the accountant here.

The Court: You mark them for identification at this point, and then if you can show me where they are admissible in evidence, and should be considered by this Court, I will do so; if not, I will have to strike them out.

Mr. Grosman: All right.

The Court: Because you can see it is a very important point now.

Mr. Grosman: The return we can mark, your Honor?

The Court: The return you can mark. And then mark those work sheets for identification and see what you can find in the books.

(2428) The Clerk: DM-63, duplicate of tax return, 1948, for Samuel Marcus.

(Received and marked Exhibit DM-63.)

The Clerk: Two work sheets, re 1948 return, marked DM-64 for identification.

(Marked Exhibit DM-64 for identification.)

The Court: Did Mr. Dobkin return the duplicate and those work sheets to you at one time?

The Witness: Mr. Dobkin makes—

Mr. Grosman: Will you answer the question, please?

The Witness: Pardon me. Yes, I believe he returned them both to me at the time—he returned my originals and made a duplicate for himself. He keeps a duplicate to file and returns my originals to me.

The Court: So I assume those work sheets were made prior to March 15, 1949, is that right?

The Witness: Yes, sir; they were.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

The Court: How did you mark the work sheets, Mr. Cooney?

The Clerk: DM-64 for identification.

Mr. Brigadier: In view of the fact that your Honor sort of conditionally qualified them, may I be permitted to look at them, because in case they do refer to them in the brief, and you decide to receive them, (2429) I will not know what is in them.

Mr. Grosman: I certainly object to that. He may look at them, but if he does, I want them to go in evidence.

Mr. Brigadier: Then I think that your Honor should rule long before we brief this thing what's to happen, because how will—

The Court: I am not going to ask you for a brief until I rule on that, obviously.

Mr. Grosman: If he wants to see them, he can see them.

By Mr. Grosman:

Q. Now, Mr. Schwartz testified that he hadn't read your testimony on deposition until 1954. Is that so? A. That is not so.

Q. What is the fact? A. After he visited your office he called me one day and asked me do I have the copies of my deposition. I said, "I do." He said, "Will you send them over to my office?" And I sent them around to his office some time around the first of April, 1952.

Thereafter—

Q. How long did he keep them? A. He kept them about three weeks. And about April 24 I sent Miss Bergler, my secretary, up to his office to (2430) pick up these records. And I believe she signed a receipt for them at the time, of which we have a duplicate.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

Q. You have a duplicate? A. I have a duplicate of the receipt Miss Bergler signed for those records.

Q. Where is it? A. I believe Mr. Leichtman should have them. I will locate it for you, in case you haven't got it, as soon as I get off the stand. The duplicate is dated—I mean the receipt is dated April 24, 1952.

The Court: '52?

The Witness: That's right.

Mr. Grosman: Is it all right to locate it a little later, your Honor, so we don't interrupt this?

The Court: Yes. Make sure you remember it, that's all.

Q. Now, you recall the day that you went to Mr. Kevelson's office? A. I do.

Q. Did you go there alone or with someone else? A. I went there with two accountants.

Q. And who was present? A. One of the Mr. Chazins. I don't know what the gentleman's—

Q. Theodore Chazin? (2431) A. Which one is Theodore? If one of them step up, I will recognize the one. The gentleman on the end there, he was present.

Q. What hour of the day did you leave? A. I left at 2:30. I had an appointment with you at 3 o'clock.

Q. Now, did the accountants remain there? A. They did.

Q. Until what time? A. I left your office—

Mr. Brigadier: I object to the admissibility of this evidence. Your Honor has already ruled on this question. This deals with the question of whether or not they were afforded an opportunity for an examination of the records. Mr. Marcus permitted his attorney to make a statement as to what Mr. Chazin had said and

done. We put Mr. Chazin on the stand. They had ample opportunity to meet it; they didn't; your Honor ruled on it and your Honor denied their application.

What are we going to do now, hear an application all over again?

Mr. Grosman: I am not making any application.

The Court: I didn't hear any application.

Mr. Brigadier: Well, what is the relevancy of this?

(2432) The Court: I don't know, until it develops.

Mr. Grosman: The testimony was, as I remember, that Mr. Marcus was there with his accountants and left around 5 o'clock with them. He says that he left at 2 o'clock and I am going to ask him now if he returned that day.

By Mr. Grosman:

Q. Now, you say you left at 2 o'clock? A. I left at 2:30, took a cab and—

Q. Did you return that day? A. I did not.

Q. You never went there again after that? A. I did not.

Q. Did you call up Mr. Chazin? A. That day, you mean?

Q. Any day thereafter. A. At 5:10 exactly I was in the Pennsylvania Station making a train, after I left your office—

Q. Did you call him up? A. I called up for Mr. Ovrut. He was one of the accountants there.

Q. Did you talk to him at Mr. Kevelson's place? A. Yes, sir; I did.

Q. Now, thereafter, did you talk to Mr. Chazin? A. I did.

(2433) Mr. Brigadier: When thereafter?

Mr. Grosman: Please.

Mr. Brigadier: It could be the same day, it could be a week later.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

The Court: Why don't you wait till Judge Grosman asks the question?

Q. When did you talk to Mr. Chazin, about? A. I believe two or three days later. I called up and couldn't reach Mr. Chazin. His secretary said he was out. And the best of my recollections, I called him again a couple of day later and asked him for permission to return to examine the records and—

Q. His answer was what? A. His answer was, "I will check with Mr. Brigadier," I believe. I am not too sure, but I know the answer was he wouldn't give me permission to see them. He said, "I will have to check with Mr. Brigadier," or something of that nature, and I don't recall what it was at this time.

Q Did you ever talk to him again after that? A. I did no..

Q. You notified— A. I notified you that Chazin refused to let me look at the records.

Q. Now, Mr. Brigadier, some time during the course (2434) of your testimony, asked you about some other fraud case that you were in; do you remember that? A. That's correct.

Mr. Brigadier: I object on the ground that this is not proper redirect. This is all prior to the date that they rested, April 12. This has nothing to do with rebuttal. I didn't bring out any evidence on redirect about fraud cases.

Mr. Grosman: This is rebuttal, your Honor. He wouldn't permit me to go into it on redirect, or to reopen the case, so we are now on rebuttal.

Mr. Brigadier: But what evidence did I offer on redirect that dealt with fraud, prior cases?

Mr. Grosman: You tried to give the Court the impression that this man was a chronic suer.

Colloquy

Mr. Brigadier: Yes, in my original case, long prior to April 12, as far back as January. And here it is in the middle of April. Is he to do it again?

Mr. Grosman: And he mentioned a specific case, if you will remember.

The Court: Yes, he did.

Mr. Grosman: And your Honor told him about some Philadelphia lawyer who raised that issue and showed you that that was proper. Do you recall that?

Now, all I want to him him, if he remembers it, and (2435) whether or not that case has been resolved, and how.

Mr. Brigadier: And I object.

The Court: Why shouldn't I find out how it was resolved?

Mr. Brigadier: Then I have to ask him the question as to how this indictment that I have in front of me was resolved, including all of these counts, which your Honor at one time said, "Let's have an end of all of this."

If we are going to open the door to all of this, then I would like to ask him questions about this indictment that I have since procured, since he originally testified. Are we going to go to all of these?

The Court: I don't care to.

Mr. Tepper: I think this is the most unfair statement that I ever heard in my 30 some odd years at the bar.

Mr. Brigadier: I object to two lawyers talking on the other side.

Mr. Tepper: It's ridiculous.

Mr. Tepper: I object to having to meet the objections of two attorneys for one lawyer.

Mr. Tepper: At this late date it comes with bad grace.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

Mr. Brigadier: I am doing it with bad grace (2436) because—

Mr. Tepper: When it hurts, you object.

The Court: You see why we can't continue this much longer.

Mr. Grosman: Now may I ask him a question, your Honor?

The Court: Well, you heard what has been promised us.

Mr. Grosman: I have no objection.

Mr. Brigadier: I promise that I am going to question him about this indictment.

The Court: I don't see any harm in finding out how the case was resolved. I have heard everything else about it. I will allow it. It is going to be brief.

A. This was tried in front of Justice Frank last week. The jury went out and came back with a ten-minute verdict in my favor.

The Court: It was just resolved last week?

The Witness: Last week; yes, sir.

The Court: Then he couldn't have told me before.

Mr. Tepper: That's right. That was what we were trying to say.

The Court: So justice required that I hear it, (2437) since it only happened last week.

By Mr. Grosman:

Q. What was the name of that case?

The Court: Were you the defendant?

The Witness: I was the plaintiff.

The Court: You were the plaintiff.

The Witness: Yes, sir.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

A. That was the case of Marcus—42nd Street Fotoshop against Anthony Chappelle.

Mr. Brigadier: I shall ask for an opportunity to call Judge Frank, whom I know very well, to find out what happened in that case.

The Court: You don't even have to call Judge Frank. The record will show it.

Q. Now, on September 14, 1948, Mr. Marcus, did you tell any of the attorneys present—that is, Mr. Robert Schwartz or Judge Lieberman—to cancel the old stock and issue new stock? A. I did not.

Mr. Brigadier: This is not redirect. He already testified to that on the original examination.

The Court: I am sure he said it more than once, too.

Q. Now, Mr. Marcus, did you have a telephone conversation with Robert Schwartz on February 27, 1952? (2438) A. I did.

Q. And did you have somebody listening in on that conversation? A. I did.

Q. Who was it? A. Miss Bergler.

Q. And did she take down stenographically what was said at the time? A. She did.

Q. And is she in the courtroom? A. She is.

Q. Now, I show you a typewritten statement, purporting to be that conversation, and ask you whether this is a correct recording of the conversation had between you and Robert Schwartz on that day? A. Do you want me to read it all over?

Q. If you have to, yes. A. Yes, I recall this conversation, yes.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

Q. Now, what is this notation down here at the bottom? A. Well, we just sort of testified to it, that—put our signatures to it.

Q. Now, can you tell us verbatim what was said between you and Schwartz that day without reference to this paper? (2439) A. Yes, I can recall some of it.

Q. Will you listen to me, please?

The Court: He said verbatim.

A. No, I cannot.

Q. Would this memorandum help you? A. It would.

Q. Will you tell us, please, what was said between you and Robert Schwartz that day?

Mr. Brigadier: I object, if your Honor please, unless I am permitted to examine the witness on the voir dire. He didn't take this memorandum. The memorandum was taken by Miss Bergler. Judge Grosman certainly knows that this is not the way you prove the taking down of an intercepted or a monitored telephone call.

You do it by calling the person who monitored it and prove it in that way.

But I object for the further reason that on my cross examination of Marcus, Marcus was questioned about this monitored call. It came out as part of their direct case. This is not rebuttal now. This was brought out as part of his original examination when I cross examined him about the monitored calls.

They wait until after they have rested their case. No evidence has been offered that they are now rebutting. This is evidence that could have been part of their (2440) original case.

Colloquy

Mr. Grosman: We elected to wait until Mr. Schwartz gave his testimony. And this is in rebuttal to his testimony.

Mr. Brigadier: Did you ask Mr. Schwartz specifically—did you read this conversation to him and ask him specifically whether it took place? No, at no time did you read him the monitored conversation.

If they had done that, and he had denied it, that would make this proper rebuttal.

Mr. Grosman: I don't understand that to be the rule at all. The man made a statement and Mr. Marcus has a right to rebut it.

The Court: I know, but if he brings up new matter now, then do we have to go and get Schwartz again?

Mr. Grosman: No.

Mr. Brigadier: Not only that, sir. This is really hearsay, as far as my clients are concerned. The only basis on which they are allowed to get it into evidence, since it is a conversation between Schwartz and him, and the only basis on which they can get it in, is on the basis of impeaching the credibility of my witness, Schwartz.

In order to impeach Schwartz as a witness they must lay a foundation by asking him, when he is on the stand, (2441) under cross, "Did this specific conversation take place?"

I press my objection.

Mr. Grosman: Now, your Honor, I don't understand that we have to ask him verbatim whether or not this conversation took place. You will recall that Schwartz said, "I know that this conversation was being monitored, and I told him to go ahead and record it."

Mr. Brigadier: But you didn't ask him point-blank.

Mr. Grosman: That being so, I have a right to put in the conversation that he said he knew was being recorded.

Mr. Brigadier: Sir, it can only be used to contradict Schwartz, to affect his credibility. That's the only basis on which it can be offered.

Mr. Grosman: That is the only reason I am offering it for.

Mr. Brigadier: How can this be in contradiction of Schwartz when Schwartz was never asked point-blank, "Did he say this to you; did you say this to him?" That's its only purpose.

I press the objection.

Mr. Grosman: Schwartz said he knew about the conversation being monitored.

The Court: That may be true, but why wasn't (2442) he questioned from that, if you had it?

Mr. Grosman: I think I did question him on it.

Mr. Brigadier: No, you didn't.

The Court: Not from that.

Mr. Grosman: Not from that verbatim, no, but I think generally I questioned him. And I figured that he, having been aware of the fact that his conversation was monitored, he having invited the monitoring of his conversation, we would be able to show exactly what was said on rebuttal. There is no surprise here.

Mr. Brigadier: It is not surprise, it is a question of what you are offering it for. It can only be offered to affect the credibility—I don't want to repeat it.

The Court: That is all he is offering it for.

Mr. Grosman: That is all I am offering it for.

Mr. Brigadier: But you haven't exacted from Schwartz a denial. As a matter of fact, you say that he admitted that it took place. Therefore, it certainly is not evidentiary, it is hearsay, as to us. It is only

evidentiary, as far as we are concerned, for the purpose of affecting the credibility of our witness, for which case you must lay a foundation by exacting a denial from him that it took place.

(2443) The Court: All we have now is that a monitored conversation took place, which Mr. Schwartz admitted.

Mr. Brigadier: That's right.

The Court: That is as far as we got with it. Now you want, in detail, to bring out what was said, without having faced Mr. Schwartz with it, and saying, "Didn't you say this?" and "Didn't you say that?" right from that.

Mr. Grosman: Of course, I haven't a clear conception now of exactly the questions I asked Schwartz at the time.

The Court: I am afraid I don't, either. You press the objection?

Mr. Brigadier: Yes, I do.

Mr. Grosman: May I say this, your Honor? For instance, I recall that I asked Mr. Schwartz whether he had been in contact with the other side, or with Miller, and he said no. I think he admitted that the only person he had spoken to—and that in the lobby of a hotel—was Mr. Brigadier. And, of course, I don't allege that was at all improper.

Now, we can contradict that statement by Schwartz in any manner whatsoever. We can show that he wasn't telling the truth at the time.

(2444) Mr. Brigadier: No, that is not true. The law of evidence is very settled how you do it. Any statement that Schwartz made out of our presence is hearsay and the only way you can offer it as against us is for the purpose of affecting his credibility.

Samuel Marcus—Defendant—Recalled—Surrebuttal—Direct

To affect his credibility, you are required to ask him on the stand. Otherwise it has no meaning.

The Court: Of course, you have to lay a basis. That's fundamental.

Mr. Grosman: We did ask him, and he said no, that he hadn't spoken to the other side.

Mr. Brigadier: No, whether he had ever made the statement to Marcus which you are now wishing to offer. That's what you have to ask him.

Mr. Grosman: All right. If your Honor wishes to rule on this, rule it in or rule it out.

The Court: Out. I sustain the objection, no proper foundation laid.

Mr. Grosman: May I proffer this statement in evidence?

The Court: Yes, sir.

Mr. Grosman: But before I do that, I would like to ask Mr. Marcus a specific question with respect to this conversation.

By Mr. Grosman:

(2445) Q. Did you ask Mr. Schwartz, Robert Schwartz, on the occasion of this conversation whether he had spoken to William Miller? A. I did.

Mr. Brigadier: I object on the ground that any conversation between him and Mr. Schwartz is hearsay as to us and is not evidentiary, unless you first ask Mr. Schwartz whether that had taken place and had exacted—

The Court: Whether what had taken place?

Mr. Brigadier: This particular conversation.

In other words, he should have asked Schwartz on cross examination, "Did Mr. Marcus make this state-

ment to you; did you make this statement to him?" because it is only for that purpose that it can be offered as against us, to affect his credibility as a witness.

Mr. Grosman: Well, now, if your Honor please, I did ask Mr. Schwartz, according to my best recollection, whether he had spoken to Mr. Miller prior to the time of this conversation. My recollection is that he said no. I want to show now that he did say yes on the occasion of this conversation.

Mr. Brigadier: But you still don't get my point, Judge Grosman.

Mr. Grosman: I do get your point.

Mr. Brigadier: My point is that you cannot (2446) prove it by a hearsay statement. In other words, what you are offering now is a statement that Schwartz made—let's presume to Marcus—that he had spoken to Miller. You have to, in order to get that statement in, as against us, ask Schwartz when he is on the witness stand, "Did you make that statement?" If Schwartz then denies it, then for the purpose of affecting his credibility you may prove that Schwartz made that statement.

Mr. Grosman: My recollection is I asked him and he denied it. Now we are trying to contradict that.

Mr. Brigadier: You point to the record where it says so.

Mr. Grosman: Well, you point to the record where it doesn't say so.

Mr. Brigadier: You are the one making the offer, sir, not me.

The Court: Just a minute. I don't remember specifically everything that Mr. Schwartz said, nor does anybody else. The only recollection I have is of some sort of a statement that he had spoken to you, Mr. Brigadier, in a hotel lobby, or something.

Mr. Brigadier: That's right.

The Court: That's all I have.

Now, I don't remember whether he said he didn't speak to anybody on your side, that I don't know. And do you (2447) say he did?

Mr. Grosman: I won't swear it. My recollection is that I asked him whether he spoke to anybody on the other side, and particularly Bill Miller, and he said no.

Now, if later on it appears that I am in error about it, I will consent to have it stricken.

The Court: All right. Then I will allow it. If he is in error, it will be stricken.

By Mr. Grosman:

Q. Mr. Marcus, was there any discussion between you and Mr. Robert Schwartz on the occasion of February 27, '52, whether or not he had spoken to Bill Miller? A. There was.

Q. What was said? A. I asked him something that I wanted to meet with him and discuss—and get the file, or look at the file, and discuss the matters pertaining to this case. And he said, "Well, I don't want to talk to you until I have talked to Bill Miller first."

Q. What did you say? A. I said, "What in the hell are you talking about?" I said, "Who is your client, Bill Miller or me?"

The Court: Now, you know, I have a very distinct recollection of Mr. Schwartz telling us that (2448) before. He used that exact language. He told us that before.

Mr. Brigadier: Marcus has. Marcus testified to that before.

The Court: Yes.

Mr. Brigadier: You said Schwartz.

The Court: No, Marcus.

Mr. Brigadier: Yes, I remember, he testified to this on direct.

The Court: He used almost the same words.

Mr. Brigadier: The original direct examination.

The Court: Because I observed that he used the word "hell." It was the only time I heard him use it.

Mr. Brigadier: He testified to it on my cross, when I first discovered about the other monitored conversations, besides the one that developed in the deposition.

The Court: I think you told us that before.

The Witness: I don't recall. It's possible, sir. I know I mentioned it in my deposition.

The Court: I remember you said, "Who do you represent, Miller or me?"

The Witness: I said that in my deposition, and I don't recall the testimony here, sir.

Mr. Grosman: In order to save time, your (2449) Honor, may I proffer the entire statement that I would read to him, line by line, because it will take me 15, 20 minutes to do it.

The Court: It will?

Mr. Grosman: I think so, yes. There are three pages here.

The Court: Well, do you want it just to be put in the record that you offer it?

Mr. Grosman: Yes, that I am offering it, instead of reading it to him.

The Court: Let's do it that way.

Mr. Brigadier: Sure, I have no objection. It will be read as a proffer into the record.

Mr. Grosman: That's right. It should be marked for identification.

Exhibit DM-65 for Identification Read Into Record

The Court: Yes.

The Clerk: DM-65 for identification, document dated February 27, 1952, 11:25 a.m.

(Marked Exhibit DM-65 for identification.)

(Exhibit DM-65 for identification.)

Telephone conversation between Sam Marcus and Bob Schwartz.

February 27, 1952—11:25 a.m.

Marcus: Hello Bob. Say Bob, I understand that the attorneys on this Milmar matter intend subpoenaing you. (2450) Bob, I would very much like to get together with you and try to learn from you exactly what did happen that day when the contracts were signed.

Schwartz: Well, I don't know, Sam, I don't remember anything about the situation and I don't want to get mixed up in this.

Marcus: What do you mean by getting mixed up?

Schwartz: Well, I don't care to talk to you about this thing until I've seen Bill Miller.

Marcus: I don't understand you, Bob. What do you mean by the remark that you must see Bill Miller first? Who was your client—me or Bill Miller? All I'm asking you is for an appointment so that we can sit down and reconstruct exactly what did happen at that meeting in your office when these contracts were signed. I am not asking you to make any untrue statements and I don't expect you to stick your neck out for me, but this whole matter seems to be in a terrible mess and I have been begging you on numerous occasions to sit down with me and get this thing clarified. Now when can you arrange for such a meeting?

Schwartz: Well, I'm too busy this week.

Marcus: Can't we make it some evening for dinner?

Exhibit DM-65 for Identification Read Into Record

Schwartz: No. All my evenings are engaged. Besides Sam, you gave me a rotten deal on that 32nd Street piece of (2451) property which I purchased from you. You backed out on the sale and you didn't give me the bonus you promised me. You know very well that I told you that I didn't have any money to buy your property and that I was going to sell a valuable piece of property I owned for the purpose of buying yours and you caused me to lose a considerable amount of money in the transaction.

Marcus: Why Bob, I'm surprised at you. You very well know I did not want to sell this property but I was strapped for some cash and when you offered to buy this property from me I told you I did not want to sell this property, but being strapped as I was, I would make a deal with you for the sale of this property if you would give me the option to repurchase this property back within one year's time. And in the event I exercised that option I would pay you interest for the money you advanced to me at the rate of one per cent per month. I have these papers and can prove it to you and I also have your signed receipt for the cash I gave you which you calculated in your own handwriting.

Schwartz: Well, I know I received some cash interest from you, but I don't think that was the entire deal. My papers are down in the vault and my father has the key and he's down in Florida now so I can't prove anything of what the deal was but I was not very happy about it.

(2452) Marcus: Well Bob, if you will arrange an appointment whereby we can discuss this other matter, I'll be happy to bring the papers with me concerning this deal. Now just give me a date, any time of the day or evening that is convenient for you.

Schwartz: As I said before, Sam, I don't know too

Exhibit DM-65 for Identification Read Into Record

much about this and I don't want to talk to you until I've had a chance to think this thing over and talk to other people.

Marcus: Who do you mean by other people?

Schwartz: Well, I can't say now.

Marcus: But Bob, this is extremely important to me and I've got to meet with you to get some details of this transaction. Now you give me a date when I can meet with you.

Schwartz: Well, I can't see you at all this week and possibly sometime next week I may find some time.

Marcus: Well shall I call you Monday for an appointment for next week?

Schwartz: No, don't call. I'll get in touch with you when I have some spare time.

Marcus: But Bob, this is extremely vague and I don't understand your attitude in this matter.

Schwartz: Well I will see if I can find some time for you next week.

(2453) I, Elsie Bergler, residing at 223½ W. Delano Avenue, Yonkers, New York, do hereby testify that the above telephone conversation took place on the day and at the time as hereby written.

I am secretary to Mr. Marcus and he instructed me to put through a call to Mr. Schwartz about 10 a.m., which I did.

Approximately 11:15 a.m. I received a return call from Mr. Schwartz for Mr. Marcus who was out of the office at the time and I advised Mr. Schwartz I would have Mr. Marcus call him when he returned.

Mr. Marcus returned in approximately 10 minutes and I put the call through to Mr. Schwartz' office. Mr. Marcus suggested I pick up the extension phone which

is near the switchboard and take a stenographic report of the conversation, which I did.

The above is a true transcript of the conversation as it took place. This report was immediately transcribed while the entire conversation was fresh in my mind as well as from my notes.

I, Sam Marcus hereby attest that on Wednesday, February 27, about 10 a.m., I instructed Miss Bergler to get Mr. Bob Schwartz on the phone. I received the connection on my phone and a girl answered me to the effect (2454) that Mr. Schwartz had not yet arrived and I requested that he call me when he does.

At 11:25 when I returned to my desk Miss Bergler advised me that a telephone call had come in shortly before from Mr. Schwartz and did I want to call him back.

Having attempted on several previous occasions to have Mr. Schwartz meet with me and discuss and enlighten me fully on the transaction and what did happen on September 14, 1948 in his office, and receiving evasive answers, I felt that it might be wise to have someone witness our conversation and I suggested that Miss Bergler pick up the extension phone when I called and have a note book and pencil available for the purpose of recording the conversation.

Mr. Grosman: Cross examination.

Mr. Brigadier: No questions.

The Court: Step down, Mr. Marcus.

(Witness excused.)

The Court: We will take a five minute recess, gentlemen.

(Short recess.)

Elsie Bergler—for Defendant Marcus—Surrebuttal—Direct, Cross

Mr. Grosman: Miss Bergler, will you take the stand, please?

ELSIE BERGLER, resumed the stand, in (2455) surrebuttal.

Direct examination by Mr. Grosman:

Q. Miss Bergler, I show you this record of a monitored conversation, dated February 27, '52, marked DM-65 for identification. Did you take that conversation down stenographically? A. Yes, sir; I did.

Q. Have you your stenographic notes of it? A. Yes, sir; I have.

Q. And these are your stenographic notes? A. That's this particular one.

Q. And did you transcribe your notes on a typewriter, and this is your transcription? A. I did, sir.

Q. Was Mr. Marcus present? A. He was in another room, at the other telephone, when I was in the outside office.

Mr. Grosman: All right. That is all.

Mr. Brigadier: I would like to ask Miss Bergler just one question.

Cross examination by Mr. Brigadier:

Q. Did you go to the Whitney label company? A. I did.

Q. And did you represent to them—

Mr. Grosman: Now, if your Honor please—

(2456) Q. —that you were the secretary or employee of Bill Miller's Riviera?

Mr. Grosman: Now, wait a minute.

Mr. Brigadier: This is very recently. I think, to

affect her credibility, I have a right to ask her this question.

Mr. Grosman: Now wait a minute. If he wants to make her his witness, I have no objection. I didn't ask her about Whitney or anybody else.

The Court: There is no doubt about that. That is so recent that nobody can dispute it.

Mr. Brigadier: Not the slightest doubt. What I am trying to do is affect her credibility as a witness. She has been recalled as a witness. At any time that a witness is called I have a right to attack the credibility of that witness.

Mr. Grosman: Not in this manner. I am sorry, I thought you were through.

Mr. Brigadier: That since she was last on the stand—and I had no opportunity to do it before—that she went to the Whitney people on March 1, 1955, and represented to them that she was the bookkeeper of Bill Miller's Riviera, Inc., and that they required certain duplicates of the invoices in connection with a pending lawsuit. I have a letter from the vice-president of the (2457) Whitney Duplicating Check Company to that effect. And I want to ask her that.

The Court: Whether she did that?

Mr. Brigadier: That's right.

Mr. Grosman: Now, if your Honor please, this seems to be quite a standard of practice of Mr. Brigadier. He makes a speech as to what he wants to prove. We have no jury. I know that you disregard it. In the back of your mind, after these many days of testimony, this thing may stick.

Now, I don't think he ought to be permitted to do it. I don't think it is quite the right thing to do. And I object to his cross examining this young lady on anything except what she testified to on direct.

Mr. Brigadier: This is my proffer, that's all. How can I tell the Court what my proffer is, unless I tell you what I am trying to do.

Mr. Grosman: I object to it as being improper cross examination.

Mr. Brigadier: I am not going to press it, Judge. If it is that serious a problem to you people on the other side, forget it.

Mr. Grosman: We are not going to throw any fits about it.

The Court: Step down.

(2458) Mr. Brigadier: No cross.

(Witness excused.)

Mr. Grosman: Now, if your Honor please, with the exception of proving the work sheets in connection with that '48 return—and I would like to produce Mr. Dobkin here for a moment—we are ready to rest, except I want to make this further statement, that in connection with the testimony of Mr. Marcus, which we proffered and which your Honor, in your judgment, ruled out, we have two accountants here, two certified public accountants, whom we were going to put on to amplify Mr. Marcus' testimony, one of whom is an expert on restaurant accounting—Mr. Gould and Mr. Granet—and I would like to have the record show that we have them here. Of course, we can't use them, in view of your Honor's ruling.

Mr. Brigadier: Then do I understand that the case is at an end? I didn't quite understand what you said about Dobkin.

The Court: Well, Dobkin had something to tell us on the stand, but he said he couldn't tell us then for certain reasons.

Mr. Brigadier: No, he said he wanted to use Dobkin

to put in the work sheets in connection with the income tax return.

(2459) Mr. Grosman: That's right.

Mr. Brigadier: Your Honor has already received them conditionally. You have them marked for identification on the condition that he can show in law that they are material. So I don't see that we have to delay the case any for Dobkin on that account, for that is all that Dobkin will testify.

The Court: Well, I suppose Mr. Dobkin will tell us that Mr. Marcus gave him these work sheets and from these work sheets he made the return. Will you stipulate that he will say that?

Mr. Brigadier: I am willing to stipulate that that is what he would say, so that we don't delay the end of the case.

Mr. Grosman: That's fine. Then we want to put the work sheets in.

Mr. Brigadier: No, because I still urge that the work sheets are—

The Court: I don't know whether they are evidential or not.

Mr. Brigadier: That's right, you are supposed to submit authority to the Court to show that they are evidential.

Mr. Grosman: Now, let me understand this thing. I understand that they are willing to admit that Dobkin (2460) would testify, if he was here, that these two sheets, work sheets, were given to him by Marcus and that he used those to prepare Mr. Marcus' return for the year 1948—

Mr. Brigadier: Right.

Mr. Grosman: —showing that there was 625 shares—

Mr. Brigadier: Whatever is on these. I am not going along with what you state, it is what the work sheet says.

The Court: As I understand it, you object that they are self-serving declarations?

Mr. Brigadier: That's right.

The Court: And I am inclined to agree with you. I don't say that I do. I am inclined to.

Mr. Brigadier: That's right.

The Court: Now, if you can show me that they are not self-serving declarations, that they are admissible, there is no need to hear from Dobkin at all.

Mr. Grosman: Except that we want to show the number of shares of Milmar that were involved in the preparation of his 1948 return.

The Court: It is written right in there, 625 shares, on the work sheet. I saw it. And the price is on there, and what he paid for it is on there. Everything (2461) is on there. I saw it all in a glance.

Mr. Grosman: You see, my difficulty, your Honor, is that the return does not show that there were 625 shares.

Mr. Brigadier. But I have already stated that I will stipulate to what you want Mr. Dobkin to testify to. What more do you want?

Mr. Grosman: I don't want any more, if you will stipulate that if he was here he would testify that the number of shares involved was 625.

Mr. Brigadier: I will stipulate that that was the work sheet that he received. If that is on the work sheet, then you have got it.

The Court: It is on there.

Mr. Brigadier: But my stipulation is that he will testify that that is the work sheet that he used and that he received from Marcus. What more do you want?

Mr. Grosman: I want you to admit, if you will, that the number of shares of Milmar stock referred to

in the income tax return, Exhibit No. DM-63, was 625 shares.

Mr. Brigadier: No, of course I won't stipulate to that, because it doesn't say so in the return. I will stipulate to what it is that Mr. Dobkin can testify to, namely, that he received this work sheet from Mr. Marcus (2462) and that he used that work sheet in making up the return. That is all Dobkin could testify to, anyway.

The Court: That's right.

Mr. Grosman: Well, Dobkin can also testify the number of shares involved in this return—

Mr. Brigadier: No, I won't stipulate to that.

Mr. Grosman: Will you please wait? —that the number of shares involved—the number of shares referred to in the return was 625. That is what he would testify to, if he was here.

The Court: He would testify, because that is what it says on those work sheets. He doesn't know that of his own knowledge. That is hearsay, too.

Mr. Grosman: He only knows what his client told him.

The Court: That's right. It is on the work sheet, and if it is going into evidence, we don't need Mr. Dobkin at all.

Mr. Grosman: All right, your Honor, that's it.

The Court: You don't need Mr. Dobkin. All right. Now, are we through?

Mr. Brigadier: I just would like one thing. I think I owe it to Ted Chazin—he has asked me to (2463) please let him take the stand to rebut what Mr. Marcus said, because Ted says he never spoke to him. And I think we owe it to Ted to let him take the stand. Just that one question.

Remember, Marcus testified that after he was finished he called and spoke to Ted.

Theodore Chazin—for Defendant Milmar Estate—Recalled—Rebuttal—Direct

Will you take the stand, please?

Mr. Grosman: He doesn't have to take the stand.

Mr. Brigadier: I want him to do it under oath, because this is getting absurd, when this man can keep taking the stand—

The Court: Don't repeat.

Mr. Tepper: There goes the speeches.

THEODORE CHAZIN, resumed the stand.

Direct examination by Mr. Brigadier:

Q. Mr. Chazin, after the examination took place on February 23, at Kevelson's place, of the books, did you ever speak to Mr. Marcus by telephone, or face to face, in relation to his request for a further examination of the books? A. Absolutely not.

Q. Did he call you on the telephone and get you on the telephone at your office? A. He did not speak with me on the telephone. He did (2464) not get me on the telephone. The only thing I got was the message I testified to here the last time.

And I just want to say this. At lunch today Mr. Marcus called me over—while you were there, Mr. Brigadier—wanted to talk to me. I told him I didn't want any conversation with him, because I figured, in my own mind—

The Court: Don't figure anything.

A. (continuing) I didn't want to—period. And I didn't. And I didn't speak with him. That's all.

Mr. Brigadier: No further questions.

The Court: I think you said, though—I may be wrong about this—that you did find a notation—

Theodore Chazin—for Defendant Milmar Estate—Recalled—Rebuttal—Cross

The Witness: That's right. I had the book here and I read it. Five days later.

The Court: Yes, that he had called you.

The Witness: That's right.

Mr. Brigadier: Left a message, but never spoke to him.

The Court: He never spoke to you?

The Witness: Absolutely not.

Cross examination by Mr. Grosman:

Q. You received his message, didn't you? A. I testified to that last time.

Q. And did Mr. Tepper speak to you about this (2465) subject, about Marcus' desire to continue the examination of the books; do you recall that? A. I am not sure whether Mr. Tepper spoke to me—as near as I can recall, I don't remember any conversation with Mr. Tepper. After that I referred the matter to Mr. Brigadier.

Q. Well, you did know that Marcus wanted the right to further—

Mr. Brigadier: I object. This is beyond the scope of what I called him for. I called him solely to establish whether or not he had this conversation with Marcus.

Mr. Grosman: I am not going to question anything that Mr. Chazin says.

(Witness excused.)

The Court: It is obvious that if he consulted you about it that somebody on the defendant's side spoke to him.

Mr. Brigadier: As a matter of fact, the call came to me from Judge Grosman.

The Court: Oh, all right.

Colloquy

Mr. Brigadier: Do you want me to take the stand?
The Court: No, I do not.

(Discussion off the record.)

(2466) The Court: We are through.

Mr. Brigadier: We are through, as far as the taking of evidence is concerned.

The Court: As far as the evidence goes.

I want you to know this. As a Judge, I realize what long cases do to lawyers. It is true that you don't see it often on the civil side, but we do see it on the criminal side. I realize that when lawyers are engaged in a trial for weeks, and weeks, and weeks, the nerves get taut, antagonisms grow, and we have these outbursts that otherwise lawyers would never make. I want you to know that as far as the Court goes I understand the situation fully.

As a mater of fact, I think that you gentlemen have done pretty well in this type of a case, where I can sense the feeling on both sides.

This is a very important case to both sides. It involves a substantial sum of money to both sides. I am sure that the facts in this case could not have been rehashed, raked and re-raked more than they have here.

Now, how can you gentlemen help this Court to make what it conceives to be a proper decision? Not by a long summation, because that is a waste of time for both of you.

Mr. Grosman: We will do it any way your (2467) Honor suggests.

The Court: That's right, because I, sitting as a jury, would not be swayed by emotion, eloquence or anything else. But you can help a lot, and I require that you shall furnish me with proposed findings of fact, of ultimate facts, not immaterial facts, ultimate facts,

to enable me to decide the factual issue in this case, with specific reference to where those facts are found in the transcript, so I can easily find what you say was established as an ultimate fact, and conclusions of law to be applied.

With that in hand, I assure you that you will get as rapid a decision as this court calendar will permit me to give you. I want you to know that every day from now until some day early in July I am booked for trials, five days a week.

Mr. Tepper: May I ask your Honor this? Do I understand correctly that what your Honor wants is for us to state succinctly the questions involved in this case and to be decided by your Honor, with reference to the supporting evidence that we rely upon, with reference to the page number, the documents, etcetera?

The Court: That's right. And then on documents, where you only require that I look at a certain part of a document, please so indicate, because you know what it (2468) means to read documents from top to bottom, looking for something.

Mr. Tepper: I also understand that insofar as the depositions which were taken—some 3,000 pages of depositions—that the only testimony that we may allude to is testimony which contradicts testimony which had already been testified to in the case in chief or otherwise.

Mr. Brigadier: No—

Mr. Tepper: Under no circumstances—

Mr. Brigadier: —or admissions made—

Mr. Tepper: Or admissions made.

Mr. Brigadier: —by the other side.

Mr. Tepper: May I please finish?

The Court: Yes. You can supplement, if you think Mr. Tepper leaves something out.

Mr. Tepper: But under no circumstances, as I understand it, is there to be a wholesale publishing of the statements made on deposition. They must have reference either to a contradiction or an admission.

Mr. Brigadier: That's right.

Mr. Tepper: Is that correct, sir?

The Court: Yes.

Mr. Tepper: Now, may I also make the following suggestion, that after your Honor receives this from (2469) opposing counsel and ourselves, may we then—if we deem it advisable—ask for and obtain from your Honor a special day to discuss special points which we deem it advisable to orally argue, if we so decide?

The Court: In fact, if I don't have to call you in after you submit both of them, I will be surprised, because certain vitally contradicted ultimate facts I shall have to discuss with you gentlemen before I make up my mind.

Mr. Tepper: That is what I thought. With that, I think the mechanics can easily be worked out.

The Court: Can you think of anything?

Mr. Brigadier: Yes, one important thing has been omitted. In fact, two things.

One is the order in which this shall be done. I would suggest this to you. We have tried altogether the following: The interpleader claim, the nature of the transaction, the fraud claim and the loan claim. I would say, on interpleader and the nature of the transaction, I should be the forward party and go forward on that.

Certainly on the fraud claim it would be absurd to ask me to brief first.

The Court: You can't go forward. He who alleges, goes first.

Mr. Brigadier: That's right. And the loan (2470)

claim. So I would suggest that on those two they go forward first, and I answer that. I go forward on the others and they answer me.

The Court: That's right.

Mr. Brigadier: Now, the other thing is time period, which is, of course, very important to us.

The Court: I know what you are going to tell me. Judge Grosman is a busy lawyer, Mr. Tepper is a busy lawyer—

Mr. Brigadier: No, I want you to make it a short time period. I am going to plead for a short time period, because this money is laying there, Judge, it is drawing no interest.

Mr. Grosman: We are in favor of that.

The Court: I could answer that, but your clients wouldn't like the answer, so I am not going to give it.

Mr. Grosman: Now, I ask your Honor to remember that there are 3,000 pages of depositions—

The Court: It is quite a monumental job.

Mr. Grosman: —about 2,000 pages of testimony taken here; there are the documents. And, in addition to that, the stenographer has been so tied up that he hasn't been able to get out the transcript. We still don't have the entire transcript.

(2471) The Court: I think what we had better do, Mr. Bremer, after you get the transcript out, you will inform the Court. And I will advise you by letter what time I think you should have it.

Mr. Grosman: All right.

The Court: You let me know as soon as it is finished. Then I will try and set a reasonable time for both of you to do your job.

As soon as I can get to this, I shall. That is all I can promise you. I will be notified as soon as the transcript is out and I will drop you a note.

Proposed Findings of Facts and Proposed Conclusions of Law

The defendant Samuel Marcus submits the annexed proposed findings of fact which he deems established by the evidence herein and proposed conclusions of law which he desires and requests shall be made.

Findings of Fact

1. The plaintiff William Miller, and the defendant Samuel Marcus, at the time of the commencement of this action, were residents respectively of the States of New Jersey and New York and Milmar Estate, Inc., was a corporation organized and existing under the laws of the State of New Jersey.

2. About January 1946, when Marcus first met Miller, Miller was an experienced night club operator and Marcus was a business man with no night club or entertainment experience.

3. Miller became interested in certain property at Fort Lee, New Jersey, and, in Florida, spoke with both Ben Marden and the plaintiff Bierman regarding purchase of this property some time prior to March 1946. On this property was a night club known as Riviera.

4. Miller recommended the Fort Lee property to Samuel Marcus, defendant, and stated that Marden would not sell unless Miller was one of the purchasing parties.

5. Marcus and Miller agreed that $200,000 would be required for the purchase and maintenance of the property and that each would contribute $100,000 toward the purchase.

Proposed Findings of Facts and Proposed Conclusions of Law

6. Miller falsely represented to Marcus that he had an ownership interest in Luna Park, Coney Island, and that he could produce his share of $100,000.

7. Marcus decided to participate in the purchase of the property as a real estate investment. The price quoted to Marcus for the acquisition of the property was $425,000, payable $125,000 in cash and the remainder by purchase money mortgage.

8. As an inducement to cause Marcus to invest in this property, Miller represented that he had an offer for the chattels on the property of $200,000. He did not produce any such buyer.

9. Miller did not produce any part of the $25,000 deposit. Marcus paid all of said deposit.

10. As an inducement to cause Marcus to advance the moneys required upon the closing of title, Miller represented that he would operate the Riviera property as a night club and pay $60,000 per year as rent therefor. Relying on such representation, Marcus assented that amortization of the purchase money mortgage be fixed at the rate of $60,000 per year.

11. Title was taken to the Fort Lee property in the names of Miller and Marcus in April 1946. The moneys produced at the closing were $97,410.32 by Marcus, $11,250 by Schwartz, and $20,000 by Al Bierman. Miller produced no money and stated to Marcus that he would obtain the money from his Luna Park interests shortly thereafter.

12. About June 1946 Milmar Estate, Inc. was incorporated and a deed was executed and delivered from Miller and Marcus to the said corporation.

Proposed Findings of Facts and Proposed Conclusions of Law

13. Thereafter, at a meeting attended by Robert Schwartz, Samuel Marcus, William Miller and Jacob Hoffman, the accountant, stock of Milmar Estate, Inc. was allocated as follows:

625 shares were issued to Samuel Marcus, 125 shares to Robert Schwartz, and certificates for 500 shares were drawn in the name of William Miller, immediately endorsed by him and delivered to Samuel Marcus together with a $50,000 promissory note made by Miller to Marcus. This note, however, although delivered that day, was predated as of the date of deed to Marcus and Miller.

14. Miller caused to be formed Bill Miller's Riviera, Inc. for the operation of the Riviera night club. Marcus had no part in the organization or in the operations of said corporation.

15. A lease was made between Milmar Estate, Inc., as landlord, and Bill Miller's Riviera, Inc., tenant, providing for the payment of a rental of $60,000, plus other charges.

16. Bill Miller's Riviera, Inc. defaulted shortly thereafter in its obligations as tenant under said lease. In July 1947 Milmar Estate, Inc. brought dispossess proceedings against Bill Miller's Riviera, Inc., which was settled by the execution of a new lease and agreements between the landlord tenant, Marcus and Miller. Miller and Bill Miller's Riviera, Inc. were represented at that time by Abraham Lieberman and at all times thereafter up to and including September 14, 1948.

17. In July 1947, Miller made and delivered a note of $50,000 to replace the note of $50,000 delivered by him to Marcus in 1948.

Proposed Findings of Facts and Proposed Conclusions of Law

18. As a result of the failure of Miller and Bill Miller's Riviera, Inc. to pay their obligation, Marcus was compelled to and did loan to Milmar Estate, Inc. a total of $67,997.00, on which there is a present balance due of $46,801.23. Under the terms of the lease and agreements of July 23, 1947, payment of this loan balance owing from Milmar Estate, Inc. to Marcus could not be demanded for five years from said date.

19. About August 1948, Miller represented to Marcus that Riviera was losing money and that Marcus was in danger of losing his entire investment.

20. Jacob Hoffman, accountant of Bill Miller's Riviera, Inc., represented that the said corporation could not meet "current obligations."

21. The books of account of Bill Miller's Riviera, Inc., and Milmar Estate, Inc., were kept at the Riviera under the control of Miller and Hoffman. Marcus had no access to said books until granted such access during the trial of this case.

22. As of the end of August, 1948, Bill Miller's Riviera was not losing money; its books reveal that Riviera realized a profit on business done during the 1948 season. (Attached Schedules showing profits)

23. In July 1948 Marcus had a bona fide offer from E. M. Loew to purchase approximately 90 percent of the outstanding stock of Milmar Estate, Inc., and 51 percent of the outstanding stock of Bill Miller's Riviera, Inc., for the sum of $250,000.

24. Miller desired to prevent and succeeded in preventing the deal between Marcus and Loew from being consummated.

Proposed Findings of Facts and Proposed Conclusions of Law

25. On or about July 27, 1948, Marcus gave Miller a written option to purchase 625 shares of the stock of Milmar Estate, Inc. for the sum of $125,000; said option was for a ten-day period.

26. On or about the 26th day of August, 1948, Miller and Abraham Lieberman, his attorney, met with Marcus and Robert Schwartz, attorney for the latter, at 18 East 42nd Street, New York, N. Y. Three different propositions with regard to the sale of Milmar stock were discussed but no agreement was reached.

27. On August 27, 1948, at the premises of Bill Miller's Riviera, Inc., Al Bierman, as agent for the undisclosed principal, Kevelson, gave to Marcus a deposit of $10,000 against the purchase of 50 percent of the outstanding stock of Milmar Estate Inc. A receipt was dictated by Al Bierman and signed by Marcus.

28. Miller, Abraham Lieberman, Marcus and Robert Schwartz met on September 14, 1948, at the office of Robert Schwartz. Abraham Lieberman and Robert Schwartz had met on the 3rd, 12th and 13th days of September. The papers executed and delivered between the parties on the 14th of September, 1948, were drawn by Abraham Lieberman and Robert Schwartz on the 3rd day of September, 1948, with some revisions having been made on the 12th and 13th days of September.

29. The escrow receipt, Exhibit DME-7, had been prepared on September 3rd, 1948.

30. It was the intention of Samuel Marcus to sell 625 shares of stock of Milmar Estate, Inc. for the sum of $125,000.

Proposed Findings of Facts and Proposed Conclusions of Law

31. It was the intention of Miller and Bierman that Marcus should receive back all of the money invested by him in Milmar Estate, Inc., all of the money advanced for and/or loaned to Miller, Milmar Estate, Inc., and Bill Miller's Riviera, Inc., and a profit.

32. Miller, acting as agent for Al Kevelson, agreed to pay $15,000 over and above the $125,000 theretofore agreed upon as the purchase price of 625 shares of the stock of Milmar Estate, Inc. Such agreement was thereafter ratified by Al Kevelson.

33. There was a great deal of confusion and wrangling at the meeting of September 14, 1948. Many papers executed that day were hurriedly signed.

34. Marcus had with him, at the office of Robert Schwartz, on September 14, 1948, certificates representing 1125 shares of the capital stock of Milmar Estate, Inc.

35. On September 14, 1948, Marcus delivered certificates representing 625 shares of Milmar Estate, Inc., to be held in escrow by Abraham Lieberman. Marcus retained the certificates for 500 shares issued in the name of Miller.

36. On September 14, 1948, new certificates of stock of Milmar Estate, Inc. were signed in blank and endorsed in blank by Marcus in anticipation of the redemption by Miller of the shares issued in his name and the purchase by Kevelson of 625 shares.

37. Abraham Lieberman received, as escrowee, the documents mentioned in Exhibit DMF-14, including the resignations of the officers of Bill Miller's Riviera, Inc., originally deposited in escrow on July 23, 1947 with Robert Schwartz by William Miller.

Proposed Findings of Facts and Proposed Conclusions of Law

38. It was the intention of the parties that in the event of default by Kevelson in the making of the payments agreed upon that Marcus should have complete control and ownership of approximately 90 percent of the stock of Milmar Estate, Inc., and 51 percent of the outstanding stock of Bill Miller's Riviera, Inc.

39. To provide for the repayment of loans due from Milmar Estate, Inc. to Marcus, Exhibit DME-9 was drawn and executed.

40. On September 14, 1948, Miller, on receipt of the $50,000 note made and delivered by him in July, 1947, to Marcus, relinquished his right of redemption of 480 shares of stock of Milmar Estate, Inc., issued in his name and held from the time of its issuance by Marcus.

41. On September 14, 1948, at the conclusion of the meeting, Marcus took with him certificates representing 500 shares of stock originally drawn in the name of William Miller, the escrow receipt (DME-7) and the Corporate outfit of Milmar Estate, Inc.

42. Marcus did not see any of the papers left with Robert Schwartz on September 14, 1948, until after the interpleader action was brought by the plaintiffs.

43. When Marcus agreed to sell his stock to Kevelson, Marcus relied on the representations made by Miller, Bierman and Hoffman that Riviera was losing money, which representations were false and known by Miller, Bierman and Hoffman to be false.

44. Miller, Bierman and Hoffman concealed from Mar-

cus the fact that the Riviera was operating, during the 1948 season, at a profit. (See Fact 19.)

45. On September 14, 1948, Marcus neither owned nor had authority to sell the 125 shares of Milmar Estate, Inc. held by Robert Schwartz.

46. On October 1, 1948, Robert Schwartz conferred with Marcus with reference to the sale of his 125 shares of Milmar Estate, Inc. to Marcus for the sum of $7,700, and prepared and had signed by Marcus on that day, Exhibit DM-32.

47. At or about the beginning of November, 1948, Robert Schwartz sold his 125 shares of stock of Milmar Estate, Inc. to Samuel Marcus for the sum of $7,850.

48. Marcus received, on account of the $140,000 to be paid to him for the 625 shares of stock sold to Kevelson, $99,200, leaving a balance due and owing of $40,800 plus interest.

50. $10,000 of the installment payments claimed by plaintiffs to have been paid to Marcus on account of the alleged contract, are entered on page 10 of Exhibit DM-14, as repayment of loans to Sam Marcus.

51. Interest allegedly paid by Bierman and Kevelson to Samuel Marcus on account of installment payments under the alleged agreement of September 14, 1948, was actually paid by Milmar Estate, Inc. and charged to the general expense of said corporation. Page 42 of Exhibit DM-14 and page 8 (November 1948) of Exhibit DM-15 so record said payments.

52. The interpleader action brought by plaintiffs Miller and Bierman in December 1950 was brought in bad faith.

Proposed Findings of Facts and Proposed Conclusions of Law

53. Neither Milmar Estate, Inc. nor any of the plaintiffs claim the fund interpleaded or any part thereof.

54. The plaintiffs failed to deposit into the Court $5,800 plus interest admittedly due on the $15,000 issued September 14, 1948.

55. All of the plaintiffs and the defendant Milmar Estate, Inc. had knowledge in December 1950 and plaintiffs have contended throughout this case that the money, the subject matter of this interpleader suit, was and is due and owing to Marcus.

56. At the time of the commencement of this action, both Bill Miller's Riviera, Inc. and Milmar Estate, Inc. were solvent and there was no danger of the appointment of a receiver for either of them.

57. The real estate mortgage and chattel mortgage mentioned in Exhibit DM-22 were of no effect.

58. On October 1, 1948, Robert Schwartz exacted from Samuel Marcus as security for the $7,700 to be paid for his 125 shares of stock an assignment in part of the said "mortgages."

59. Marcus first because suspicious that false representations were made by Miller and Hoffman approximately one and a half year after September 14, 1948, at which time he consulted his attorney, Norman Roth, regarding the matter.

60. The defendant Marcus tendered to the plaintiffs repayment of the sums received by him on account of the alleged contract of September 14, 1948.

Proposed Findings of Facts and Proposed Conclusions of Law

61. Material alterations were made by Abraham Lieberman in paragraphs 5 and 10 of the alleged contract of September 14, 1948, after the execution and delivery of the said instrument and without the knowledge or consent of either Marcus or Milmar Estate, Inc.

CONCLUSIONS OF LAW

1. At all times, from June 1946 to and including September 14, 1948, Marcus was the unconditional owner of 625 shares of the issued stock of Milmar Estate, Inc.

2. At all times, from June 1946 to September 14, 1948, Marcus was holder and entitled to possession of 480 shares of Milmar stock issued in the name of William Miller and delivered by the said William Miller to Samuel Marcus as security for payment of a promissory note in the amount of $50,000 and interest.

3. Samuel Marcus is the owner and holder of 125 shares of stock of Milmar Estate, Inc., which he acquired by purchase from Robert Schwartz on or about November 1, 1948.

4. Bierman is the owner of 20 shares of the outstanding stock of Milmar Estate, Inc.

5. There is due and owing from Milmar Estate, Inc. to Samuel Marcus the sum of $46,801.23, balance on account of loans advanced by Samuel Marcus to Milmar Estate, Inc.

6. The complaint herein does not conform to the requirements of 28 U. S. C. 1335 and Rule 22 of the Rules of Civil Procedure and should be dismissed.

(The provisions of Paragraphs 7, 8, 9 and 10 are inconsistent and are alternatives.)

Proposed Findings of Facts and Proposed Conclusions of Law

7. There was no meeting of the minds of Marcus and Kevelson with regard to the sale of any shares of the stock of Milmar Estate, Inc. by Marcus to Kevelson; there is no enforceable contract for the sale of any shares of the stock of Milmar Estate, Inc., and the writing, DM-22, is a *nudum pactum;* therefore:

(a) Marcus is the owner and entitled to the possession of the 625 shares of the stock of Milmar Estate, Inc., purported to have been sold by Marcus to Kevelson on September 14, 1948, provided that Marcus shall repay the sum of $99,200, together with interest thereon.

(b) Marcus is the holder and entitled to the possession of 480 shares of the 500 shares of the stock of Milmar Estate, Inc., originally issued in the name of Miller and endorsed and delivered by Miller to Marcus, subject, however, to the right of Miller to redeem said shares upon payment to Marcus of the sum of $50,000, together with interest thereon.

(c) The plaintiffs are entitled to the return of the sums deposited by them with the Clerk of this Court pursuant to the order of interpleader made in this action.

8. On September 14, 1948, Marcus sold to Kevelson and Kevelson purchased from Marcus 625 shares of the stock of Milmar Estate, Inc. for the sum of $140,000 payable in installments; Kevelson defaulted in the payment of the installments due in January, 1951, and thereafter; Marcus elected to and did disaffirm the said sale by reason of such defaults; therefore:

(a) Marcus is the owner and entitled to the possession of the 625 shares of the stock of Milmar Estate, Inc., purported to have been sold by Marcus to Kevelson on September 14, 1948, provided that he shall repay the sum of $99,200, together with interest thereon.

Proposed Findings of Facts and Proposed Conclusions of Law

(b) Marcus is the holder and entitled to the possession of 480 shares of the 500 shares originally issued in the name of Miller and endorsed and delivered by Miller to Marcus, subject however, to the right of Miller to redeem said shares upon payment to Marcus of the sum of $50,000 together with interest thereon.

(c) The plaintiffs are entitled to the return of the sums deposited by them with the Clerk of this Court pursuant to the order of interpleader made in this action.

9. On September 14, 1948, Marcus sold to Kevelson and Kevelson purchased from Marcus 625 shares of the stock of Milmar Estate, Inc. for the sum of $140,000 payable in installments; Marcus was induced to sell such shares by the fraud of the plaintiffs and others acting on their behalf; on discovering said fraud Marcus elected to and did disaffirm the said sale; therefore:

(a) Marcus is the owner and entitled to the possession of the 625 shares of the stock of Milmar Estate, Inc. purported to have been sold by Marcus to Kevelson on September 14, 1948, provided that he shall repay the sum of $99,200, together with interest thereon.

(b) Marcus is the holder and entitled to the possession of 480 shares of the 500 shares originally issued in the name of Miller and endorsed and delivered by Miller to Marcus, subject however, to the right of Miller to redeem said shares upon payment to Marcus of the sum of $50,000, together with interest thereon.

(c) The plaintiffs are entitled to the return of the sums deposited by them with the Clerk of this Court pursuant to the order of interpleader made in this action.

10. On September 14, 1948, Marcus sold to Kevelson and Kevelson purchased from Marcus 625 shares of the stock of Milmar Estate, Inc. for the sum of $140,000; therefore:

Evidence in Support of Proposed Findings of Fact

(a) Kevelson is the owner and entitled to the possession of the 625 shares of the stock of Milmar Estate, Inc. sold to him by Marcus on September 14, 1948, for the sum of $140,000.

(b) Marcus is entitled to payment of the sums deposited by plaintiffs with the Clerk of this Court pursuant to the order of interpleader made in this action.

(c) Marcus is entitled to judgment against Kevelson in the sum of $5,800, together with interest thereon.

(d) Marcus is the holder and entitled to the possession of 480 shares of the 500 shares of the stock of Milmar Estate, Inc. originally issued in the name of William Miller and endorsed and delivered by Miller to Marcus.

11. The defendant, Samuel Marcus, shall have judgment in accordance with the foregoing conclusions of law.

Respectfully submitted,

/s/ Robert D. Grosman,
/s/ Jules E. Tepper,
Attorneys for Defendant,
Samuel Marcus.

Evidence in Support of Proposed Findings of Fact

The defendant Samuel Marcus, by Robert D. Grosman and Jules E. Tepper, his attorneys, respectfully submits the following evidence in support of his proposed Findings of Fact.

Fact 3

Bierman Deposition, page 4:

> "Q. And how did you become associated or interested in Milmar Estates? A. Mr. Miller came down to Florida, visiting down there. He told me—"

Q. Can you fix a time, about? A. Sure. Some time in February or March of 1946. I don't remember the exact date.

Q. That's all right. A. He told me he was contemplating—or trying to buy Ben Marden's Riviera."

FACT 4

Marcus Testimony, pages 736, 737, 738.

FACT 5

Marcus Testimony, page 739.

Miller Testimony, page 423:

"Weren't you supposed to put up a sum equal to that by Marcus on April 5th, when title was taken? A. I was."

Miller Deposition, pages 55, 57.

FACT 6

Miller Deposition, page 8:

"I know I was financially responsible. I owned Luna Park in Coney Island, 14½ acres. It belonged to me."

Miller Testimony, page 410:

"Did you tell Mr. Marcus you had an interest in Luna Park? A. Sure. I must have. I did have an interest. I may have told him."

Schwartz Deposition, page 195:

"Q. Did you ever hear from him the fact that he was negotiating to sell Luna Park? Meaning from Miller. A. Well, I wasn't aware that he owned it. As I gathered he had a dance concession out there. At least this was the story he told me."

Evidence in Support of Proposed Findings of Fact

FACT 7

Exhibit DM-53.

Marcus Testimony, page 737.

FACT 8

Marcus Deposition, page 410.

FACT 13

Miller Deposition, page 28.

Schwartz Testimony, pages 2213, 2214.

FACT 14

Winne Testimony, page 2102:

> "Miller provided the incorporators. Marcus did not appear in Bill Miller's Riviera."

Marcus Testimony, page 2417.

FACT 15

Exhibit DME-68.

FACT 16

Exhibit DME-28, paragraphs 40 and 47.
Exhibit DME-2.
Exhibit DME-16, paragraphs 3, 5 and 6.
Exhibit DME-68.

FACT 18

Loan Schedule attached hereto, marked Schedule A.

FACT 19

Marcus Testimony, pages 825, 827, 828, 838, 839, 840, 887, 888, 889, 980, 981.
Lieberman Testimony, pages 14 and 15.
Miller Testimony, page 283.
Miller Testimony, page 289:

> "I said to Sam Marcus, 'Make up your mind, what do you want to do? Do you want to close the deal or do

you want to open it? Do you want to lose this man? If you lose the man, you are going to lose every buck you have.' "

Miller Testimony, page 522.
Miller Deposition, page 67.

FACT 20

Affdavit of Hoffman verified Nov. 23, 1953.

FACT 21

Hoffman Testimony, pages 481, 482, 483, 487 and 488.
Kevelson Deposition, pages 6, 7.
Marcus Testimony, pages 1407, 1408.

FACT 22

Exhibit DM-14, Exhibit DM-1.

FACT 23

Loew, Testimony, pages 792 to 798.

FACT 24

Loew Testimony, page 792.
Marcus Testimony, page 1060.

FACT 25

Exhibit DM-18.
Marcus Testimony, page 818.

FACT 26

Marcus Testimony, pages 833, 834, 835, 837, 897, 898.
Schwartz Testimony, page 1870.
Miller Testimony, page 284:

"There were lots of plans discussed."

Lieberman, Testimony, pages 117, 118:

"A lot of arguing. The question of where the stock was; The question of the $50,000 note. Marcus kept re-

peating constantly that he got into the Riviera without putting up his money; * * * "

Maginn Testimony, pages 1686 and 1687:

"I did hear Mr. Marcus say he wouldn't consider selling Miller any of the stock without cash. Miller became very excited and walked out."

Schwartz Deposition, page 94:

"There was a meeting in Marcus' office which sort fell through because Miller and Marcus were fighting. Finally, as I recall, Miller stormed out of the door. There was a lot of noise and shouting. I turned around and was surprised he was gone."

FACT 27

Bergler Testimony, pages 702, 703, 710.
Bierman Deposition, page 22:

"Q. Were you acting for Kevelson? A. At that particular time, yes, both of us."

Exhibit DME-1.
Kevelson Deposition, page 75:

"Q. Was Bierman acting as your agent at that time? A. Both of them."

FACT 28

Schwartz Testimony, page 1876.
Schwartz Deposition, pages 101, 102, 394.

FACT 29

Schwartz Deposition, page 101:

"Q. Re escrow receipt. A. It was prepared within the week before the closing."

Schwartz Testimony, page 1928.

Evidence in Support of Proposed Findings of Fact

FACT 30

Marcus Testimony, page 1942.
Miller Testimony, page 264:

"Q. What was the conversation you had with Kevelson? A. That he could step into Milmar Estates; that he could get 40% of the stock; that it would cost him $30,000 down; $3,000 a month when open and $1,500 a month when we are closed.

Q. That was the proposal you had made to Kevelson? A. That's the proposal Marcus had given to me, and that's the proposal I made to Kevelson."

Miller Testimony, page 285:

"Q. So you say, how many shares were being sold? A. 625 shares.

Q. What about the other 625? A. That belonged to me, they were my shares."

Kevelson, Deposition, pages 7, 10, 26, 29, 38 and 71.
Kevelson Testimony, pages 635, 636, 654 and 657.

FACT 31

Miller Testimony, page 263:

"All he wanted to do was get his money out, with a little profit, and he would be very happy."

Miller Testimony, page 511:

"Q. And that what you were doing at the time was acceding to his wish, so that he would get his money out of there and go on about his own affairs? A. That's correct."

Evidence in Support of Proposed Findings of Fact

Lieberman Deposition, pages 9 and 10:

> "Q. What was all the dispute about, if you remember; what did they get all worked up about, when they did get worked up? A. It was mostly past occurrences. He kept—Marcus kept on shouting that he never got his $50,000 note paid; he kept on shouting that Miller
>
> didn't put in a lot of money into the deal. Miller kept on telling him, 'What do you want? Here is your chance to get out and get all your money back and make some money.' "

Bierman Testimony, pages 562, 563:

> "Q. And was there anything said with respect to the selling of the stock, or the property, or anything to do with respect to Mr. Marcus getting out of the Riviera? A. He expressed a desire to get out of the Riviera, get his money back and get out."

FACT 32

Kevelson Deposition, pages 10, 26.

FACT 33

Schwartz Testimony, pages 421, 357, 358, 1913.
Schwartz Deposition, page 83.
Marcus Testimony, pages 970, 1246.

FACT 34

Marcus Testimony, page 944.
Schwartz Testimony, page 2192:

> "Q. Did Mr. Miller make such affidavit? A. Not all of the stock certificates were missing. There were just one or two."

Evidence in Support of Proposed Findings of Fact

Schwartz, Testimony, page 2193:

"A. I couldn't answer at this time. I know my certificates were missing for one, and I think, one other certificate was missing.

Q. At that time how many shares were turned in by Marcus? A. I don't know exactly but there were a couple of certificates."

Schwartz Testimony, page 2194:

"Q. Did you call for the surrender of the certificates, 500 shares issued to Mr. Miller in the name of William Miller? A. As far as I recall Mr. Marcus had the certificate. He had it with him as I recall. I think they were all present except one certificate of mine and possibly one of Marcus."

Schwartz Deposition, pages 8, 83.
Schwartz Deposition, page 264:

"Q. Did you take a loss affidavit from any of the people involved with respect to the failure to deliver their stock? A. No. Not all of the stock certificates were missing. Just one or two. I know my certificates were missing for one and I think one other certificate was missing."

FACT 35

Marcus Testimony, page 942.
Miller Testimony, page 2129.
Miller Affidavit, verified November 23, 1953.

FACT 36

Lieberman Deposition, page 81:

"Q. Now, the stock you held was in whose name, the 625 shares? A. All in blank. It was endorsed in blank."

Evidence in Support of Proposed Findings of Fact

Miller Deposition, page 92:

"A. No. I don't remember anything except that I saw them all write 'canceled' out in the stock books. I saw them issue new stock. I saw Marcus sign them in blank and turn them over to Lieberman.

Q. You saw him do that on this particular day? A. That's correct."

Marcus Testimony, pages 1150, 1151.

FACT 37

Lieberman Testimony, page 176.
Lieberman Testimony, 251, 252:

"Q. Now all the other letters, papers, documents, stocks and other securities are held in escrow in connection with certain agreements in connection with the lease for Bill Miller's Riviera dated various dates on/or about July 23rd, 1947, shall all remain in escrow with Abraham Lieberman—was that done? A. Yes."

FACT 38

Lieberman Testimony, page 176:

"In the event of a default Marcus would have been put back in status quo.

Q. How could he be put back in status quo when Miller would wind up with 625 shares of stock for which he hadn't paid a dollar? A. He still would have had a $50,000 note outstanding against it. And we go back to an agreement of 1947 in which, in the event of default Miller would have lost the Riviera stock, Miller would have been dispossessed from Bill Miller's Riviera, he had the resignation of Bill Miller from Bill Miller's Riviera. He had him tied up, but good."

Evidence in Support of Proposed Findings of Fact

Lieberman Deposition, page 75:

> "Only in the event of a default was he going to be put back into status quo."

Miller Deposition, page 95:

> "A. The only reason for that is that in the event there was a default in the agreement Marcus would be in a position to say, 'I own the Riviera. I own the Milmar Estates. I own everything. Get out. I want to put you out tomorrow.' He would be in that position to do it."

Schwartz Deposition, page 246:

> "Did you in representing Marcus have in mind that if this transaction should not be fully consummated in accordance with the terms of the agreement, all parties should be restored to the status quo? A. Yes, I believe so."

Marcus Testimony, pages 818, 1256, 1257, 1258.

FACT 39

Schwartz Deposition, pages 402 and 403:

> "Miller didn't want that particular clause in there because he said he didn't want the creditors or any other people to know the terms and he said he would want it in a separate letter."

Schwartz Testimony, pages 1798, 1897, 1899, 1912.
Marcus Testimony, pages 918, 1256, 1257, 1258.

FACT 40

Lieberman Deposition, page 76:

> "And the note was left with me. As a matter of fact, not in escrow. It was left with me."

Evidence in Support of Proposed Findings of Fact

Maginn Testimony, pages 1686, 1687, 1707.
Marcus Testimony, pages 921, 942, 943, 944.
Exhibit DM-26.

FACT 41

Maginn Testimony, page 1696.
Marcus Testimony, pages 938, 942.
Schwartz Deposition, pages 402, 403.

FACT 42

Marcus Testimony, page 2256.
Roth Testimony, pages 2238, 2245, 2246.

FACT 43

Miller Testimony, page 289:

> "I said to Sam Marcus, 'Make up your mind, what do you want to do? Do you want to close the deal or do you want to open it? Do you want to lose this man? If we lose the man, you are going to lose every buck you have.' • • • "

Marcus Testimony, pages 829, 981.

FACT 45

Marcus Testimony, pages 1580, 1581.
Schwartz Deposition, pages 285, 286, 287:

> "When Marcus was dealing with Miller and Bierman he assumed, and I don't know where he got this assumption, he more or less represented he was the owner of the entire number of shares including mine. He had no such authorization from me."

FACT 46

Marcus Testimony, pages 973, 1200, 1201, 1202.

Evidence in Support of Proposed Findings of Fact

FACT 47

Exhibit DME-52, Exhibit DME-40.
Marcus Testimony, pages 1202, 1611, 1615, 1616, 1622, 1623, 1631.
Maginn Testimony, pages 1692, 1694.
Schwartz Deposition, page 313:

> "Q. And wouldn't that call for you to receive payment on September 14th, or, in the absence of payment, interest from September 14th from Sam Marcus? A. That's right."

FACT 48

Miller Testimony, pages 306, 321.

FACT 49

Exhibit DME-32.

FACT 50

Exhibit DM-14, page 12.
Exhibit DM-14, page 10.

FACT 56

Exhibit DM-45.
Miller Deposition, page 105.

FACTS 57 and 58

Exhibit DM-32.

FACT 59

Marcus Testimony, pages 889, 890, 891.

FACT 60

Marcus Testimony, pages 975, 976, 977.

Schedule A

LOANS BY MARCUS WITH MILMAR ESTATE, INC.
LOANS MADE BY MARCUS

Date	*Amount*	*Evidence*
July 16, 1946	$2,000.00	DM-44; DM-43
Sept. 30, 1946 Oct. 30, 1946	$3,500.00 $3,500.00	DM-15, p. 11; DM-14, p. 10; DM-43
Nov. 13, 1946	$ 700.00	DM-15, p. 13; DM-14, p. 10; DM-43
Nov. 27, 1946 Dec. 4, 1946	$3,500.00 $3,500.00	DM-14, p. 10; DM-43
Dec. 28, 1946	$5,100.00	DM-14, p. 10; DM-43; DM-24
Jan. 2, 1947	$3,500.00	DM-24
Feb. 6, 1947	$ 700.00	DM-24; DME-54
Feb. 24, 1947	$1,727.23	DM-24; DME-54
Feb. 27, 1947	$3,000.00	DME-54; DM-24
March 5, 1947	$1,100.00	DM-24; DME-54
Apr. 9, 1947 Apr. 11, 1947	$1,000.00 $ 500.00	DM-24; DME-54
June 20, 1947	$2,000.00	Minutes, p. 1819; DM-47
July 7, 1947	$3,000.00	DME-54
Aug. 15, 1947	$2,500.00	DME-54
Sept. 2, 1947	$1,000.00	DM-24; DME-54
Sept. 5, 1947	$3,000.00	DM-24; DME-54
Sept. 8, 1947	$ 100.00	DM-24; DME-54
Sept. 30, 1947	$1,500.00	DM-24; DME-54
Nov. 5, 1947	$5,820.00	DM-24; DME-54

Schedule A

Date	*Amount*	*Evidence*
Dec. 2, 1947	$6,000.00	DM-24; DME-54
Dec. 16, 1947	$1,500.00	DM-24; DME-54
Jan. 3, 1948	$ 808.33	DM-24
Feb. 3, 1948	$ 600.00	DME-54
Feb. 5, 1948	$2,500.00	DM-24
March 5, 1948	$2,500.00	DM-24
March 8, 1948	$ 791.00	Minutes, p. 1653; DM-15, p. 4
Sept. 15, 1948	$ 50.00	DM-24; DME-54

REPAYMENTS OF LOANS

All repayments are shown by Exhibits DM-34 and DM-35

Dates	*Amounts*
January 1947	$3,500.00
March 1947	$1,500.00
July 1947	$3,000.00
August 1947	$3.500.00
September 1947	$3,000.00
July 1948	$5,000.00
July 1948	$1,696.00
	$21,196.00

Excerpts from Deposition Testimony of William Miller, Robert J. Schwartz, Al Bierman, Al Kevelson, Abraham Lieberman (Miller Group) and Samuel Marcus

Deposition of William Miller:

(commencing at 7-24)

Q. You and Mr. Marcus went into the Milmar Realty venture, Milmar Estates, Inc. A. Yes, at the beginning, in 1946, (8) when the club was successful and doing tremendous business.

Q. Yes. What happened; you and Mr. Marcus agreed to buy it? A. To buy a piece of property called Ben Marden's Riviera.

Q. Well, were you buying the Riviera or were you buying the realty? A. We were buying everything.

Q. That is, the real estate— A. The real estate, and the night club, and the contents, and the name, and everything else.

Q. Now, had you and Mr. Marcus agreed to buy that property? A. Yes, we had.

Q. And how much was it to be purchased for? A. $425,000, with $125,000 down, and a mortgage of $300,000, of which he and I went personally on the mortgage.

Q. Now, were you financially responsible at that time? A. I think so.

Q. Did you have a credit rating at that time? A. I don't know, but I know I was financially responsible. I owned Luna Park in Coney Island, fourteen and a half acres, which belonged to me.

Q. Exclusively? A. With a partner, under a corporation, called Luna Park, Inc. I was a 50 per cent partner.

Q. It didn't belong to you, it belonged to a corporation. A. A corporation, of which I was president. And I had 50 per cent of the stock.

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* All figures in parentheses indicate the beginning of each new page of the Depositions Upon Oral Examination.

(9) Q. In your possession? A. That's correct.

• • •

(commencing at 44-2)

Q. Now, didn't you tell Mr. Marcus, to begin with, that you would contribute equally to whatever sum was required to acquire the Ben Marden real estate? A. I don't remember what I told Mr. Marcus.

Q. You might have told him that? A. I can't remember what I told him in 1946.

Q. You might have told him that? A. I'm sorry. I can't might, think or guess. I don't remember.

Q. You can't even imagine? A. I don't want to imagine.

• • •

(commencing at 53-6)

Q. And you don't remember how you paid the initial deposit of $25,000? A. No.

Q. Did any part of that money come from you, personally? A. Yes, $50,000.

Q. No, no. I am talking about the original $25,000, the deposit paid to Michael Realty. A. No.

Q. Who did it come from? A. Sam Marcus.

Q. Now, come down to the payment of the hundred thousand dollars, which was paid, I take it, on the closing—on the passing of title. You were there? A. Yes.

Q. You saw the money passed? A. Right.

Q. Whose checks paid the hundred thousand dollars? A. Marcus'. I am sorry. Let me correct that. I think there was numerous checks, whether they were Marcus' or Schwartz's or someone else's. I never looked at the checks. It was of no interest to me. And anything I tell you, outside of that, I am guessing, except I know there was $125,000 paid. Whose checks they were, I don't remember.

Q. Any part of the hundred thousand dollars come from you? A. Yes, $50,000.

(54) Q. And how was that $50,000 paid? A. Mr. Marcus gave me $50,000, which I executed a note for. Now, whether

he actually handed me the money, or anything like that, no. But upon that thing I had—$50,000 of that money was mine, of which I had a note for, which he could have called in any time he wanted to.

Q. Your note was good at that time? A. Yes, it was good.

• • •

(commencing at 142-7)

Q. Did you have an interest in Luna Park at that time? A. Yes, sir.

• • •

Deposition of Robert J. Schwartz:

(commencing at 194-19)

Q. On the occasion of your going to Mr. Miller's room in the Saint Moritz Hotel, when you told us that Mr. Miller did not discuss the Riviera with you, did Mr. Miller tell you that he was about to sell his property in Luna Park in Coney Island? A. No, he didn't discuss about selling it or not selling it. He was just telling me about his wartime experiences running (195) the place.

Q. Did you ever hear from him the fact that he was negotiating to sell Luna Park? Meaning from Mr. Miller. A. Well, I wasn't aware that he owned it. As I gathered he had a dance concession out there. At least this was the story he told me.

• • •

Deposition of Al Bierman:

(commencing at 4-5)

A. I met Bill when he was running the Copa.

Q. Where? A. Copa City in Miami Beach, Florida. We became very good friends. And right after that he came to New York and opened up the club in New York.

• • •

Deposition of Al Bierman

(commencing at 4-13)

Q. And how did you become associated or interested in Milmar Estates? A. Mr. Miller came down to Florida, visiting down there. He told me—

Q. Can you fix a time, about? A. Sure. Some time in February or March of 1946. I don't remember the exact date.

Q. That's all right. A. He told me he was contemplating —or trying to buy Ben Marder's Riviera.

Q. At Fort Lee, New Jersey? A. Fort Lee, New Jersey.

• • •

(commencing at 8-1)

Q. Oh, you mean— A. Oh, yes, the building.

Q. Not the night club? A. I wasn't interested in any night club. I wanted property for my money.

• • •

(commencing at 10-10)

Q. But you gave Mr. Miller the $20,000 specifically for an interest in this Ben Marden's property? A. Yes, sir.

Q. Do you know why your name wasn't included in the deed to that property? A. I don't know; no, sir.

Q. Was it supposed to be included? A. The supposition —yes, sir; it should have been.

• • •

(commencing at 14-18

Q. When were you first given anything to show for your $20,000? A. Never.

Q. To this very day? A. To this very day I have never received anything, outside of the man's word. • • •

• • •

Deposition of William Miller

Deposition of William Miller:

(commencing at 54-16)

Q. You say that you merely told Marcus about this. A. About this beautiful building that was for sale. And he went over and looked at it, and then came back and was all enthused.

Q. Then he had to sell you on it, to go into this thing? A. That's right. That's correct.

• • •

(commencing at 42-21)

Q. Now, you were to have a 50 per cent interest. A. That's correct.

Q. And Mr. Marcus was supposed to have a 50 per cent interest. A. That's correct.

Q. What was Bierman supposed to have? A. Ten (43) per cent of mine.

• • •

(commencing at 19-1)

Q. Will you look at this letter, please, and tell me whose handwriting those insertions are, in the first and second paragraph from the top? A. This looks like Mr. Marcus' handwriting. I know it is not mine.

Q. Were they made with your approval? You don't question the propriety of these insertions? A. Oh, no.

Q. They are all right, they meet with your approval? A. Absolutely.

• • •

(cor mencing at 20-20)

Q. Now, were the terms of this—what seems to be some sort of an agreement set forth in DM-303*—ever

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* All exhibit numbers referred to herein will be found printed on page 1939a infra, with their corresponding numbers as set forth in the original transcript of testimony.

Exhibit numbered DM-303 is the same as DME-40.

carried out? A. Oh, by all means. Just the way Mr. Marcus wanted it.

• • •

(commencing at 27-23)

Q. When? A. When I turned over my stock for the note. Whether it was three months later, or two months later, I don't remember now. This happens to be eight years ago. So (28) how would I remember whether I had physical—when I got the note, and when I turned over everything in this letter, he made sure I did, according to this letter.

Q. Now, let me ask you again so I get this thing straight in my mind, did you at any time have physical possession of any stock in Milmar Estates, Inc.? A. I just answered that. At the time when I signed my note, I turned over my stock to Mr. Marcus.

Q. That first $50,000 note. Right? A. Evidently. Whenever it was. I don't remember.

• • •

Deposition of Al Kevelson:

(commencing at 5-5)

Q. What facts did he outline to you? A. He said that he is partners here with somebody who owns fifty percent of the real estate and he would like to get him out, he thinks he can work out a deal with him, and he started to ask me—I asked him what is the deal about. And he told me. Then I asked him, as anybody would say, "Why do you want to get him out?" And he told me he is having a lot of trouble with this man, this man is unpopular, he doesn't let him run his business, and—oh!—a lot of stories.

Q. Suppose you tell them to us as nearly as you recall them. A. All I can recall is what I just told you, that the man was of no value to him, he was just a thorn in his side, does not let him run the business correctly, and found it to be a detriment, and it was hurting him tremendously,

and he just can't carry on, and he is definitely looking to get somebody to buy him out.

Q. Now, is that all that was said that night? A. No.

Q. What else was said? A. Except as to the provisions of the contract, that is, what he wanted to sell. (6) He told me he can get this man out for a hundred and twenty-five thousand dollars; and he will be out completely, he don't want no part of him. I said, "Well, what do you mean, 'completely' "? He said, "Well, out of the Milmar Estates, Incorporated. I don't know what I had with him before, but I got to get him out of my hair, in every way, shape or form." I says, "Now, how does that hundred and twenty-five thousand have to be paid?" He said he thinks he can get it with him for thirty thousand dollars down, and three thousand dollars a month when the Riviera would operate and fifteen hundred dollars a month when it's closed. And my next question to him was, "Can we look at the Milmar books?" He says, "Yes, you can." I says, "All right, I will be up here with my accountants." And I came up there with my accountants.

Q. When? A. Oh, I don't remember. Maybe a day or two later, or the next day. I don't remember the date.

• • •

(commencing at 7-8)

Q. Now, when you came with your accountants, did you go there in the daytime or at night? A. Daytime, afternoon.

• • •

(commencing at 7-25)

Q. What do you mean by that? (8) A. That business wasn't so good. They were behind in debts,—

Q. The business of Milmar? A. They were behind in debts.

• • •

(commencing at 8-19)

Q. Did your accoutants make up a statement of the fin-

ancial condition of the assets of Milmar Estates? A. Not to my knowledge.

Q. They never gave you a statement? A. No.

Q. They just took a look at the books. A. (Witness nods.)

• • •

(commencing at 78-6)

Q. Now, Mr. Kevelson, I am referring to an affidavit made by you under date of November 5, 1953, and filed in this Court, as I remember it, in opposition to an application made by Mr. Marcus for the appointment of a receiver. I am not sure about that. And you say in here that you are the president of Milmar Estates, Inc., and a stockholder and director of the company, right? A. If it is in there.

Q. Well, your lawyer is following me on this. A. I will read it with you.

Q. Sure. Now, you say, "In or about September, 1948, William Miller spoke to me concerning the purchase of an interest in Milmar Estates, Inc.," is that correct? A. That's correct. Around August, September. When I say 'about', possibly—

Q. It might have been— A. In August. Definitely in August.

Q. But it was before September? A. Yes, definitely.

Q. Now, you refer here to the fact that you were to buy out Marcus' interest in this Milmar Estates for $125,000, right? A. That's correct.

• • •

(commencing at 52-1)

Q. Now, that money that you contributed to the bank account of Milmar Estates for the purpose of paying Mr. Miller—

Mr. Brigadier: You mean Mr. Marcus.

Q. —was that delivered in cash?

Mr. Grosman: Mr. Marcus, rather. I am sorry.

Q. (Continuing.) Mr. Marcus. Was that given by you in cash or by check? A. When we made deposits into the bank?

Q. Yes. A. Cash. Mostly cash.

Q. And that came from your private sources? A. That's correct.

Q. And not from your bank account? A. That's correct.

• • •

(commencing at 37-2)

Q. But he did tell you that there were claims by Mr. Marcus against Bill Miller's Riviera? A. No, I don't think he specified any particular claims against Bill Miller's Riviera.

• • •

(commencing at 37-23)

Q. But he did tell you that Marcus had a $50,000 note signed by him, Miller? A. That's correct.

Q. How about stock, did he tell you anything about stock? (38) A. In reference to what?

Q. In the Milmar Estates held by Marcus? A. You mean how much stock?

Q. No, stock earmarked for Miller and held by Marcus. A. No, he did not tell me about stock, but he told me that he was a 50 per cent owner, that William Miller was a 50 per cent owner of Milmar Estates.

• • •

Deposition of Al Bierman:

(commencing at 88-21)

Q. Well, where did you get the information that Mr.

Miller had 50 per cent of the outstanding stock of Milmar Estates, Inc.? A. Mr. Miller and I.

Q. The two of you had 50 per cent. A. That's right.

(89) Q. Did you ever have a stock certificate for any number of shares of Milmar Estates? A. At that time; no, sir.

Q. Or prior to September 14, 1948? A. Mr. Miller told me I had that much.

Q. You didn't have actual possession of a stock certificate? A. No, sir.

Q. Did you ever see a stock certificate issued to William Miller for any number of shares of stock— A. I have never seen—

Q. —of Milmar Estates, Inc., prior to September 14, 1948? A. I have never seen any.

Q. Before or since. A. That's right. Outside of—

Q. Outside of what? A. You know, photostat copies of it.

Q. In these proceedings, you mean? A. Yes.

Q. Now, were you ever given a certificate of stock for any number of shares in Milmar Estates, Inc.? A. No, sir.

Q. Miller told you that between you two you had 50 per cent of the stock— A. Yes, sir.

Q. —of Milmar Estates, Inc. A. Yes, sir.

Q. Did he tell you whether he paid anything for his shares of stock? A. We didn't discuss it.

Q. Who did you pay for your shares of stock? A. I sent my money to Bill Miller.

(90) Q. You had no personal dealings with Samuel Marcus in respect to stock, other than that letter of—

Mr. Brigadier: DM-226.

Q. —DM-226? A. No, sir.

Q. That's all the dealings you had? A. Yes.

* * *

Exhibit numbered DM-226 is the same as DME-1.

Deposition of Al Kevelson

Deposition of Al Kevelson:

(commencing at 9-11)

Q. And what were you supposed to get for that hundred and twenty-five thousand dollars? A. A fifty percent interest in Milmar Estates, Incorporated. And that was intended to buy out Sam Marcus, who was to relinquish his complete rights, whatever he had against Bill Miller, and any papers, a note that was outstanding, any claims against Bill Miller's Riviera, or against Milmar Estates, Incorporated.

• • •

(commencing at 10-9)

Q. Were you told how many shares were issued and outstanding of Milmar Estates, Inc.? A. No, I didn't discuss shares whatsoever, with anybody. I just knew that I was going to have fifty percent of Milmar Estates, Inc.

Q. Did you have anything in writing to show that? A. No, sir.

Q. Did you authorize William Miller to act for you in acquiring that fifty percent interest? A. Yes, sir.

Q. How did you do that, verbally or in writing? A. Verbally.

• • •

(commencing at 13-25)

Q. You said that Miller had told you that this (14) man, Marcus, with whom he was in partnership was getting into his hair, that he wasn't permitting him to run his business the way he wanted, and all that sort of business. Did you ever attempt to find out whether that was so or not? A. No.

• • •

(commencing at 14-11)

Q. You just took William Miller's word for it? A. That's correct.

Q. That the man was no good, right? A. Correct.

• • •

Deposition of Al Bierman:

(commencing at 22-19)

Q. Were you acting for Al Kevelson? A. At that particular time, yes, both of us.

• • •

Deposition of Al Kevelson:

(commencing at 34-24)

Q. Those interlineations, those lines that are stricken out, or the words that are stricken out, the corrections, were (35) they discussed with you? A. No, sir.

Q. You authorized Mr. Miller to make them on your behalf? A. Yes, sir.

• • •

(commencing at 75-2)

Q. Had that matter been discussed between you and Mr. Bierman before the money was paid to Marcus? A. No, they were authorized to give him a deposit and do everything correctly.

Q. Was Bierman acting as your agent at that time? A. Both of them.

Q. Both Miller and— A. Yes.

• • •

(commencing at 29-3)

Q. What do you mean, "we had an agreement." Were you a party to any agreement? A. Bill Miller and Al Bierman.

Q. Was that a written agreement? A. No, they went orally and they acted on my behalf.

Q. Were they acting as your agent at the time they negotiated the purchase of this stock from Mr. Marcus? A. That's right.

• • •

Deposition of Al Bierman:

(commencing at 90-6)

Q. I show you photostatic copy of a letter dated August 26, 1948, marked Exhibit DM-225, addressed to Mr. Samuel Marcus, and the first line of which reads as follows, "The undersigned, Al Bierman,"—but it is not signed. Did you ever see that letter, the original of that letter? A. No, sir; I have never seen that.

Q. Do you know how many shares of stock Mr. Marcus was supposed to own at the time that you say he signed the exhibit, DM-226, August 27, '48? A. No, sir.

Q. You had no idea? A. No, sir.

Q. Now, did you make him a previous offer by letter to buy his stock—Mr. Marcus? A. A previous offer?

Q. Yes, previous to August 27, '48, Exhibit DM-226. A. That was that other letter.

Q. There was another letter? A. You just read it.

Q. You are now speaking of the 12½ per cent that we referred to— A. That's right.

Q. —which you said would give you and Miller control. A. That's right.

Q. You say that offer was previous to August 27, '48,— (91) A. Yes, sir.

Q. —even though the date would indicate that it was subsequent? A. That's right.

Q. Now, did you make any other offers to Mr. Marcus? A. I don't remember.

Q. Did you ever make an offer to Mr. Marcus, or authorize the making of an offer to Mr. Marcus, in this language, "The undersigned, Al Bierman, does hereby

offer to purchase all of your shares in Milmar Estates, Inc., consisting of approximately 62½ per cent of the outstanding shares (described as all those shares not held by Bill Miller or Al Bierman) for the sum of $125,000 payable as follows:" Then you go on and give a number of suggested payments. Did you ever make an offer of that sort? A. No, sir.

Q. You are sure of that? A. Positive.

Q. And did you offer to pay him the $125,000 in the manner following: "$19,000 on execution of this agreement, receipt whereof is hereby acknowledged"—the word 'hereby' I think is stricken out—"$11,000 upon the execution of the necessary papers called for in this agreement; $3,000 each month, on the first day of each and every month, that the Riviera (or successor) is open, and $1,500 each month on the first day of each and every month that the Riviera is closed. And for the purpose of this clause the question of whether or not the Riviera is open or closed shall be the state of affairs (92) that prevail on the first day of each month."

Do you remember making an offer to Mr. Marcus in those terms, or authorizing anybody— A. No, sir.

Q. —to make that offer? A. No, sir.

Q. You know nothing about that? A. Know nothing about it.

Mr. Brigadier: Judge may the record show that you were referring to Exhibit DM-225, so that it will be clear—

Mr. Grosman: Yes, I think it is in there.

Mr. Brigadier: —what you were examining about?

Mr. Grosman: Yes.

• • •

(commencing at 82-19)

Q. I show you photostatic copy of a letter dated Septem-

Exhibit numbered DM-225 is the same as DME-2.

ber 14, 1948, addressed to Mr. Samuel Marcus, and signed by Al Bierman, by William Miller, Attorney, Exhibit DM-208. Will you read it, please?

(Witness complies.)

A. Yes, sir.

Q. Do you know anything about this? A. Yes.

(83) Q. Did you ever see this before, or the original of this exhibit? A. Yes, sir.

Q. And are you familiar with its contents? A. The date is wrong, Judge.

Q. What is wrong with the date? A. I wasn't here that day.

Q. I know, but you didn't sign this. A. I wasn't here on that date.

Mr. Brigadier: Why do you say the date is wrong?

The Witness: Because I wasn't here on the 14th.

Mr. Brigadier: But you didn't sign it.

The Witness: I didn't sign it, either.

Mr. Brigadier: Then how do you know the date is wrong?

The Witness: I didn't get a chance to answer about the signature.

Mr. Abraham Chazin: Why don't you read it? Take your time and read it.

A. I didn't sign this.

Q. I know, but I didn't ask you—

Mr. Abraham Chazin: Mr. Bierman, do you want to take the time to read that paper?

The Witness: I have read it before.

Q. Does it mean anything to you, that paper; does that mean anything to you? A. Yes, sir.

Q. Are you familiar with its contents? A. Yes, (84) sir.

Q. Did you ever authorize Mr. Miller, on your behalf, as

Exhibit numbered DM-208 is the same as DME-25.

your attorney, to make this offer to Mr. Marcus? A. Yes, sir.

Q. And you know the nature of this offer? A. Yes, sir.

Q. Now, did you offer to purchase from Mr. Marcus 12½ per cent of the outstanding stock of Milmar Estates, based upon a $500,000 valuation of the corporation? A. Valuation less the—

Q. Now, there is some more there, but I— A. Yes, sir.

Mr. Grosman: Do you have a copy?
Mr. Brigadier: I gave you my copy.
The Witness: Yes, I know. I—
Mr. Abraham Chazin: You said valuation less what?
The Witness: Less what we owed on the building. That was supposed to be in there.

Q. What Milmar owed on the building? A. Milmar; yes, sir.

Q. Now, let me read this to you—or you may read it yourself, if you like, I don't want to confuse you.

• • •

(commencing at 85-7)

Q. Now, did you make that offer? A. Yes.

Mr. Brigadier: Did you make that offer?
The Witness: Yes, sir.
Mr. Brigadier: You, yourself, made it?
The Witness: Yes, sir.
Mr. Grosman: Now.
Mr. Brigadier: Sorry.

Q. Did you agree to buy 12½ per cent of the outstanding stock of Milmar based upon a $500,000 valuation? A. Less the amount of money that was owed at that time on Milmar.

Q. All right. That is your answer. A. Yes, sir.

Q. And was that an unqualified offer or was it conditional upon something else? A. That was conditional that if this other deal that we were negotiating at that particular time fell through.

Q. Then you still wanted to have the right to buy— A. Yes, sir.

Q. —12½ per cent of Mr. Marcus' stock based on a (86) valuation of $500,000, right? A. Less the amount of money that they owed on the building; yes, sir.

Q. Did you have anything to do with the preparation of this offer, the actual preparation of the typewritten letter,— A. No, sir.

Q. —marked DM-208? A. No, sir.

Q. Were you told about it in advance? A. Sam Marcus wrote this.

Mr. Brigadier: How do you know?

The Witness: I was there.

Mr. Grosman: Please, Mr. Brigadier.

Q. You were familiar with all the details of this offer made on your behalf by Mr. William Miller? A. Yes, sir.

Q. And you say that Samuel Marcus prepared this? A. Yes, sir.

Q. Where? A. In Bob Schwartz's office.

Q. Were you present? A. Yes, sir.

Q. Were you there on September 14,— A. I was not.

Q. —'48? A. I was not. This was prior to this.

Q. Well, now, you say that DM-208 was prepared prior to— A. Prior to August 27.

Q. —to Exhibit DM-226, the letter of August 27. A. Yes, sir.

Q. Even though the month of September, 1948, was typed (87) in there, and the numerals '14' added in ink? A. Can I explain it my way?

Q. Sure, go ahead, explain it any way you like. A. We were in Sam Marcus' office—

Exhibit numbered DM-208 is the same as DME-25; DM-226 is the same as DME-1.

Q. Who is 'we'? A. Mr. Miller and I. —negotiating this.

Q. You are now referring to DM-226. A. Yes, negotiating the purchase of the property. I am sorry. When he brought up the subject, "suppose this deal falls flat."

Q. Yes. A. Knowing that Mr. Marcus was harassing Mr. Miller at that particular time, and I had some money with me at the time, I was very anxious to buy enough stock to have complete control—Mr. Miller and I to have complete control of Milmar. There is your answer.

Q. So you figured that by buying 12½ per cent of the outstanding stock of Milmar Estates, Inc., you would thus became a majority stockholder, you and Mr. Miller. A. Yes, sir.

Q. Who told you that? A. Who told me what?

Q. That by acquiring 12½ per cent of the stock— A. Sam Marcus.

Q. He suggested to you that you buy 12½— A. No, I suggested I buy from him.

Q. Yes. A. The amount we would have had would be completely controlling.

Q. But Samuel Marcus told you that by acquiring 12½ (88) per cent of the outstanding stock of Milmar Estates it would give you and Mr. Miller control. A. Complete control; yes, sir.

Q. And in what connection did he say that to you; how did he come to say that to you, do you know? A. We were talking about it, and he said it, "Supposing this deal doesn't go through?" I said, "Well, Sam, if it doesn't go through, I would like to buy some more stock."

Q. Yes. And he suggested— A In back of my mind I had complete control, so as Mr. Miller could run this without any harassment from Mr. Marcus.

Q. And Mr. Marcus suggested that by buying this percentage you would acquire complete control? A. Yes, sir; because we had 50 per cent at that time.

Depositions of William Miller and Robert J. Schwartz

Q. Which would make him a minority stockholder. A. That's right.

Q. And he was satisfied that that be done? A. There it is, right there.

Q. And he prepared this writing? A. I didn't type it. It was done in Bob Schwartz's office.

* * *

Deposition of William Miller:

(commencing at 93-14)

Q. Now, tell me about this letter of September 14, marked DM-208 addressed by Al Bierman—by William Miller, Attorney—to Samuel Marcus, with respect to an offer to purchase 12½ per cent of the outstanding stock of Milmar Estates, Inc. based upon a $500,000 valuation of the corporation, "In the event that there is a default in the purchase by myself of my contract to purchase the premises known as Bill Miller's Riviera, under agreement dated September . 1948," which I now show you; whose idea was that? A. This was Al Bierman's idea.

Q. He was not there? A. No.

Q. When had he communicated those instructions to you? (94) A. He had made this deal previous to me—my being there with Mr. Marcus. This is something he did himself. He entered into this agreement and made a deal with Mr. Marcus and at the closing of this deal Mr. Marcus insisted on this deal, here, Mr. Marcus insisted that Bierman go through with the agreement he made with him.

* * *

Deposition of Robert J. Schwartz:

(commencing at 402-5)

Q. But you had nothing to do with negotiating the agreement expressed in this letter? A. I am sure I did not.

Exhibit numbered DM-208 is the same as DME-25.

They had dozens of others besides that. This is just one of a dozen other agreements they had.

• • •

Deposition of William Miller:

(commencing at 143-1)

Q. Did Mr. Lowe ever talk to you about buying out your interest and that of Marcus in the Milmar Estates or in Bill Miller's Riviera? A. Yes, he did.

Q. And did you discourage him? A. I told him he could do what he wanted with Marcus, but I refused to sell my interest.

Q. And did you tell him why you refused to sell your interest? A. Yes, I told him that I had a lot of faith in this proper', and I wanted to keep my interest.

Q. And when was this, about? A. Oh, sometime before the sale.

• • •

(commencing at 63-18)

Q. Didn't Lowe offer to buy the Milmar property and the Riviera and didn't you discourage him from so doing? A. Mr. Lowe offered to buy nothing. Mr. Lowe just talked to Mr. Marcus. What his intentions were, I don't know. And I did not discourage Mr. Lowe, or anyone else, not to buy it. In fact, I brought to him three or four times different people who looked over the situation, and after looking it over, and their accountants, walked out on the deal and wouldn't give him even (64) $90,000.

• • •

(commencing at 69-9)

Q. Now, wasn't that stock turned over to you many, many months prior to September 14, 1948? A. Yes.

Q. So that he was out of the management of the Riviera entirely? A. That's correct.

• • •

Deposition of Al Bierman

(commencing at 70-4)

Q. Well, all he could do was suggest? A. That's correct. He didn't interfere, as far as the operation is concerned. He had no way of interfering.

Q. He had no standing? A. No.

Q. He had no interest whatever in Bill Miller's Riviera? A. Oh, his interest—

Q. I mean— A. —was tremendous.

Q. I mean the night club. A. That's correct.

* * *

Deposition of Al Bierman:

(commencing at 46-25)

Q. Did you see him do anything else besides raising hell (47) with Bill Miller? A. In what way?

Q. Well, did you see him do anything else,— A. Dancing.

Q. —while you were there? A. He was dancing.

Q. Yes. What else? A. Eating and dancing.

Q. That is all you saw him do? A. Yes.

Q. And therefore you concluded that Samuel Marcus was in intimate contact with the financial affairs of Bill Miller's Riviera on practically a day to day basis; is that the basis of your opinion? A. No, sir. And conversation I had with Mr. Miller.

Q. Anything else? A. That is about all.

* * *

(commencing at 93-5)

Q. Do you recall the date that you were present at Robert Schwartz's office? A. No, sir.

Q. Was it before August 27, '48? A. Yes, sir.

Q. How long before? A. It may have been a week or two, or a few days. I don't remember the exact dates.

Deposition of Al Bierman

Q. Was it in the month of August? A. August; yes, sir.

Q. Were you there at all in the month of September? A. No, sir.

• • •

(commencing at 68-11)

Q. Now, the $9,000, was that your money? A. Some of it.

Q. How much of it? A. $6,000.

Q. In cash? A. Perhaps.

Q. What do you mean, perhaps? A. I think it was.

Q. Well, aren't you sure? It was your money. A. I don't remember whether it was all mine or not. I remember some of it was mine.

Q. And some of it was given to you by whom? A. Someone else. I don't remember.

Q. Who? A. I don't remember.

Q. You don't remember. A. I don't remember all of it. It could have all been mine. I don't remember.

Q. You don't remember if somebody gave you $3,000? A. I don't remember—it could have been Mr. Kevelson. I (69) don't know. I don't know who it was.

• • •

(commencing at 69-7)

Q. You might have borrowed it? A. I could have.

Q. From whom? A. From friends.

Q. Who? A. Friends.

• • •

(commencing at 70-18)

Q. Now, will you tell us again, please—where we left off prior to the objection—from whom you got this surplus money, over and above the $6,000 which you think may have been yours? A. I don't remember.

Q. Did you have this money in the bank at any time? A. Which money?

Deposition of Al Kevelson

Q. The $9,000. A. I might have cashed a—I don't know. I have had money in the bank.

(71) Q. On or about the 27th of August, '48, did you withdraw $9,000, or any such sum from a bank? A. I don't know, sir. I don't remember.

• • •

(commencing at 27-21)

Q. And did he give you any part of this money? A. Who is that?

Q. Bill Miller. A. Miller gave it all to me.

Q. Are you sure about that? A. No, I am not sure, because one of these checks may have been mine. I am not (28) sure.

• • •

(commencing at 28-9)

Q. He liked you? A. Well, he didn't like Miller. He liked me.

• • •

(commencing at 77-4)

Q. Did Mr. William Miller give you any cash to be used in connection with the payment of this stock? A. I don't remember whether Mr. Miller gave me any cash or not. He could have, but I had two checks there.

• • •

Deposition of Al Kevelson:

(commencing at 30-3)

Q. How much did you put up? A. You mean on deposit or the complete amount?

Q. No, on deposit, or however you put it up. A. We put up—when I say 'we', after we made the deal, Al Bierman who owned 10 per cent of the 50 per cent that Bill Miller owner, wanted 10 per cent more, and I gave him

10 per cent of the 50 per cent which I bought—which is the part that bought out Sam Marcus completely, lock, stock and barrel—I sold him 10 per cent, which, in turn, meant that he had to pay one-fifth of every dollar that we had to pay—that I had to pay to Sam Marcus. In other words, the $30,000 deposit, he paid $6,000 and I paid $24,000.

Q. You are now referring to Mr. Bierman? A. That's correct.

Q. Now, did you put up twenty-four thousand? A. That's correct.

Q. How did you put it up, by cash or check? A. By cash.

• • •

(commencing at 32-7)

Q. Now, will you tell us, please, where and when you gave Mr. Miller these $30,000 in cash? A. I gave him part of the money at Garden City, New York, and the rest of the money at Bill Miller's Riviera.

Q. Did you get a receipt for the money? A. No, sir.

Q. You had nothing to show for the fact that you gave Mr. Miller $30,000 in cash? A. That's correct.

Q. Now, at this time you had a bank account, did you? A. That's correct.

Q. Any particular reason why you didn't gave him a check for this money? A. No, no particular reason.

• • •

(commencing at 33-1)

Q. Well, you gave him what; how did you give him this money? A. I think I gave him five at the beginning and then I gave him nineteen.

Q. That would make it twenty-four. A. That's correct.

Q. And did Mr. Bierman give you the money? A. No, he must have given Mr. Miller the other six.

• • •

Deposition of Al Bierman

(commencing at 33-18)

Q. How long before that had you given the first payment? A. Maybe two weeks, three weeks. I don't remember.

Q. Now, did you take these $24,000 from the bank? A. From a bank account?

Q. Yes. A. No, sir.

Q. Where did this money come from, this cash money? A. I had it personally.

Q. In a vault? A. That's correct.

• • •

Deposition of Al Bierman:

(commencing at 16-3)

Q. Were you in a position to buy him out yourself? A. Some of it. I was going to borrow some more money; yes, sir. I was going to buy some of it. I couldn't buy it all; no, sir.

• • •

(commencing at 16-14)

Q. Was there an understanding? A. Just a personal understanding. We were going to try to get enough money to buy Sam Marcus' interest, all of his interest, everything included. Wanted to get rid of him.

Q. Well, what do you mean, you wanted to get rid of him? A. Because he wasn't a nice person.

• • •

(commencing at 17-18)

Q. Now, did you negotiate with Mr. Marcus to buy out his interest? A. I did.

Q. When? A. Prior to August 28, or whatever it was. I met him there and we went down to his office.

Q. Where? A. On Forty-second Street. I don't know

the exact address. And from there we went up to Bob Schwartz's office.

Q. And? A. At that particular time he wanted (18) $90,000. Prior to that when we went down there he raised it to $125,000 by telling us that a man by the name of Lowe —he was trying to interest a man by the name of Lowe— offered him $125,000 and that is what he wanted from us.

• • •

(commencing at 18-17)

Q. Did you agree to buy his interest? A. At what price?

Q. At a hundred and twenty-five thousand. A. Yes, sir.

Q. When? A. August, the latter part of August.

Q. In Bob Schwartz's office? A. No, sir.

Q. Where? A. The Riviera.

Q. That's in the night club? A. In the night club.

(19) Q. You met Marcus there? A. Yes, sir.

Q. And it was in the night club that a writing of some sort was drawn up? A. Yes, sir.

Q. Who drew the writing up? A. Both of us.

Q. Where? A. In the office upstairs, in the night club.

• • •

(commencing at 29-1)

Q. Now, do you know why that was not inserted in this writing,— A. I didn't deem it necessary.

Q. —DM-226? A. I didn't think it was necessary to do that. It says here—because he didn't want it, he wanted to put down here in the event—he wrote this contract himself. He dictated all of this.

Q. Didn't you have anything— A. I was right with him, yes, but I insisted on putting in there all the outstanding stock. He tore up three or four of them before

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Exhibit numbered DM-226 is the same as DME-1.

this one was put down. He wanted to write it his way. So we destroyed a half dozen of these sheets before this was written. I wanted included all the outstanding stock that wasn't owned by Bierman and Miller.

• • •

(commencing at 29-21)

Q. And you think that Marcus sat down and typed half a dozen of these things and tore them up? A. I tore them up.

Q. You tore them up. A. Yes, sir.

• • •

(commencing at 33-2)

Q. Well, was it near the bar that you talked to him? A. Well, everything is near the bar.

• • •

(commencing at 34-8)

Q. Somewhere near the bar. A. It had to be near the bar.

• • •

(commenced at 40-23)

Q. And did you know what papers there were outstanding between Mr. Miller and Mr. Marcus? A. There were so many of them, Judge, I don't remember all of them. There (41) were so many of them.

Q. Do you remember any of them? A. Yes, a $50,000 note. He was to deliver that back on payment of $125,000.

• • •

(commencing at 41-19)

Q. So, without any instructions from Mr. Miller you took it upon yourself to demand that Marcus surrender his $50,000 note, right? A. There was no instructions. We discussed it. I wasn't instructed to do anything.

Deposition of Al Bierman

Q. Were you requested by Mr. Miller— A. I wasn't requested.

Q. —to make that demand? A. We discussed it. (42) Mr. Miller told me about this note..

Q. What did he tell you about it? A. He just says Marcus has a note of his for $50,000, that he is to surrender this note. I wasn't instructed by Mr. Miller. Mr. Miller told me that Marcus had this note, that he was to surrender this note on the completion of payment of $125,000.

• • •

(commencing at 26-22)

Q. And the words, whatever they are, that were stricken out underneath. A. That's not my handwriting.

Q. Would you say it is Sam Marcus' handwriting? A. Yes, sir. That's the only man I was talking to at the (27) time. Now, there was no one present when this was being done.

Q. Who asked you to give Mr. Marcus this money? A. He did. He wanted a deposit.

Q. Were you prepared that night to give him a deposit? A. I had the money with me.

Q. I mean, were you prepared? A. Yes, sir. Here it is.

Q. Ordinarily you don't carry ten thousand dollars. A. That's right. I don't carry that kind of money around. He was to meet me there that night.

Q. And you had agreed upon the terms before you met? A. No, sir.

• • •

(commencing at 76-3)

Q. Now, you say that this note, marked 302 for identification, was made necessary by something connected with the letter DM-226. A. Yes, sir.

Q. Why was that made necessary? A. Because it said on the bottom—you read that bottom, if you will, please, sir.

Mr. Brigadier: You read it.

A. "In the event that a written contract is not entered within ten days from date of this letter satisfactory to my attorney I will return this deposit without obligations to either party."

When I left here that next day, this was just signed, this wasn't—the whole transaction hadn't been what you would call—

Q. Consummated? A. Consummated or concluded, whatever it is. I talked to Bill a few days afterwards and he told me they were going to get ready, and he said, "I want a letter from you authorizing me to act for you."

* * *

Deposition of Abraham Lieberman:

(commencing at 6-19)

Then there was a lot of discussion, a lot of argument going on between Miller and Marcus—it seemed they couldn't get together on some of the details, terms—insignificant, ridiculous arguments about paying of tabs. And one of the conditions Sam Marcus wanted was that he should get free food for the rest of his life, as long as the Riviera was there, and drinks, and all. Stupid arguments in which I wasn't even (7) interested.

Then we finally adjourned and we met the early part of September, after we got some idea of what the conditions were to be, I met at Bob Schwartz' office—

Q. Pardon me. That was September 14? A. No, no, before that. It was around September 2 or 3.

Q. In '48. A. This is all '48. It was also August, '48, that was first talked about.

* * *

Depositions of Robert J. Schwartz and William Miller

Deposition of Robert J. Schwartz:

(commencing at 265-24)

Q. Who spoke? A. I couldn't say. There was a general noisy conversation. Miller and Marcus (266) were calling each other names; they were screaming at each other; they were fighting with each other. Whenever they recessed for a minute or two we would try and carry on a sensible discussion with them.

• • •

(commencing at 266-7)

A. We weren't drawing a contract at that time. We were just discussing what to do.

• • •

(commencing at 278-10)

Q. You don't know when P-4 was prepared? A. There may have been another agreement on the order of P-4 which we couldn't rescue and that we may have re-dictated in the form of P-4.

• • •

(commencing at 278-21)

Q. Actually you do have definite knowledge that it was prepared some time prior to the 14th of September, 1948? A. Yes. P-4 itself was prepared a day or two before, or a week or so before.

Q. Yes. Were the parties the same as you see on (279) P-4 now? A. I have no specific recollection.

Q. No independent recollection? A. No.

• • •

Deposition of William Miller:

(commencing at 59-20)

Q. Go right ahead. A. Mr. Marcus, after negotiating

Exhibit numbered P-4 is the same as DME-22.

for weeks, which you can see by the original deposit slip, suddenly on the closing day said that he couldn't find the stock. And I had Mr. Kevelson ready to buy. And this was a great moment in my life, because it meant that I could either live or die by the Riviera, and operate it the way (60) I could or I can't. I was very anxious to close the deal. And at the time Mr. Marcus was also very anxious. But he had a wonderful habit of every time you come to make a deal of liking to change it again. • • •

• • •

Deposition of Robert J. Schwartz:

(commencing at 94-7)

Q. Now, when did he tell you to draw up these contracts that have been referred to, contracts of September 14, '48? A. Well, about a week before that there was a meeting at Mr. Marcus' offic at which Mr. Miller and, I think. Mr. Lieberman was present, Mr. Marcus and myself, at which time there was a general discussion about selling the property. It sort of fell through because Miller and Marcus were fighting amongst themselves quite a bit. Finally, as I recall, Miller stormed out of the door and there was a lot of noise and shouting. As a matter of fact, I turned around and was surprised to see that he was gone.

• • •

(commencing at 94-22)

Q. That was about how long prior to the 14th of September, 1948? A. Well, I said a week, but it could have been ten days before then. Sometime the week before these contracts are dated. In other words, sometime around, say, (95) the 7th of September, '48, Mr. Marcus called me up and he said he was out at the Riviera the night before and he entered into some kind of a memorandum, and he

was going to send it over, and that he had finally straightened the whole thing out with Mr. Miller, he said. And he instructed me to prepare the papers at that time, as I recall.

• • •

(commencing at 95-11)

Q. Do you recall what that memorandum was? A. It was—One page of it has been produced here as an exhibit, if I recollect.

Q. Is that the memorandum you refer to, DM-225? A. This is one part of it, that I am positive; there was another page.

• • •

(commencing at 98-8)

Q. Now, what was it that you were not satisfied with in the terms set forth in DM-225 ? A. Well, if you will give me the second page and I can read from both pages I will give you an answer intelligently; I can't tell you from one page.

Q. I can't give it to you because this is all I have. Is there anything on this page—take a look at it, please—that you found fault with? A. Well, for one thing, it was erroneous in that it said that "Al Bierman was going to purchase all of your shares in Milmar Estates," where Mr. Marcus had informed me that we were selling all our interest, so therefore the letter would have to be re-addressed to me, too. Then there were a couple of other points that it is pretty hard to mention, but that one sort of stands out right away.

Q. The fact that your name was not included in the offer? A. That's right.

Q. And did you voice that objection? A. I did.

• • •

(commencing at 99-2)

A. • • • Specifically what I said I wouldn't know, but I

remember the first point very clearly because it is erroneous right from the start.

• • •

(commencing at 427-18)

Q. Now, at the closing Mr. Marcus in his own right had 625 shares, so far as you know, correct? A. Right.

Q. But, nevertheless, he undertook to convey his and yours, regardless of whether he was acting as your agent or passing title for you? A. Right.

Q. But still he only had a beneficial interest in 625 shares? A. Yes.

Q. Do you recall now, after having gone through the (428) books why only 625 shares of stock was delivered in escrow? A. That was a negotiated deal. That is what we were told after Miller and Marcus returned from one of their eighteen visits out of the room. They came back and said, "O. K. 625." That is all I can tell you about that, and we inserted 625. When I say "we" I mean Mr. Lieberman and myself.

• • •

On recross by Mr. Grosman.

• • •

(commencing at 429-20)

Q. Was that changed later on? A. They were always changing. Every two days there would be a new deal. Sometimes with a memorandum, sometimes without a memorandum.

• • •

(commencing at 430-9)

Q. I show you Exhibit DM-225, dated August 26, 1948, and direct your attention to the third line of that exhibit wherein it is provided that 62 and one half per cent of stock was to be sold. A. That is one of the previous variations on the theme, yes.

• • •

Exhibit numbered DM-225 is the same as DME-2.

Deposition of William Miller

(commencing at 431-1)

A. I don't know his statement, but this is the exhibit. Originally when we prepared this thing we were under the impression that all shares were going to be put into escrow, and they kept varying the deal and varying it until finally they agreed on this, but Lieberman and I had nothing to do with their terms. They were agreeing on it themselves.

* * *

(commencing 431-16)

Q. Now, I show you Exhibit DM-203, dated September 14, 1948, being what purports to be the escrow receipt signed by Judge Lieberman and ask you to look at paragraph two and tell me why the words "being all the shares of said corporation authorized and outstanding" are stricken out and initialed? A. Because Mr. Miller and Mr. Marcus varied their deal on that particular day and decided that only half of the shares were going to be put up.

* * *

Deposition of William Miller:

(commencing at 64-16)

Q. All right. Now, why did it take all these hours to negotiate this contract, P-4? A. Because Mr. Marcus is an awfully hard man to deal with, a very hard man.

Q. Well, when did you meet, when did you get together on that day? A. I couldn't remember at this time.

Q. Was it the morning or the afternoon? A. Sometime during the afternoon or morning, I don't remember. It must have been in the afternoon, because I like to sleep late—I work late and I probably sleep late, so it must have been in the afternoon.

(65) Q. And do you recall at what hour this contract, P-4, was signed? A. No, I do not.

Exhibit numbered DM 203 is the same as DME-25; P-4 is the same as DME-22.

Q. Was it daylight yet? A. No, I do not.

Q. You don't remember. Have you any idea how many hours were consumed in these— A. A good many hours.

Q. —preliminary negotiations? A. I know it was a good many hours.

Q. What were you talking about, what were you negotiating during all of these hours? A. The obvious thing that we were negotiating was how to get someone in who could help me, and how to get Mr. Marcus get his money back, and someone who would let me operate, and someone who would repay Marcus, and make him happy, and get his money out, and someone who would come in and give me a little assistance, which I needed badly at that time.

* * *

Deposition of Abraham Lieberman:

(commencing at 9-19)

Q. What was all the dispute about, if you remember; what did they get all worked up about, when they did get worked up? A. It was mostly past occurrence. He kept—Marcus kept on shouting that he never got his $50,000 note paid; he kept on shouting that Miller didn't put in a lot of money into the deal. Miller kept on telling him, "What do you want? Here is your chance to get out and get all your money back and make (10) some money." Just talking about a lot of nonsensical things, not so much as bearing on the contract, just a lot of old ancient history they were rehashing every time they met, on these three occasions and others.

* * *

Deposition of William Miller:

(commencing at 68-9)

Q. Well, what did you want to do? A. I wanted to make

an agreement, and help him, because he pleaded with me to get him out. And I knew that financially he wasn't helping me any more at all. And I was at my end with my own money because I had spent—I don't know how many thousands, trying to hold this thing together, of my own personal money, which he didn't share in at all, which he made me struggle with. And I only knew that my only solution was if Marcus could get his money back and I could get someone else into the corporation who would give me a little financial relief before we went under.

* * *

Q. Was business bad at the time? A. Yes, very bad. My debts at the Riviera were numerous. I certainly didn't go into Chapter 11 because things were good.

* * *

Deposition of Al Bierman:

(commencing at 58-2)

Q. You don't know whether it was a paying proposition or not? A. When was this?

Q. At any time? A. Well, at that particular time that business wasn't very good, no.

Q. You are now speaking of '46 or '47? A. '46.

Q. Did business ever improve? A. Later on.

Q. When? A. After Mr. Marcus got out and Mr. Miller could pursue the policy he wanted to.

Q. Well, can you fix an approximate time? A. No, I can't. It was right after—after he took charge of the property, after Mr. Marcus got out.

Q. You mean after he got out of Milmar? A. Out of Milmar.

Q. After September of '48? A. Yes, after September of '48.

Q. That is when business improved at Bill Miller's Riviera? A. Not at that particular day. Right after that.

Q. How soon after that was there a noticeable change? A. The following season.

Q. That would be the season of what, '48, '49? A. No, '49.

Q. And how do you know that? A. Well, I saw it.

Q. How was that visible? A. By people in there. More people coming in. Every time I'd get there, people standing (59) in line to get in, because he had good attractions.

Q. And prior to September of '48, that wasn't so, because of Mr. Marcus? A. That's right.

• • •

Deposition of Abraham Lieberman:

(commencing at 6-1)

Q. Go ahead. A. That was the general discussion at the first meeting. Of course, the price was mentioned. At that time I was advised there had been some preliminary discussions, I understand, that Al Bierman had had with Sam Marcus.

I don't remember if I had seen that paper wherein—some receipt—I must have seen it—that Al Bierman gave—or Marcus gave to Bierman for ten thousand dollars. But I think it was based on that that we proceeded to talk about the contract.

Having been advised that Marcus was going to step out completely, that his associates and dummies in the corporation, whatever he had, were going to step out completely, so that Al Bierman and Bill Miller would become the sole owners of Milmar, I, of course, asked for the return of whatever outstanding stock there was, stock certificates. I was advised at that time by Sam Marcus—now, this is the first time we met—I was advised by Sam Marcus that he didn't think he had all the certificates, but that he would produce as many as he could find.

• • •

Deposition of Abraham Lieberman

(commencing at 6-19)

Then there was a lot of discussion, a lot of argument going on between Milier and Marcus—it seemed they couldn't get together on some of the details, terms—insignificant, ridiculous arguments about paying of tabs. And one of the conditions Sam Marcus wanted was that he should get free food for the rest of his life, as long as the Riviera was there, and drinks, and all. Stupid arguments in which I wasn't even (7) interested.

Then we finaly adjourned and we met the early part of September, after we got some idea of what the conditions were to be, I met at Bob Schwartz' office—

Q. Pardon me. That was September 14? A. No, no, before that. It was around September 2 or 3.

Q. In '48. A. This is all '48. It was also August, '48, that was first talked about.

• • •

(commencing at 7-13)

A. • • • And then Bob and I met and we had some of the details—one of the big arguments that I remember—Marcus may have been there, Miller may have been there, I don't remember—but I do know that I asked before we started to prepare any agreements because Marcus had promised to turn over all the stock—I asked for the return of the stock so we would know how to begin to prepare the agreement, and Marcus said he didn't have any stock, he couldn't find any of the Milmar stock.

Well, I told Miller at that time that this sort of throws a hitch into the thing because we wanted the stock back, knowing the background that Bill Miller had had with Marcus—I must digress a minute, why I was so particular about some of these things—knowing the background that existed between Miller (8) and Marcus—when I first started to represent Bill Miller and I asked him for different papers, he started to tell me different things. He never had a paper, he never got a paper from Marcus, never got any

stock from Marcus. As far as Milmar was concerned, he never had anything.

So I wanted to make sure, as long as the understanding was that Marcus was going to step out, that I at least got the stock certificates, but he stated he had no stock certificates and couldn't find them.

So it seems then Miller and Marcus got together and they decided that, in their opinion, although Schwartz and I—Schwartz and I argued against it—they got together and they said, "This is the way we will adjust this matter. We want to close this, don't want anything to delay it. Let's consider all the stock that ever was issued canceled—all the stock that was issued and outstanding as canceled. Even though we don't actually have the stock certificates here, we will mark them canceled on the books, on the stock transfer book, rather the stock certificate book. We will consider them—"

This was their theory. As I say, Schwartz and I didn't think it was a great theory, but we prepared the agreement accordingly.

"We will consider all the stock as having been canceled and having been turned back to the corporation, to Milmar. And we will then issue a similar amount of shares of stock that was (9) originally issued"—which I believe was 1,250 shares—"so that there will be no question of any outstanding stock."

• • •

(commencing at 11-24)

Q. You knew nothing about Mr. Miller or Mr. Bierman acting as agents for an undisclosed principal? A. Oh, no, I (12) knew there was somebody else that was going to come in and buy, if that's what you want to know.

Q. Yes. A. Oh, yes; I knew—and I don't know if I even knew the name, I may have or may not—that somebody was coming into the corporation so that when they

were through with this agreement there would be three owners of everything that Milmar had, of every share of stock outstanding.

Q. And was that fact made known during the course of these negotiations? A. To whom?

Q. To Mr. Marcus or to Mr. Schwartz? A. Marcus is the one who ran the whole proceeding.

Q. What do you mean, he ran the whole proceeding? A. He ran Bob Schwartz, too.

Q. Did he run you? A. He didn't run me, because I would have thrown him out of the room, because I personally have no use for Marcus, because I think he is a liar. He proved it to me on several occasions. So I dealt with him at arm's length.

Q. From the very beginning? A. Yes, I hade quite an argument with him back in 1947, when some agreements were prepared following the dispossess proceeding.

Q. So you were thoroughly convinced that Marcus was wholly unreliable, that he was a man of no principle,— A. I wouldn't—

Q. —that he was a liar. A. In my opinion, a liar.

(13) Q. Well, a liar could be a man of— A. You can put whatever definition you want on it. I know some liars have principle.

Q. You knew that he was a man that could not be relied upon, that he was a liar? A. As far as I was concerned, I wouldn't trust him.

Q. And you knew that from the very beginning, did you, Judge, from the very beginning of your negotiations for this contract, P-4. A. That's right.

Q. Now, you didn't trust Marcus at all during the course of these negotiations. A. That's right.

Q. You were looking out for the interests of Mr. Miller and Mr. Bierman. A. Correct.

Q. Now, when Marcus told you that he did not have the

stock that you called for, did you believe him or didn't you believe him? A. The truth?

Q. Yes. A. I didn't believe him.

Q. Well, now, did you ask him to give you an affidavit— A. I did not.

Q. —verifying the fact that he could not find his stock or that it was lost? A. I did not.

Q. And will you tell us, please, why you didn't ask this liar to give you an affidavit verifying the fact that he had lost or misplaced the stock that was to be transferred on this agreement? A. I didn't think it was necessary, (14) under the circumstances, in view of the type of agreement that was prepared.

Q. Now, this agreement, P-4, contemplated the surrender of all of the stock of Milmar Estates. A. That's right.

Q. And why do you say that in view of the type of agreement—and I suppose you are referring to P-4? A. P-4, yes.

Q. —drawn, that, in your opinion, it was not necessary to verify the fact that the stock had been, a substantial part of the stock had been lost or misplaced? A. Didn't care about the old stock, because we had considered all the old stock as canceled, as I testified earlier.

Q. But you had Marcus make no commiitment in writing to that effect? A. No, he signed new stock to take the place of the old stock, which we had considered surrendered to the corporation. There was new stock issued. It is his signature. I saw him sign it.

Q. Judge, will you look at Exhibit P-4, if you like— A. Yes.

Q. —and tell us why there wasn't some provision in that contract covering the situation you have described? A. In view of this agreement, we didn't think it was necessary. In view of this type of agreement, we didn't think it was necessary.

Deposition of Abraham Lieberman

Q. Have you ever drawn this type of agreement before? (15) A. Never.

Q. Or since? A. Never, because I don't think it was a good—I don't think it was the type of agreement that I ordinarily would have drawn, but it was a peculiar situation here, where both clients insisted on having that type of agreement drawn.

Q. Now, there isn't anything in this agreement with respect to the nonavailability of the old stock. A. Right.

• • •

(commencing at 15-17)

Q. Now, what did you mean that ordinarily you wouldn't draw this type of an agreement? A. Well, do you want me to tell you legally what I would do?

Q. Yes, legally. Yes. What did you mean when you said you ordinarily wouldn't draw— A. Ordinarily I would have the stock canceled, I would have the stock certificates returned. I would have a stockholders' assignment of it. I would have the stockholders themselves, who were selling the stock, sell the stock, not have Milmar selling it. Probably (16) have a 'whereas' clause in there, and so forth. You know how to prepare an agreement. I am sure.

Q. Well, I know that you— A. I hope you give me credit for the same.

Q. I give you credit for knowing your business. A. Thank you.

Q. That's why I am wondering, Judge, how you came to sanction an agreement of this kind. A. Well, I thought I made myself clear that both Mr. Marcus and Mr. Miller insisted on it, over the objection of Bob Schwartz and myself. We felt that this wasn't the best type of an agreement for lawyers to draw, but as long as they insisted on it, as long as we felt there was a meeting of the minds, and they both knew what was taking place, we prepared it.

Deposition of Abraham Lieberman

Q. Now, what objection to this agreement, to the form of this agreement, was voiced by you and by Mr. Schwartz to your respective clients? A. We didn't tell them what was wrong with it, we told them what type of agreement we would want to have. At least I remember that. I didn't go into details as to what was wrong with it. I just didn't like it.

• • •

(commencing at 17-18)

Q. What objections did Bob Schwartz voice in your presence? A. As to what?

Q. As to the agreement. A. The same thing. We both agreed on the same thing. We both had the same thought of the type of agreement that should be prepared. We had discussed this previously. But we said we have no alternative, that's what they want.

Q. So the agreement of September 14, P-4, was drawn over (18) your objection and that of Mr. Schwartz, Mr. Marcus' attorney. A. Not over the objection, because if we had refused to do it, we wouldn't have done it. We told them we didn't think it was the best type of an agreement, that we would prefer a different type, but they wanted it drawn and we did it.

Q. They wanted it drawn this way? A. They wanted it drawn that way.

Q. They were stubborn about it? A. Very stubborn.

Q. Both of them? A. Very stubborn.

Q. Will you tell me, Judge Lieberman, how many times you and your clients, Mr. Schwartz and Mr. Marcus, met prior to the signing of the agreement, P-4? A. We may have met twice. We may have met—I know we met once in Marcus' office. Miller and Marcus may have been present. The early part of September, September 2 or 3. I can't recollect if they were there. They may have been there, because we had some more discussions. And they

certainly were there on September 14, the day of the closing of the agreement.

• • •

[HEARING OF MARCH 17, 1954]

Deposition of Robert J. Schwartz:

(commencing at 87-4)

Q. Yes, why they appeared there as the seller. A. This is a recollection but it cannot be too wrong. It is a question of where it took place. It either took place at the final session when the papers were executed on September 14 or it took place in Mr. Marcus' office. It did not take place at the time Mr. Lieberman and I met to dictate the papers. It took place at either one of those two sessions. Mr. Lieberman and I were saying that Mr. Marcus was going to sell the stock to—

• • •

[HEARING OF MARCH 17, 1954]

(commencing at 87-22)

I don't know whether it was Mr. Miller or Mr. Marcus who insisted we do that, and the other one agreed. I don't know who suggested it and the other agreed but they both instructed (88) Mr. Lieberman and myself to get it up that way. When we said, "That's ridiculous," and we shouldn't do it that way they said they wanted it that way.

• • •

(commencing at 122-3)

Q. • • • Can you tell us why the contract was drawn up in that fashion? A. It was drawn up that way at Mr. Marcus' and Mr. Miller's request.

• • •

(commencing at 122-13)

Q. And Mr. Marcus insisted that the contract be drawn in this manner? A. Mr. Miller and Mr. Marcus insisted.

• • •

Deposition of Robert J. Schwartz

(commencing at 123-2)

Q. (Read by Reporter) "Well, isn't it a fact that the corporation could not possibly sell something it didn't have?" A. I don't know, I am not prepared to give an answer.

Q. Did the corporation Milmar Estates, Inc., named as the seller in the agreement, P-4, have any stock to sell on the 14th of September, '48? A. You mean corporate, treasury or reserve stock?

Q. Any kind of stock? A. All the stock had been issued.

• • •

(commencing at (234-18)

Q. Yes. All right, why did you let Mr. Marcus enter into a contract with Milmar Corporation for the sale of a certain number of shares of stock well knowing that the Milmar had no stock to sell? A. Because Mr. Marcus and Mr. Miller instructed us—both—Mr. Marcus instructed me and Miller instructed Judge Lieberman that they wanted it done that way.

• • •

(commencing at 281-8)

A. Not specifically, but it was—it certainly isn't correct to say that what we intended didn't occur. We intended to put Milmar Estates in as the seller.

Q. You intended to put in the name of an entity which did not own stock, is that correct? A. That's not true. I don't know whether it owned the stock or not.

• • •

(commencing at 289-19)

Q. You said before that Sam Marcus, and also Judge Lieberman's client, practically forced you gentlemen into a situation of approving something which you didn't want

to approve. A. I don't know where you got that impression.

Q. Didn't you say that? A. No.

Q. Didn't you say that you disapproved and told (290) Sam Marcus that the corporation had no stock to sell and therefore the contract should not be in the form as P4 and P-8 ultimately developed to be? A. You took that as a premise and drew a conclusion from it which I don't agree with.

• • •

(commencing at 352-20)

Q. Why did you beg him to change it? A. Because we thought it was the wrong way to do it. We would much prefer to have the stockholders sell.

• • •

(commencing at 353-13)

Q. Did you point out to Mr. Marcus or did Mr. Lieberman—or Judge Lieberman in your presence point out to Miller or Marcus that this contract, P-4, as drawn could not be enforced? A. I have answered that already. I don't agree with your statement, and I didn't say it.

• • •

(commencing at 275-12)

Q. Isn't it a fact, Mr. Schwartz, that the contract was actually drafted on September 3rd? A. Close to that.

Q. P-4. A. Yes.

• • •

(commencing at 275-24)

Q. And that contract, which was originally drafted on or about September 3rd, was the exact contract that (276) was formalized on September 14, 1948, is it not? A. You mean the same one, yes.

• • •

Depositions of Abraham Lieberman and Robert J. Schwartz

(commencing at 278-10)

Q. You don't know when P-4 was prepared? A. There may have been another agreement on the order of P-4 which we couldn't rescue and that we may have re-dictated in the form of P-4.

• • •

(commencing at 278-21)

Q. Actually you do have definite knowledge that it was prepared some time prior to the 14th of September, 1948? A. Yes. P-4 itself was prepared a day or two before, or a week or so before.

Q. Yes. Were the parties the same as you see on (279) P-4 now? A. I have no specific recollection.

Q. No independent recollection? A. No.

• • •

Deposition of Abraham Lieberman:

(commencing at 28-21)

Q. Wasn't a draft of it prepared around the second or third and submitted to the parties for their approval and study? A. I honestly don't remember. It may have been.

Q. Well, it wasn't prepared by you, anyway, it was (29) prepared by Bob Schwartz. A. No, we worked on it together.

• • •

Deposition of Robert J. Schwartz:

(commencing at 102-9)

Q. How long did it take to close this transaction on the 14th of September, 1948? A. I'd say about from 10 o'clock until almost 3 o'clock.

Q. Who was present at that time? A. Mr. Miller, Mr. Marcus, Judge Lieberman and myself.

Deposition of Robert J. Schwartz

Q. Had the papers been previously prepared? A. All the papers but possibly one or two small things had been previously prepared.

• • •

(commencing at 102-20)

Q. That would be on September 13, 1948? A. Yes.

Q. You were on the phone with him? A. The 12th or the 13th.

Q. Yes. For what purpose? A. Discussing various points raised by Judge Lieberman.

(103) Q. How did Judge Lieberman raise those points, in writing or verbally? A. Verbally.

Q. Was he with you at that time? A. Yes, he was.

• • •

(commencing at 353-2)

Q. Who dictated these contracts? A. Mr. Lieberman and myself.

Q. In the presence of your respective clients? A. No, they were prepared a day or so or two or three days before the 14th of September.

• • •

(commencing at 394-11)

Q. Are you certain that your first knowledge of these two exhibits came to you from Samuel Marcus, or is it possible that somebody else first disclosed the existence of these documents to you? A. I am not certain, but I would say that I am pretty sure that Mr. Marcus gave them to me.

Q. Is it possible that Judge Lieberman may have given them to you? A. I wouldn't think so. No. The only thing—If you are in doubt as to whether or not a copy was in my file or not, I can only say that when Judge Lieberman was over to my office on September 12, 13th

and or 14th, we got a lot of our files mixed up together, so several of his papers could have been in mine. If that is troubling you, that would be the explanation of that, but otherwise it is my recollection that Mr. Marcus gave these exhibits to me.

Q. You have a very distinct recollection of that? (395) A. No, I wouldn't say it is 100%, but I am pretty sure.

Q. You could be mistaken? A. There is always a slight room for doubt for something that happened six years ago. Let's see how long ago that is—'48—six years ago, yes.

• • •

(commencing at 97-12)

Q. • • • Did you draw the contract marked Exhibit P-4? A. Well, both Mr. Lieberman and I worked on it so I couldn't say that I drew it or that he drew it. I would say that we both were present.

Q. You both drew it in conjunction with each other? A. Yes.

• • •

(commencing at 97-23)

A. • • • A few of the papers in the deal were brought to the office, pursuant to a telephone call we made to divide up a little bit of the work in advance.

(98) Q. Did you prepare, or you in conjunction with Judge Lieberman prepare Exhibit P-4 on the basis of the facts contained in this Exhibit DM-225? A. No.

• • •

Deposition of Abraham Lieberman:

(commencing at 7-9)

A. • • • I then met Bob in his office. As a matter of fact, each and every paper that has ever been exhibited here has been prepared in Bob Schwartz' office. I never prepared

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Exhibit numbered P-4 is the same as DME-22; DM-225 is the same as DME-2.

a paper in my office at all. It was all done in Bob Schwartz' office.

* * *

(commencing at 28-3)

Q. Who dictated the agreement, Exhibit P-4? A. We dictated it together, or it may have been dictated by Bob, showed me a rough copy of it then changed it and re-dictated it, and so forth. We did a lot of those instruments over and over again, because there were a lot of corrections to be made, initialing and so forth. As a matter of fact, there were errors even after it was executed that I had to correct.

* * *

Deposition of Robert J. Schwartz:

(commencing at 100-14)

Q. Well, now, the contract marked Exhibit P-4, when was that prepared with respect to the date on which it was signed? A. I would say that probably the day before, the afternoon before.

Q. It was prepared in the presence of yourself and Judge Lieberman? A. That is correct.

Q. Where? A. At my office.

Q. What else was prepared in connection with this transaction on that day? A. I would say that many, but not all, of the papers were prepared there that day. There were several others that were prepared by Judge Lieberman and brought to the office, and several that we reworded in (101) my office but had been prepared outside, and so forth.

Q. Let me ask you, the escrow receipt—I don't see the exhibit mark on here but it has been identified and I think marked in evidence—when was that prepared, and by whom? A. Could I see it, please?

* * *

Deposition of Robert J. Schwartz

(commencing at 101-11)

A. It was prepared within the week before the closing date of September 14, as shown by the date which is partly crossed out.

* * *

[Hearing of March 17, 1954]

(commencing at 84-11)

Q. Will you tell us what was stated by the parties and what they agreed upon? A. I can tell you what was stated. Of course it is impossible, six years later, to give it to you other than in substance, but my recollection was that it was a very noisy session. Mr. Miller and Mr. Marcus were quarreling. If I say violently I am understating it. They were at the point of blows, just short of it. In addition to that, Mr. Lieberman and Mr. Marcus were also quarreling violently. In fact, the only one who was not quarreling was myself, and it was what might be described as an impossible session because no one finished a sentence without being jumped upon by someone else. Every page and every paragraph was fought about, as I recall. I don't mean to imply every single paragraph was but it seemed that way. It was a very noisy, (85) quarrelsome two or three hours, as I recall.

Now, there was a great deal of discussion about who—about how the money was to be paid and that particularly stands out in my mind because Mr. Miller and Mr. Marcus asked for another room. Mr. Lieberman and I offered to go out and they said no, they would go into another room. We found an empty room for them in the office and put them in there and they were gone 15 or 20 minutes. It might be 10 minutes or a half hour. They were gone for a while. Mr. Lieberman and I continued with the initialing of the papers.

As to any particular word that was said I doubt if I could recall it.

* * *

Deposition of Robert J. Schwartz

(commencing at 288-14)

Q. You were a lawyer and you represented Marcus. A. Well, I can see you weren't around when we were trying to do things for Sam Marcus in those days. If you had represented him from day to day you would know you have to make the best of a situation like this. He was jumping around, he was on the telephone, he was in and out the door. It was pretty hard to get to any definite conclusion with him.

Q. Everybody was jumping around then, weren't they? A. Yes.

Q. There was a lot of confusion. A. That's (289) right.

• • •

(commencing at 289-12)

Q. And during all of this confusion who was the dominant character in the deal? A. I couldn't say.

• • •

(commencing at 104-8)

Q. On the 14th. I think you said there was a lot of excitement, did you not— A. There was.

Q. —in your office, that Miller and Marcus were at each other's throats? A. Quite frequently.

• • •

(commencing at 357-18)

Q. Do you recall how long this conference lasted? A. Well, I think it went to almost three o'clock or to three o'clock, something like that.

Q. I take it you went out for lunch, you adjourned for lunch? A. No, we did not adjourn for lunch. We went right through.

Q. From ten to about three? A. That is right.

Deposition of William Miller

Q. What took so long? A. Oh, you weren't present. (358) You would have some of the most fabulous wrangles that you ever heard in your life. Miller and Marcus almost came to blows on several occasions. Then we calmed down for a little while and then Marcus and Lieberman would start it up, one of their quarrels, and that would quiet down. Then Miller and Marcus would resume. Then there where phone calls and more phone calls, and there were calls to Kevelson and there were calls to Bierman and then Marcus was calling his office. His office was calling him. It took five hours.

• • •

(commencing at 421-1)

Q. You wouldn't have issued new certificates without the old ones being cancelled, would you? A. Might have in the confusion.

Q. Was there confusion? A. There was.

• • •

Deposition of William Miller:

(commencing at 59-11)

Q. And did you rely upon your attorney? A. Yes, I did.

Q. You took his advice? A. Completely.

Q. Now, didn't you, as a matter of fact, insist against the advice of your attorney that this contract, P-4, be drawn in this manner? A. No.

Q. Are you sure about that? A. We came to an agreement between Marcus and I. And if you give me a minute, I will explain why it was done.

Q. Go right ahead. A. Mr. Marcus, after negotiating for weeks, which you can see by the original deposit slip, suddenly on the closing day said that he couldn't find the

stock. And I had Mr. Kevelson ready to buy. And this was a great moment in my life, because it meant that I could either live or die by the Riviera, and operate it the way I could or I can't. I was very anxious to close the deal. And at the time Mr. Marcus was also very anxious. But he had a wonderful habit of every time you come to make a deal of liking to change it again. He had changed it five different times. And this time I made a definite statement that if I walk out of the office I am not coming back, we will forget about it, and we were going to lose Mr. Kevelson, which he didn't want to do, because he got on the phone and talked to Mr. Kevelson more than I did. We had a discussion, and he suggested—I don't know enough about law, he is a Bronx lawyer, I think he took—and he suggested that as long as he can't find the stock, perhaps it would be best to me—why not take and cancel all the stock and give me and Mr. Bigrman the corporation and he will step out completely and we will have nothing to worry about. And that was the way it was drawn up—supposed to be drawn up.

I am not a lawyer and I don't know if that is the way it was handled. So we suggested, to save a lot of time, and to save a lot of nuisance, and go looking for stock, that we will put all the stock in the name of the corporation, regardless of what name it was in, regardless of who it belonged to, regardless of whatever happened before September 14, and we issue new stock, he would resign as an officer, he would quit, and I would never see him again.

Q. You think all that is in the contract, P-4? A. I hope so.

(61) Q. Have you read that contract? A. I never read contracts. I am not a lawyer. And if my lawyer says this is the deal, and we have signed it, and I heard what negotiations—I wasn't somewhere in Chiwawa, I was there, and I know what our intentions were, and I have enough—if I

bring an attorney, I know, and I have enough confidence in this attorney, that he put in what we talked about, or, at least, it is in the paper somewhere.

Q. Now, all this was discussed, substantially the way that you have stated here, on September 14, 1948? A. That's correct.

• • •

(commencing at 83-9)

Q. Mr. Miller, are you certain thta everything that you and Mr. Marcus agreed on on September 14, 1948, in the room with your attorneys, or in the private room that you say you adjourned to, was reduced to writing? A. Yes.

Q. You are certain about that? A. Positive.

Q. There can't be any doubt in your mind about it? A. No. And, furthermore, we were both represented by counsel. Mr. Marcus had his attorney, and his partner, which I later found out that he testified, and I had an attorney, and I am sure that two people who come with attorneys, and the thing is reduced to writing, I am sure that it would be in the papers. I am sure if there is any other agreements Mr. Marcus wouldn't let me walk out without having a paper.

• • •

Deposition of Al Kevelson:

(commencing at 20-13)

Q. With respect to September 14, 1948, when the contract, P-4, was signed—you remember that event, do you? A. I remember the day quite well.

Q. Well, let me ask you this, why do you remember that day so well? A. Because they called me on the tele phone three times.

Q. Who called you? A. Mr. Miller.

Q. You said 'they'. Did anybody else call you? A. Then Mr. Marcus got on the phone, too.

Deposition of Robert J. Schwartz

Q. He spoke to you? A. Yes.

Q. And what did they say to you on that day? A. Well, on that day one conversation was that he wants more money.

* * *

(commencing at 31-18)

Q. Now, you weren't present on September 14, 1948, in the office of Mr. Schwartz— A. No, sir.

Q. —when the contract, P-4, was signed? A. No, sir.

Q. Did you have any dealings or conversations with Judge Lieberman— A. No, sir.

Q. —with respect to the details of this contract, P-4? A. No, sir.

(32) Q. You didn't discuss with Sam Marcus any of the details of this transaction, did you? A. No, sir.

Q. Who did you get all of your information from with respect to what you were buying and what you were required to pay? A. Mr. Miller.

Q. William Miller. A. Correct.

* * *

Deposition of Robert J. Schwartz:

(commencing at 348-3)

Q. Did any one pick up your tab and pay it for you? A. The first two summers, yes.

Q. Who did? A. Mr. Marcus or I don't know who. Somebody would. The understanding was, as I gather, that stockholders would not pay their checks if they didn't over do it, and the first two summers we were out there a few times. Mr. Marcus was out very frequently. I was out a few times, but that was all, certainly not after the property was sold.

Q. After what property was sold? A. After September.

Q. 14th? A. September 14th of '48.

Deposition of Abraham Lieberman

Q. 1948? A. Yes.

Q. Thereafter that deal was off about stockholders? A. I don't know whether it was officially or not, but we got a paper from Mr. Miller and Mr. Lieberman to the effect that all checks were, you know, all unpaid checks were cancelled or something of that sort.

Q. That your unpaid tabs were cancelled? A. Something to that effect.

• • •

(commencing at 402-23)

Q. I show you a letter marked DM-214 dated September 14, '48, addressed to Mr. Al Bierman by Milmar Estates, Samuel Marcus, president, attested Robert J. Schwartz, (403) secretary, which seems to restore that deleted paragraph three, does it not? A. That is correct, but I can explain that if you would like me to.

Q. What is the explanation of that? A. As I recall it, Mr. Miller didn't want that particular clause in there because he said he didn't want the creditors or any other people to know the terms, and he said he would want it in a separate letter. He wouldn't want it as part of the contract, and there didn't seem to be any objection on that point. Mr. Marcus thought maybe he had a point there, and I think we got that separate letter there to remove that and we put it in a separate letter.

• • •

Deposition of Abraham Lieberman:

(commencing at 81-2)

Q. Where Mr. Kevelson obtained his 500 shares of stock. A. Out of the 1,250.

Q. Who assigned them to him? A. What is that?

Q. Who assigned the stock to Mr. Kevelson? A. Well, Sam Marcus—there was 1,250 shares issued. Sam Marcus endorsed all the 1,250 shares.

Exhibit numbered DM-214 is the same as DME-14.

Q. In blank. A. That's right. Of which he requested, according to the agreements to hold 625 shares in escrow, which he was to receive in the event of a default. The other 625 he had no interest in whatsoever, he had no interest in the other 625 that I was holding in escrow unless there was a default.

Q. Now, the stock you held was in whose name, the 625 shares? A. All in blank. It was endorsed in blank.

• • •

(90) *Cross examination by Mr. Chazin*:

(commencing at 90-21)

Q. Do you know whether Miller ever paid anything for the stock certificates which he claimed? A. That I don't know.

• • •

Deposition of William Miller:

(commencing at 92-21)

Q. Now, do you recall whether any of the attorneys demanded that the stock that had previously been issued by Milmar Estates, Inc., be produced and surrendered? A. No, I don't remember anything, except that I saw them all write 'canceled' out in the stock books—'canceled, canceled, canceled'—and (93) I saw them issue new stock. And I saw Mr. Marcus sign them in blank and turn them over to Mr. Lieberman.

Q. You saw him do that on this particular day? A. That's correct.

• • •

Deposition of Abraham Lieberman:

(commencing at 44-25)

Q. Now, was there talk on September 14, 1948, Judge,—(45) A. Yes.

Depositions of Robert J. Schwartz and Abraham Lieberman

Q. —when the agreement, P-4, was executed, of the possibility that the property owned by Milmar Estates might be condemned? A. There must have been because we did put a provision in there, I think, something pertaining to condemnation.

• • •

Deposition of Robert J. Schwartz:

(commencing at 395-10)

Q. Was the subject of the possible condemnation discussed between the parties on any occasion preceding the signing of the contract, P-4, on September 14, 1948? A. Yes, there was a discussion of that point in Mr. Marcus' office.

• • •

Deposition of Abraham Lieberman:

(commencing at 48-6)

Q. I call your attention to the fact that the exhibit, DM-203, the receipt, the escrow receipt, refers to Bill Miller's Riviera, Inc. That was an error? A. I don't think that was an error because I think it described what they had in mind. The ownership was the same—Milmar, Bill Miller's Riviera. And I think it was more of a description than anything else. We just put—re: Milmar.

Q. Actually, it refers to Milmar. A. It should have been Milmar, no question about that.

• • •

(commencing at 48-19)

Q. Now, Paragraph 1, "Resignations of officers and directors of Bill Miller's Riviera, Inc.," that was definitely an error? A. Yes, that is definitely an error.

Q. That is a substantial error? A. Well, I don't know what you mean by "substantial error," Judge.

Exhibit numbered P-4 is the same as DME-22.

Deposition of Robert J. Schwartz

Q. You never received any resignations from— A. That's right. I had the resignations of Milmar.

(49) Q. An altogether different corporation. A. That's right. And the fact that I had physical possession of them showed that was the intention of it, so that it was purely an oversight which should have been corrected among our notes that we had. Whatever we caught, we caught; some things we didn't.

• • •

Deposition of Robert J. Schwartz:

(commencing at 124-1)

Q. Did you examine that before you accepted it? A. Well not only examined it but I think I dictated it with Judge Lieberman.

Q. Were there resignations executed by the officers and directors of Bill Miller's Riviera, Inc.? A. Were there any?

Q. Yes.

• • •

(commencing at 277-26)

Q. I show you Exhibit P-5 for identification, which has been described as the escrow agreement, and ask you if it is not true that this instrument was drawn prior to September 14, 1948? A. I believe so.

Q. And would you say that this instrument was (278) drawn approximately around September 3, 1948? A. I would think so, yes.

• • •

(commencing at 30-23)

Q. Now, when it came to the closing of this transaction on September 14, at some point in the transaction the production of the shares of stock was called for, was it not, (31) on behalf of the purchasers? A. Yes.

Exhibit numbered P-5 is the same as DME-7.

Deposition of Robert J. Schwartz

Q. Was it at that time that the disclosure was then made that there were certain certificates missing? A. No. I had called it to Judge Lieberman's attention prior to September 14, if that was the closing date.

Q. Yes. On what occasion had you called it to Judge Lieberman's attention? A. As I recollect, Judge Lieberman was in my office one afternoon and we were working out some of the particulars and at that time I called his attention to the fact that we did not have all of the certificates.

• • •

(commencing at 31-17)

A. There was a telephone call made, several telephone calls made to Mr. Marcus, and we discussed at that time the question of the missing certificates and what to do about it.

Q. And what was decided with Judge Lieberman? A. It wasn't decided with Judge Lieberman, although that worked out subsequently. Mr. Marcus suggested that we cancel all the outstanding stock and issue fresh certificates.

• • •

(commencing at 422-5)

Q. You told him that? A. I told him that he should have the old certificates, but that since it was obvious he didn't have the old certificates we would have to do the best we could, and he said—please listen to what I am telling you—"Cancel whatever stock certificates we have and issue new ones." I said, "I know, Sam, but—" I don't remember. He said, "That is the way we are going to do it." He said, "That is the way I am going to do it." I said, "O.K."

• • •

(commencing at 422-22)

Q What I am trying to bring out, Mr. Schwartz, is this. You are down to the signing of the contract, P-4. All of

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Exhibit numbered P-4 is the same as DME-22.

the stock is not present, right? It couldn't be present because you say— A. That is right.

(423) Q. So you told Mr. Marcus to cancel whatever stock there was present. A. That is right.

Q. And issue a new set of stock certificates? A. That is correct.

• • •

[HEARING OF MAY 11, 1954]

(commencing at 8-18)

Q. • • • Do you recall what certificates were missing? A. No, not at this time. I know several were missing.

Q. Do you remember whose certificates they were or to whom they were made out? A. They may have been mine. I know that mine were missing at one time or another.

• • •

(commencing at 83-3)

Q. And that he then stated he didn't have all the certificates available, is that right?

Mr. Grosman: Or what is your best recollection of what the conversation was?

A. Either that he didn't have them or that I didn't have all the certificates available. I think my certificates were missing.

• • •

(commencing at 264-10)

Q. Did you take an affidavit, a lost certificate affidavit from any one of the people involved with respect to the failure to deliver their stock? A. No.

Q. Did you make such an affidavit yourself? A. No.

Q. Did Mr. Marcus make such an affidavit? A. No.

Q. Did Mr. Miller make such an affidavit? A. Not all of the stock certificates were missing. There were just one or two.

Q. Whose certificates were present? A. I couldn't an-

swer at this time, but I know my certificate was missing for one and I think one other certificate was missing.

• • •

(commencing at 356-23)

Q. What became of the old certificates? A. I think they were placed back in the book if I am not mistaken, but I really have no distinct recollection. I couldn't say.

• • •

(commencing at 421-16)

Q. You think your certificate was missing for 125 shares? A. Yes.

Q. And you think one other certificate was missing? A. I think one other.

• • •

(commencing at 419-8)

Q. Not the way you describe these people's acts. Now, did you supervise the cancellation of the old stock and the issuance of the new? A. Mr. Lieberman and I did, yes.

Q. And at that time how many shares were turned in by Mr. Marcus? A. I don't know exactly but there were a couple of certificates.

Q. Whose certificates? A. Mine among others, possibly more.

Q. Who else? A. Possibly one other of Mr. Marcus. I am not sure of that.

Q. Yours were missing? A. I claim I turned it over to him. He claims he didn't—previously, I mean.

Q. Did you call for the production and surrender of all the old outstanding certificates? A. I did.

Q. Did you call for the surrender of the certificate issued in the name of William Miller for 500 shares of stock in Milmar? A. —

• • •

Deposition of Robert J. Schwartz

(commencing at 420-1)

Q. Well, 500 shares issued to Mr. William Miller, in name of William Miller? A. As far as I recall, Mr. Marcus had that certificate.

Q. Did he ever surrender it? A. He had it with him as I recall.

Q. Did he surrender it? A. I believe so but I wouldn't know. I think they were all present except one certificate of mine and possibly one of Mr. Marcus'.

• • •

(commencing at 420-21)

Q. How about the Miller stock? When I refer to the Miller stock I am talking about the one or more certificates issued in the name of William Miller? A. I don't know.

Q. Do you know whether they were surrendered or not? A. No.

• • •

(commencing at 424-1)

Q. Now, why didn't you demand that Mr. Marcus surrender the Miller certificates which you say he had with him? A. That was something between Miller and Marcus. I don't know. They were going to hold it as evidence or receipts for all their previous dealings, and they were going to show it around or going to do this or that. I don't know.

• • •

(commencing at 129-13)

Q. I see. What was to become of the remaining 625 shares of stock of Milmar Estates, Inc., issued and outstanding? A. I don't have any specific recollection of what Mr. Marcus was doing. There was an awful lot of secret deals between them. When I say "them", Mr. Miller and Mr. Marcus. They would often go into rooms and exchange checks, notes, papers and other things, and come back and tell us that they took care of something, or something of

that sort. I don't know what they agreed to do about the balance and I didn't even want to know.

• • •

On re-cross examination by Mr. Grosman:

Q. Let me ask you, at the time that the contract P-4 (413) was concluded on September 14, 1948, wasn't there a fifty thousand dollar note outstanding which had been given Mr. Marcus by Mr. Miller? A. There was, and there was loads of other things that were outstanding. Miller and Marcus had a dozen secret agreements that they wouldn't tell Liberman and myself about. I say a dozen. I am understating it, probably two dozen.

• • •

(commencing at 433-14)

Q. Do you know what was done with these certificates, 17, 18, 19 and 20? A. Well, I know in accordance with the escrow receipt that Mr. Lieberman got two of the certificates. Then Mr. Miller and Mr. Marcus got into their own deal on the balance, and to this day I don't know what they did, if they know.

• • •

(commencing at 435-2)

Q. I think you told us, Mr. Schwartz, that there were any number of private deals between Mr. Marcus and Mr. Miller; that you were not familiar with. A. That is right.

Q. And that the reason Mr. Miller's 500 shares of stock in the possession of Marcus on September 14, 1948—was in the possession of Marcus on September 14, '48, was, perhaps because of some private understanding between those two? A. It is possible. I don't know whether it was surrendered or not.

• • •

(commencing at 435-16)

Q. You are certain of that? A. That is my best recollection. Let's put it that way, that on September 14 we cancelled every certificate. The ones we had I think we

destroyed and it is possible that Mr. Marcus may have retained his certificate and not handed it to us. I don't know.

* * *

Deposition of Abraham Lieberman:

(commencing at 3-7)

Q. Was there any transaction involving the Riviera and Milmar Estates and Marcus, that you know of, that you did not represent him in? A. He may have had some personal agreements made that I don't know anything about.

* * *

Deposition of Robert J. Schwartz:

(commencing at 414-17)

Q. Now, why do you say only 625 shares of stock were deposited with Judge Lieberman on September 14, 1948? A. It was my impression that that was all he owned at the time.

Q. You had given him permission to deal with your 125 shares of stock? A. Yes.

Q. As his own? A. Not as his own. It was to be included.

Q. Yes, it was included in whatever stock holdings he (415) had at the time. A. Yes.

* * *

(commencing at 415-25)

Q. Would you tell us why he was required to deposit in (416) escrow with Judge Lieberman 625 shares if in fact he owned 750? A. That was the negotiated deal they had arranged between themselves. I had originally prepared the papers, you see, calling for—

Q. 1250. A. 1250, as I recall, but when they got together among their various other points of agreement or disagreement was this 50% clause.

* * *

Deposition of Robert J. Schwartz

(commencing at 410-7)

Q. In other words, actually all Mr. Marcus was selling, meaning his and yours, was 625 shares. A. I don't follow you. That is all he had.

Q. That is what he was selling. A. You are not meaning he was selling Mr. Miller's are you?

Q. No, that is why I am asking. I want the reason why 625 shares were put in escrow. A. He was selling the shares that he had including mine, I presume.

Q. Those were the shares that were put in escrow? Yes.

• • •

(commencing at 259-16)

Q. All right. A. The original deal was that all of the stock was to be escrowed, but when we got together and started to work on this thing they agreed on half. And if you will look at the escrow letter I think you will find that it also refers to the whole business.

• • •

On re-direct examination by Mr. Margulies:

(commencing at 427-2)

Q. If I am correct, at an early part in the drafting of the agreement that was eventually consummated on September 14, 1948, there was a provision that all of the stock that was being sold, be put in escrow, is that right? A. Yes, originally, one of the earlier memorandums.

• • •

(commencing at 432-1)

Q. Did I understand you to say that you understood to begin with that all shares of Milmar Estates were to be deposited in escrow? A. Originally?

Q. Yes. A. Originally that is correct.

Q. At the time this agreement was prepared on September 3, 1948, I take it, was that the understanding? A. That was my impression, yes.

• • •

Depositions of Abraham Lieberman and William Miller

Deposition of Abraham Lieberman:

(commencing at 36-13)

Q. Why was only 50 per cent of this stock purchased by the buyer, endorsed in blank, to be deposited in escrow with you? A. That's the amount that Sam Marcus wanted deposited.

Q. He wanted that deposited? A. Yes, he wanted 50 per cent deposited in escrow.

Q. What about the remainder of this stock? A. I held that. That belonged to Miller and Bierman. All of this belonged to Miller and Bierman, as far as that is concerned.

* * *

Deposition of William Miller:

(commencing at 95-9)

Q. Now, Mr. Miller, was there any talk about depositing any stock of Bill Miller's Riviera with Mr. Lieberman—with Judge Lieberman on September 14, '48? A. Yes, there was discussion about putting some stock in escrow.

Q. Stock of Bill Miller's Riviera? A. I don't remember offhand.

Q. What would be the occasion of putting up stock of Bill Miller's Riviera on September 14? A. The only reason for that is that in the event there was a default in this agreement Marcus would be in a position to say, "I own the Riviera. I own the Milmar Estates. I own everything. Get out. I want to put you out tomorrow." He would be in that position to do it. So I imagine he wanted control of eveything, because he always liked to have it.

* * *

(commencing at 96-5)

Q. You remember there was talk of putting up stock of Bill Miller's Riviera. A. Yes.

Q. Now, Sam Marcus wanted that as additional collateral. A. Yes, I believe.

Q. Well, do you recall how much of the stock of Bill Miller's Riviera was to be put up A. No, I do not.

• • •

Deposition of Abraham Lieberman:

(commencing at 75-16)

A. Only in the event of a default was he going to be put back in status quo.

• • •

(commencing at 72-23)

A. * * *—his intentions were that he should not be deprived of any rights that he may have in Milmar, in the event that it should be placed back in its (73) status quo because of a default. * * *

• • •

Deposition of Robert J. Schwartz:

(commencing at 246-1)

The Witness: Now, what is your question?

Q. My question is: Did you in representing Marcus, have in mind that if this transaction should not be fully consummated in accordance with the terms of the agreement that all parties should be restored to the status quo? A. Yes, I believe so.

Q. Yes. A. In general.

• • •

(commencing at 26-23)

Q. Did you make any agreement with Mr. Marcus prior to September 14, 1948? A. No.

Q. As to the sale of your stock? A. No.

• • •

(commencing at 216-6)

Q. Well, may I ask you this, Mr. Schwartz, did you sell your stock to Mr. Marcus? A. I don't know whether

I sold it or not. I was to receive seventy percent of what we received from the sale of the Riviera.

• • •

(commencing at 216-15)

Q. And if there were more received? A. No, I didn't. As a matter of fact, from what I gather from this case, Mr. Marcus is contending that I have no interest in this case, and I agree with him.

• • •

(commencing at 237-17)

Q. All right. Now, in turning over this stock to Mr. Marcus, did you endorse the stock? A. Yes.

Q. And pass title to the stock to Mr. Marcus? A. That's right.

• • •

(commencing at 282-5)

Q. Therefore, if you endorsed the stock and gave it to Marcus, as you have already testified, at the time the title passed to Marcus, Marcus was in possession of that stock, was he not, legally? A. No.

Q. No? A. No.

Q. What was he in possession of? A. The certificate.

Q. Wasn't that the indicia of ownership of the stock? A. It might be; not the sole test.

Q. What did you intend to give him? A. Mr. Marcus wanted the stock. He was going to try to make a deal. He thought it would be a good idea to keep all the stock certificates together.

• • •

(commencing at 283-10)

Q. All right, I will break it down. In delivering the stock to Marcus, endorsing the certificate, and physically delivering the certificate to Marcus, did you intend that

Marcus should deal with that certificate as his property? A. No.

Q. What did you intend that he should do? A. He wanted the certificate and I gave it to him.

Q. Did you intend that he should deal with it as your property? A. No.

• • •

(commencing at 285-6)

Q. What was the oral understanding? A. He wanted the certificate. He wanted to have them all together in one place. I said I had no objection to it and I gave it to—whether it was to him or to his secretary—I think it was to his secretary, I didn't even give it to him.

• • •

(commencing at 92-23)

Q. When you turned over the stock to Mr. Marcus did you turn them over to him personally? A. I may have given it to his secretary, he may not have been there.

• • •

(commencing at 66-6)

Q. In other words, since part of the purchase price was deferred and to be paid in instalments, you were to get paid out of those instalments, is that so? Out of the deferred balance of the purchase price? A. That is correct.

• • •

(commencing at 93-18)

Q. I don't care what you testified to, I am asking you now when did Marcus tell you that he intended to sell his stock in Milmar Estates, Inc.? A. He called me several times during the spring of 1948, had potential deals with Mr. Bierman, with Mr. Miller, with both Mr. Miller and Mr. Bierman, and a few other possibilities that I can't

even recall now, and at that time he said, "I am trying to sell out our interest in the Riviera." Which by that I presumed would (94) mean his stock and mine.

Q. You presume that or did he tell you that, or did he tell you that he also intended to sell your stock? A. No, he didn't say that specifically, he said, "We can get out", or, "We can do this" and so forth.

Q. You inferred by that that he intended to sell not only his stock but yours? A. That is correct.

* * *

(commencing at 240-11)

Q. Why didn't your payments start when the contract was signed, if you were interested in proportion to your holdings in the corporation, why didn't they start at the time of the closing of this P-4 and P-8 on September 14, 1948? A. Because Mr. Marcus said that he needed the money very badly and could I possibly wait. And I said I could wait, and he paid interest on it, so I waited.

Q. Did Marcus then acknowledge that he owed you this money? A. Yes, shortly—around the first of October or some date close to that.

* * *

(commencing at 313-5)

Q. And wouldn't that call for you to receive payment on September 14th or, in the absence of payment, interest from September 14th from Sam Marcus? A. That's right.

* * *

(commencing at 132-12)

Q. Did you exact interest from him on these loans? A. Yes, I did.

Q. What rate of interest did you exact from him? A. It would depend; sometimes it would be a definite loan with

a definite promise; sometimes it would be 6 per cent; at one time it was 10 per cent. It might have been any different thing, I can't recall.

Q. You loaned him money and exacted 10 per cent interest from him? A. Yes. You are not surprised, are you?

• • •

(commencing at 134-18)

Q. Weren't you in the habit of collecting your interest from him at very short intervals, figuring your interest exactly to the day? A. When you say "habit", I don't know as I can draw any general conclusion. Sometimes he used to pay it monthly and I would drop by. When I would see him he was very nice, I must say that for him, he always lived up to his obligations. • • •

• • •

(commencing at 135-7)

Q. Didn't you make it a practice to drop into his place of business every 30 or 40 days and collect your interest right down to the day of giving him a receipt for it? A. Very often I did on a particular loan. • • •

• • •

(commencing at 37-7)

Q. Now, I refer to Exhibit DM-228 and direct your attention to the word "mortgage" as it appears therein in connection with the "mortgage on the Riviera, Fort Lee, which is in my name." Is the mortgage referred to herein the mortgage that was executed pursuant to Exhibit P-4? A. That's correct.

• • •

(commencing at 37-22)

Q. Prior to the signing of Exhibit DM-228 on October 1, did you have a conversation with Mr. Marcus about your

---

Exhibit numbered DM-228 is the same as DM-32.

share of the purchase price on that day? A. On this particular day?

(38) Q. Yes. A. I don't recall whether it was on that particular day or not. It may have been before.

Q. Will you tell us what the conversation was. A. That I was to get 70 per cent of the—I withdraw that. As I understood it, we were getting back about 70 per cent of our original investment, and Mr. Marcus said that I would, of course, get my proportionate share.

• • •

(commencing at 314-2)

Q. No, I am asking you whether by its express language it doesn't give you a participation in an existing mortgage. A. It would seem to.

Q. Well, it does, doesn't it, Mr. Schwartz? A. Well, if it's a valid document, I suppose it would.

Q. Is this your signature? A. No.

Q. Did you write this document? A. That's right.

• • •

(commencing at 316-23)

Q. Now, Mr. Schwartz, don't you know that Mr. Marcus did not have a mortgage on the Riviera in Fort Lee? A. He didn't individually, no.

• • •

(commencing at 317-25)

Q. So that you knew that Mr. Marcus didn't hold (318) this mortgage, is that correct? A. This was just a loose memorandum between Mr. Marcus and myself. We just scribbled it out standing on the sidewalk, if I remember rightly—or, if not, waiting for an elevator, at the edge of the elevator door, just something to have a little something in case we got mixed up on the figures, that's all.

Deposition of Robert J. Schwartz

Q. Why didn't you speak of an automobile, or a yacht, why did you speak of a mortagege? A. I don't know. It just struck me as a nice word.

Q. And that is your best answer? A. That is my answer.

• • •

(commencing at 324-12)

Q. So that when you stated in here "in connection with the mortgage on the Riviera, which is in my name," it was merely a form that you used as a convenience in working between yourself and Marcus. A. That's right.

• • •

(commencing at 40-10)

Q. And on the original you are sure the date is 1948 also? A. Well, if it's on a carbon, it must have been on the original.

Q. When did you first notice that it said 1948 on Exhibit DM-229? A. Oh, I guess about a year ago or so.

• • •

(commencing at 41-13)

Q. Will you explain as best as you can why you accepted as you did Exhibit DM-229 which contains this language, "I hereby agree to purchase your interest in Milmar Estates, Inc., for which you paid $11,250 consisting of all the shares held by you." A. It was just general language. I was sitting at the typewriter and we got up a memorandum, and that's all there was to it.

• • •

(commencing at 44-16

Q. The two Exhibits that you produced today, DM-229 and DM-228, they were not part of the client's file. Is that right? A. That's right.

Exhibit numbered DM-229 is the same as DME-52; DM-228 is the same as DM-32.

Deposition of Abraham Lieberman

Q. They represented your own transactions with Mr. Marcus? A. That's right.

• • •

Deposition of Abraham Lieberman:

(commencing at 19-8)

Q. Was the minute book of Milmar Estates present? A. On September 14?

Q. Yes. A. Yes, because I insisted on getting everything—how I remember that, I insisted on getting everything I could possibly get belonging to Milmar, and I took with me at that time the Milmar minute book, I took it back with me, the Milmar minute book, the stock book, and the transfer book. I think I had the transfer book.

Q. Was there a minute entered in the minute book of the corporation covering the sale of this stock? A. I don't think so. I wasn't the lawyer for Milmar at that time.

Q. Who was the lawyer for Milmar at that time? A. I would say it was Bob Schwartz. Bob represented Sam Marcus. Sam Marcus was the big cog in the wheel in Milmar. And I didn't represent him. I think it was Schwartz.

Q. This was a contract—P-4 was a contract between Milmar Estates, Inc., and Al Bierman and William Miller. A. That's right.

(20) Q. Didn't you think there should have been something in the minute book showing the assumption of this obligation by the corporation? A. I imagine there should have been.

• • •

(commencing at 26-6)

Q. Well, was Marcus the owner of 625 shares of stock of Milmar on September 14, 1948? A. I don't know what he owned. I haven't any idea what he owned.

• • •

Depositions of Al Kevelson and Abraham Lieberman

Deposition of Al Kevelson:

(commencing at 26-5)

Q. Did you authorize Mr. Miller to offer Mr. Marcus any more money when you received this telephone call on September 14, 1948? A. At that time I did not authorize him.

Q. Did you authorize him to do so subsequently? A. I don't ~~remember~~ if I authorized him, but according to the facts that he stated, and the aggravation that he had with this man, I sanctioned it.

• • •

(commencing at 26-24)

Q. And now, subsequently, as you say, you sanctioned the payment, right? A. That's correct.

(27) Q. How much payment did you sanction in dollars and cents? A. I think he agreed to give him $15,000 more in payments.

• • •

(commencing at 12-23)

Q. Now, did you know Sam Marcus? A. No, sir.

Q. Did you know anything about him? A. No, sir.

(13) Q. Did you ever go to see him before you agreed to buy a half interest in this night club? A. No, sir.

Q. Did you know Mr. Bierman? A. No, sir.

Q. You never met Bierman before you went into this Milmar venture? A. I don't think so. Maybe casually at the Riviera, too, but my memory don't serve me right on it.

• • •

Deposition of Abraham Lieberman:

(commencing at 23-14)

Q. May I ask at this point, was Mr. Schwartz ever an officer and director of the corporation? A. He said he

was. He said he was, and, as a lawyer, I took his word for it.

As a matter of fact, I will tell you something, Judge. I was very much surprised to know that Bob Schwartz was part owner of shares of stock. I thought—when I saw his name in that book originally back in his office I thought he was just one of these dummies, as lawyers usually take stock. But I was surprised to hear him testify here that he actually owned the stock.

• • •

(commencing at 27-18)

Q. When did you learn that Robert Schwartz was a stockholder, a bona fide stockholder of this corporation? A. When I heard him testify here in court.

Q. You didn't know it on September 14, 1948? A. Never knew that he was a bona fide stockholder and that he had paid for his stock to Sam Marcus. I was astounded when I heard it.

Q. He never asserted that claim? A. Never (28) did. Never said a word at the closing. Never said a word about it.

• • •

(commencing at 10-5)

Q. You speak of Marcus and his associates, or dummies, as you call them, getting out of the picture. A. That's right.

Q. Do you know who his associates or dummies were? A. Only what I saw in the stock book. I saw names in there that I didn't know, except one name I saw in there that I recognized, and I think that was Bob Schwartz. That was the only name I recognized.

• • •

Deposition of Robert J. Schwartz

Deposition of Robert J. Schwartz:

(commencing at 286-19)

Q. What I am trying to find out, Mr. Schwartz, coming back to where we were before, did Marcus handle your stock as your representative in dealing with the buyers or did Marcus handle the stock which you previously owned and to which you passed title to Marcus in dealing with the buyer? A. When Marcus was dealing with Miller and Bierman—and/or Bierman, let's say—he assumed (287)—and I don't know where he got this assumption, but I subsequently went along with it—that I would agree with any price that was satisfactory with him. And he more or less represented that he was the owner of the entire number of shares, including mine. And he had no such authorization from me. But, however, I didn't know about it and had no objection to it, as a matter of fact.

Q. How did he make this representation that he owned all of the stock, including yours? A. I don't know. But when Miller and Lieberman finally came around on about September 14 they said something about the fact that "Sam Marcus says he owns all the shares of stock and that you never were an owner." And I said I was an owner but I have consented to this deal.

Q. Did you tell them that you stopped being an owner at that point? A. No, I said I was going into the deal, I was consenting to the deal, I was going to sell my interest.

Q. The question of ownership and who was selling to whom, and what, was a pretty confused situation at that point, wasn't it? A. I don't think so.

Q. It was clear? A. I think so. I think it was clear.

Q. Crystal clear, wasn't it? A. Clear to me.

(288) Q. Clear to you that Marcus was acting for you in your behalf or was it clear that Marcus was acting for himself as owner of the stock which he had acquired from

you just before the contract was formalized; which was it? A. My understanding was that we were both selling the stock and that Sam Marcus was to be the party in the contract, the nominee for all the shares of stock, that's all.

• • •

(commencing at 28-24)

Q. But at the time that Exhibit P-4 was executed in the presence of Judge Lieberman and William Miller, the discussion (29) did come up about the whereabouts of all the shares of stock. Right? A. Yes.

Q. And you testified already that some of the certificates were missing. Right? A. That's correct.

Q. Including yours totaling 125 shares of stock? A. That's correct.

• • •

(commencing at 362-19)

Q. Did he tell you on that occasion that he had heard that you were conferring with Mr. Miller's attorneys, that he couldn't understand your hostility toward him in the matter? A. He did say that, yes, sir.

• • •

(commencing at 363-18)

Q. Didn't he say to you that whenever he had asked you to confer with him and tell him what was happening that you never had time to see him, and you said you didn't have time to go out to Jersey? A. I have no specific recollection but I may have said that. It may be so, and the fact was, however, that it was very easy for him to get in touch with me, and I was not giving him a run around. All he had to do was get in touch with me.

• • •

(commencing at 364-13)

Q. Did he then ask you on that same occasion what

papers you had with respect to this matter and what you had shown the opposing attorneys? A. He did. Yes, he did. As a matter of fact I think I testified—

Q. I am sorry. A. I am sorry too. I think I testified about that previously.

• • •

(commencing at 365-11)

Q. And didn't he say—Mr. Marcus, say to you then, "Plenty of mistakes were made. These fellows think they have taken me for a ride, but I am coming right back where I belong." A. I think he said something.

Q. Yes. A. Something of that general order.

• • •

(commencing at 366-11)

Q. Did you ever say to Mr. Marcus over the phone that you had been subpoenaed and would have to be a witness? A. Yes, I think so.

• • •

(commencing at 366-23)

Q. Did he tell you that Roth had complained to him that you had refused to let him see papers in your possession pertaining to Mr. Marcus' affairs? A. Yes, something to (367) that effect.

• • •

(commencing at 370-9)

Q. Didn't Marcus then say to you, "You know damn well you gave him information because he passed remarks to my attorneys of such a nature that he could have received from no one else but you." A. He may have said it.

Q. Didn't you then say to him, "On my word of honor, I didn't." A. That is correct, and it is true.

• • •

Deposition of Robert J. Schwartz

(commencing at 379A-15)

Q. "I can't talk to you until I see Miller first," is that what you said? A. I have no recollection.

Q. Did he then say to you, "What the hell are you talking about? You are my attorney and you are telling me you have to see Bill Miller first before you can talk to me." Do you remember his saying that to you or words to that effect? A. I have no specific recollection.

• • •

(commencing at 217-10)

Q. And did you have any conferences about this case before you came over here to testify the first time with any of the counsel for Mr. Miller, or Mr. Bierman, or Mr. Kevelson, or with the parties themselves? A. Well, besides the conference I had with Mr. Grosman, about which we discussed previously, I received a call from Mr. Brigadier and he asked whether or not I would meet with him.

Q. When was this? A. This goes back—I guess about a year and a half ago.

• • •

(commencing at 219-8)

Q. All right. Now, after—as you put it, some months later—you say you received a telephone call from Mr. Brigadier.

Mr. Kesselhaut: Some months later than what?

Q. Some months later than the time you were at Judge Grosman's office. A. Oh, much later. At least a year or more later.

• • •

(commencing at 220-5)

He said, "Did you know that I represented one of the

defendants?" And I said, "Well, no, I didn't know that you particularly did."

And he said, "Could I meet with you?" And I said, "Well, what is it about?"

He said, "I'd like to speak to you about the case." I said, "I didn't know that I could testify to anything because I was Mr. Marcus' attorney," and did he know that? And he said yes, he did. He said, "He is finished" or "practically finished" or had examined Mr. Marcus—I can't recall that exactly—and that he would nevertheless like to speak to me.

I said I will be glad to speak to him because I wouldn't refuse him on that particular point. And we arranged an appointment for the following day, because I was not going to be at the office the following day, at the Hotel Paramount in New York City. And he met me there the following morning at about eleven o'clock, I guess, and he asked me what my recollection of the case was, and whether I recalled the circumstances of the case.

* * *

(commencing at 229-20)

A. As I recall it—but I haven't got the exact date- as I recall it, the conversation with Mr. Brigadier took place about a week, let's say, or a few days before Mr. Marcus and/or Mr. Roth called me or wrote to me.

Q. Before? A. That's correct.

* * *

(commencing at 230-18)

Q. Did you tell Mr. Roth on the occasion of this telephone call that Mr. Brigadier had phoned you about the case? A. He asked me in substance the same thing as Marcus did, in other words, had I exhibited any papers and, if so, could he see what the papers were. I said, "Well, nothing was exhibited." That was the substance of the conversation.

Deposition of Robert J. Schwartz

Q. Now, after that conversation with Mr. Brigadier, (231) what happened with respect to your coming over here to testify? A. I think the next thing that happened was that I got a subpoena.

• • •

(commencing at 231-9)

Q. And at that point did you phone Marcus? A. To tell him I was subpoenaed?

Q. Yes. A. I think so.

• • •

(commencing at 344-17)

Q. Thereupon you did disclose them? A. That is my recollection.

Q. That is after Judge Modarelli ruled on the subject. A. I don't know whether it was before or after.

Q. You said you wouldn't show it to them before. A. That is correct.

Q. It must have been after? A. I don't know possibly.

• • •

(commencing at 350-1)

Q. Now, why did you and Mr. Brigadier meet there at this hotel instead of at your office? A. There were several reasons. In the first place he wanted to see me the following day. • • •

• • •

(commencing at 350-17)

Q. Did you tell Mr. Marcus that Mr. Brigadier had been over to see you and had wanted to see your file? A. Yes, I called him up shortly thereafter. I wouldn't say it was—it certainly was not that day—whether it was that Friday or the Monday following I don't know—and I told him of the conversation and Mr. Marcus said something like, "You

didn't tell him anything, did you?" I said no, I said I thought it was private.

• • •

(commencing at 358-23)

Q. Have you discussed this suit with Mr. Brigadier or with Judge Lieberman or with Messrs. Chasan and Chasan since its execution? A. Yes, recently since these examinations (359) started up I have spoken to them.

Q. Who did you speak to? A. I spoke to Mr. Brigadier on three or four or five occasions.

Q. Where? A. Well, over at the place where the first examination took place. I forget the name of the building.

Mr. Margulies: 605 Broad Street.

A. And then subsequently here on possibly three occasions or something of the sort, and—excuse me, he also called me on the phone once or twice.

• • •

(commencing at 360-5)

Q. Yes. A. No, we never discussed that. Most of the conversation was whether I had anything in my file and whether I would sign an affidavit and whether I would testify.

Q. Now, did you ask the plaintiff or any of these gentlemen who now represent him to indemnify you if you conferred with them? A. No.

• • •

(commencing at 361-21)

Q. You called him once? A. I called him and called him.

Q. After Mr. Brigadier— A. Yes, and I said Mr. Brigadier had been over to see me and I repeated the conversation that I had with him, you know, in substance, in a (362) few lines.

• • •

Deposition of Robert J. Schwartz

(commencing at 71-3)

Q. Was any statement made to you in any way by any of these gentlemen as to whether a deposition of Mr. Marcus had begun, or anything said about a deposition that would help fix the time? A. Nope, I can't recall anything, if it was said. It's three years ago. * * *

* * *

(commencing at 71-23)

Q. That is what I am trying to find out. You say you went to Mr. Grosman's office, that Mr. Tepper was there, that there was a discussion as to the transaction that had taken (72) place on September 14, 1948, is that right? A. Yes, that's right.

Q. Were you asked any questions as to what you had done by way of participating in that transaction? A. Yes.

Q. As to what you understood the transaction was? A. Yes.

Q. What did you state? A. Well, I told him, in substance, that I understood we were selling all the shares of stock and that the price was $125,000, and that I was to get 10 per cent of the proceeds, and just about more or less what I have testified to in these depositions.

* * *

(commencing at 72-24)

Q. Did you make any statement in writing at the office of Judge Grosman? A. No, it was strictly oral.

(73) Q. Were you asked to sign any statement? A. On that I will just have to say I don't recollect. I don't think so, but I don't believe so.

* * *

(commencing at 74-9)

Q. Well, let me fix a date around December 21, 1953,

which certainly you ought to be able to remember that far back in the action; at the time Mr. Marcus made this affidavit that I have been reading from. Did Mr. Marcus at that time request that you prepare or execute any affidavit in connection with the application that he was making to the Court for the appointment of a receiver? A. Not that I recollect, no.

Q. Did Judge Grosman ask you— A. No.

Q. —to make any such affidavit? A. No.

Q. Did Mr. Tepper or Mr. Roth? A. No. • • •

• • •

(commencing at 76-9)

Q. Well, was there any discussion in Judge Grosman's office about testimony that Mr. Marcus had been given? A. No. As a matter of fact, my recollection is that most of the conversation was made by myself because Judge Grosman said to me, "We have this litigation pending and it is here in the Federal Court. What happened? What actually happened? What is your best recollection?"

I told him pretty much what I have told you, my recollection of what occurred, and probably gave a better version of it because it was about three years ago, as I recall. Most of the time was used up with my saying what had happened and Judge Grosman asking me questions about what had happened.

• • •

(commencing at 76-25)

Q. He didn't read any portions of it to you that you (77) recall? A. I couldn't answer, I don't recall. I know there was a general conversation in which I was asked what happened, and I told him.

• • •

Deposition of Robert J. Schwartz

(commencing at 411-17)

Q. Let me ask you, at the time when the property was purchased from Ben Marden, did Mr. Marcus ever indicate to you that he intended to tear down the night club? A. No, but I will tell you what that probably refers to. He had no intention of doing it when he bought it.

• • •

(commencing at 412-19)

I think that is what he is referring to, because I am pretty sure that is the connection in which I heard discussion of tearing it down and using it for real property.

Q. He didn't originally acquire it for that purpose so far as you know? A. Oh, no. I am positive.

• • •

(commencing at 360-18)

Q. Did anyone on behalf of the plaintiffs or the plaintiffs themselves offer to pay you for whatever time you might be required to lose in testifying here? A. No, but Mr. Marcus did.

• • •

(commencing at 336-14)

Q. Do you have a specific recollection of any bill that you sent Mr. Marcus that he did not pay? A. He paid them but he paid them by taking off certain amounts from them.

Q. Do you have in mind any specific bill that you sent him from which he deducted items which you thought were improperly deducted? A. Every bill practically.

• • •

(commencing at 308-6)

Q. That may be so, but I'd like to see the receipt. When is the last time you saw this receipt? A. I don't know. I didn't get the receipt. I wasn't even in the office when Mr. Marcus picked up his files.

Deposition of Robert J. Schwartz

Q. How do you know what the receipt says in its language? A. That's what every receipt says in our office.

• • •

[HEARING OF MARCH 17, 1954]

(commencing at 77-19)

Q. Was the original of this letter in that file? A. I have no recollection, no particular recollection.

Q. Will you examine this letter? A. I have read it.

Q. I want you to examine it carefully. Did you receive this letter? A. I have no definite or particular recollection of it. It is quite a long while ago.

(78) Q. Now that you have looked at the letter does it serve to refresh your recollection in any way as to whether you received it? A. No.

• • •

(commencing at 78-9)

Q. You see that this letter purports to be a letter stating that this is being done pursuant to arrangement with you? A. I still have no particular recollection. I would only have to rationalize or work backwards.

• • •

[HEARING OF JULY 7, 1954]

(commencing at 66-25)

Q. Now, did you make any alteration on the copies in (67) your file? A. I haven't any distinct recollection about that because I don't have the file and haven't seen it in about six years.

• • •

(commencing at 67-20)

Q. As far as you recall, you don't know whether or not you may not have made the insertion on one of those copies? A. I have no distinct recollection of either making it or not making it.

• • •

Mr. Lieberman's Letter is the same as DME-8.

Deposition of Robert J. Schwartz

(commencing at 83-17)

Mr. Brigadier: We would like to have a five minute recess if it is agreeable to you, so we can confer for a few minutes.

• • •

(commencing at 109-8)

Q. You have no distinct recollection of ever having received from Judge Lieberman the original of the letter DM-227? A. No. But I do have a distinct recollection of the phone call and of getting out the file and making the corrections.

• • •

(commencing at 111-23)

Q. When you say these corrections were made, you say several corrections after the parties had executed the contract? (112) A. That's right. And I called up Mr. Marcus and told him about it and mentioned the particular points, and he said, "Oh, yeah", or something like that, "O.K."

• • •

(commencing at 117-3)

Q. Now, you did not secure Mr. Marcus' consent previous to the time that you say you agreed to the making of these corrections in paragraphs 5 and 10 of Exhibit P-4. A. That is correct.

• • •

(commencing at 104-19)

Q. Will you tell me, please, how it is that if you took up with Mr. Marcus on September 14, 1948, the several paragraphs of the contract P-4, that you omitted to insert in paragraph 5 the words "up to 50%"? A. I can't answer that. We just didn't insert it, that's all.

• • •

Deposition of Robert J. Schwartz

(commencing at 106-18)

Q. Now, why wasn't that inserted, that provision inserted in the contract to begin with? A. We had intended to but apparently overlooked it until a day later.

Q. That was one of the most essential parts of this agreement, was it not? A. Possibly.

Q. And you overlooked it? A. That's true.

Q. And Judge Lieberman overlooked it? A. We had it (107) on our list but we probably didn't get it in.

Q. Did Mr. Marcus read this contract before he signed it? A. He did.

Q. And he overlooked it? A. He must have overlooked it, too.

Q. How about Mr. Miller, did he read the contract? A. Well, I don't think Mr. Miller read it as thoroughly as Mr. Marcus.

Q. Did he read it at all? A. Yes.

Q. And he overlooked it? A. Well, when you say overlooked it, I don't say it was overlooked, we had found it and intended to insert it and we had it on our list but failed to put it in.

Q. You had it on what list? A. Judge Lieberman and I were getting up a list of corrections for each document as we went through them, and as our clients were passing on them, and the papers were going back and forth to the stenographer for corrections, and we had intended to put that in but failed to do it. We didn't overlook it.

* * *

(commencing at 118-6)

Q. Did you tell Mr. Marcus that you had told Judge Lieberman that he had your permission to insert these two phrases in the contract, P-4? A. In effect, yes; not in particular.

Deposition of Abraham Lieberman

Q. What do you mean by "in effect"? A. Just what I say.

Q. What do you mean by "effect"? A. Will you define effect?

Q. I don't know, you define it, you are using the word. A. I have used it so I have given you an answer.

• • •

(commencing at 248-9)

Q. Didn't you testify that you told Marcus that the change had been made? A. That was correct, because I had made the change.

• • •

Deposition of Abraham Lieberman:

(commencing at 32-12)

Q. Yes. A. I said I am making these changes, the same changes—without going into detail—"I am making the same changes on my copy and we will consider it as part of the agreement. I have initialed mine and I understand you have initialed yours likewise."

I initialed mine. I never sent the agreement over to Bob Schwartz to initial it, because he told me he was initialing his. • • •

• • •

(commencing at 35-5)

Q. You never insisted that Schwartz initial the insertion, as he had done every other insertion, or correction, in this agreement? A. No, I did not, because I had the agreement. You see. I had the agreement in my office. He had the other one there, and I was initialing mine and he was initialing his.

• • •

Deposition of Robert J. Schwartz

(commencing at 78-7)

Q. And you knew that you were dealing with an extremely tricky and dangerous man. A. That's right.

Q. And a man whom you have described as a liar. A. Right. See, I had experience with him back in 1947, in this dispossess proceeding. That is what I based my conclusion that he was a liar because he lied to me on a number of occasions pertaining to that dispossess proceeding.

And in spite of all our carefulness, Schwartz and myself, we still omitted a few little things here and there, which we then tried to correct later on, as you know.

Q. Well, when you learned of these omissions, why weren't you more circumspect in orrecting them, considering the fact that you were dealing with a man who you considered to be so unreliable and so dangerous? A. Are you through?

Q. Yes. A. I thought I did everything that was necessary. I called the attorney. He said he was initialing his. I initialed mine. He told me if there was any difficulty about it with his client, he would let me know; if I don't hear from him, then everything is okay. I was satisfied with that.

(79) Q. Didn't you think it might be important for you to get some sort of a confirmation from Marcus himself? A. No. No, I took his attorney's word for it. I thought Bob Schwartz was an honorable fellow, and I still think he is, comes from a very fine law firm, has an excellent reputation, as far as I know, and I knew nothing against him at that time. Nor do I know now anything against him.

• • •

Deposition of Robert J. Schwartz:

(commencing at 406-3)

Q. Would you say he was continuously active in a num-

ber of different business ventures? A. He was active in more than a number. He always had at least a dozen or more different ventures going at the same time.

Q. Sometimes in his own name? A. Sometimes in his own name, sometimes a corporate name, sometimes a partnership.

• • •

(commencing at 300-1)

Q. Do you recall that in August of 1948 Sam Marcus served notice upon you that he intended to recapture the property? A. I know he sent me a notice, but when he sent it, I couldn't say.

• • •

(commencing at 398-17)

Q. All right. You tell us, if you don't mind. A. I thought Mr. Marcus represented to me when he met me on this particular matter that he would take about a year to pay it off, in other words that the loan would carry through for a year, and before I went into it I said I wasn't interested in bothering with a short term loan of a month or two because it was more trouble to get up the papers than it was worth, and he said, "I am telling you," or "giving you my assurance that it will take a year," so I said, "O. K." (399) and I went into the deal and before the year was up—considerably before—I don't recall how much—he paid off the loan, and I told him I was disappointed that he did that and that he had not followed through with what he had said, and he said, "I came into some money or some money came in unexpectedly and I want to pay it off." So I said, "O. K."

• • •

(commencing at 400-17)

Q. The loan was made in April, May and June of 1948.

A. That is right. No, I didn't default. Mr. Marcus told me he didn't need any more money at that particular time and I should hold up.

• • •

(commencing at 337-17)

Q. Yes. A. And those he lived up to. Whatever he put in writing he lived up to eventually, although sometimes he delayed, but he did pay them.

Q. That is what you meant when you said he was honorable and respected his financial obligation? A. That is correct.

• • •

(commencing at 291-1)

Q. Well, was Sam Marcus's word always good with you? A. Yes, he was, I must say, always pretty reasonable and fair in his dealings and I had very few complaints with him in our personal relationship.

• • •

(commencing at 294-5)

Q. Well, did you express displeasure about the situation? A. I said to him, "It strikes me that you said you would take a couple years about this." He said, "Well, I got some cash in and I'd like to pay it off." So I said, "OK, pay it off." And he did.

• • •

(commencing at 294-25)

A. Secondly, that was not a bad experience. It (295) was just something I felt he shouldn't have caused me all that trouble to go through, preparing these papers for a shorter period, because it wasn't worth the effort.

• • •

Deposition of Robert J. Schwartz

(commencing at 232-9)

Q. Did you feel yourself culpable, did you feel you were negligent in any way in the handling of his affairs? A. What are you referring to?

Q. Anything in connection with the Riviera transaction, anything in connection with the Milmar transaction, anything in connection with the Michael Realty Company, anything in connection with anything which in any way related, directly or indirectly, to the Riviera, real property and the operations surrounding the real property of the Riviera? A. No.

Q. You did not feel yourself so culpable, right? A. Right.

Q. You were satisfied that you did everything a prudent and reasonable lawyer should have done in the protection of his client's interests? A. No.

Q. You didn't? A. That's right.

Q. All right. Would you elaborate, please? (233) A. Mr. Marcus wouldn't let me.

• • •

(commencing at 186-12)

Q. So that you on that occasion were at Mr. Miller's room in the hotel? A. That's correct.

Q. Can you name the hotel? A. I think it was the San Moritz.

Q. Was anybody else present outside you and Mr. Miller? A. No, Mr. Miller and myself.

Q. And can you recall as to whether or not this was in close proximity to the time when Mr. Miller discussed the Riviera deal with Mr. Marcus? A. I can recall very distinctly that there was no connection whatsoever with the Riviera because it was in the middle of the winter, and some time around Christmastime, as I recall. I can sort of remember it was around New Year's—December, January.

• • •

Deposition of William Miller

(commencing at 192-17)

Q. In going to Mr. Miller's room, wasn't that on the date and the evening when you were to take up with him a commercial matter relating to the affairs of the Embassy? A. I think so, yes.

Q. Yes. So that when you stated that you did not have a conference with Mr. Miller in his room, but merely came there on a social basis to walk back to the Embassy Club, were you in error? A. No.

Q. You still say that that was your purpose in (193) going to Mr. Miller's room? A. It was a social courtesy for me to walk over and meet him at his hotel room and then walk over to the Embassy. And we did not begin to transact any business for about an hour after we got to the Embassy, which was about an hour and a half after I met him.

• • •

(commencing at 197-1)

Q. Did you bill the Embassy Club for these services? A. Yes, I believe so.

Q. Were you paid for these services? A. I believe so.

• • •

(commencing at 198-19)

Q. All right. Now, did you thereafter represent any corporation in which Mr. Miller had an interest? A. Yes. Well, the Milmar and—the Milmar Estates and the Bill Miller's Riviera, Inc.

• • •

Deposition of William Miller:

(commencing at 49-8)

Q. Now, did Mr. Winne represent you in the negotiations leading up to the making of this contract, Exhibit

P-1 for identification? A. No. No, Mr. Schwartz represented us, Robert Schwartz.

Q. The man who testified here? A. Yes, Mr. Marcus' attorney. I never knew Robert Schwartz. I don't know him to this time, except by acquaintance.

• • •

(commencing at 56-11)

Q. Didn't you both have the same attorney? A. That was not my attorney. I didn't know Mr. Schwartz. I had never met Mr. Schwartz, only when Mr. Marcus brought him and introduced him to me. This was Mr. Marcus' attorney, and still is to this day, as far as I know. I have never used Mr. Schwartz in anything.

• • •

Deposition of Abraham Lieberman:

(commencing at 57-23)

Q. Now, after the contract, P-4, was drawn, did you become counsel for Milmar Estates, Inc.? A. You mean after September 14?

(58) Q. Yes. A. Yes.

Q. And you continued to be counsel for Milmar Estates until the present time? A. I don't represent them any more now. I stepped out of this as soon as suits were started by Mr. Chazin, and I didn't represent them any more at all. When this dower question came along, I stepped out.

Q. And you have had nothing to do with representing Milmar Estates since? A. Not that I remember.

Q. Or Miller? A. Oh, I was representing Bill Miller. I was representing the Riviera, as a matter of fact. The Riviera only closed last summer. I was handling a lot of their legal matters.

Deposition of Abraham Lieberman

Q. Now, who substituted you as counsel for Milmar Estates? A. You mean who did it?

Q. I mean who took your place? A. I thought you meant who was responsible for it.

Q. Oh, no. A. I think it was Chazin & Chazin. Chazin & Chazin, I believe.

• • •

(commencing at 3-17)

Q. With respect to Milmar, when did you first become interested in any of the affairs of Milmar Estates? A. I would say sometime in 1947.

Q. And from then on you were consulted quite regularly by Mr. Miller— A. That's right.

Q. —with respect to his dealings with Marcus and Milmar Estates? A. That's right.

Q. And also Riviera. A. Right.

• • •

(commencing at 59-4)

Q. Who took over from you? A. Who took over for Milmar after I stepped out.

Q. Yes. A. I said I stepped out with the commencement of the dower suit and from then on Chazins took over.

• • •

(commencing at 60-1)

Q. You continued, however, to represent William Miller? A. I would say on his personal matters. I continued representing Bill Miller on his personal matters.

Q. With respect to his interests in Milmar Estates? A. No, no. Just his strictly personal matters. I stepped out of his personal interests in Milmar and everything else. It was just his personal matters.

• • •

(commencing at 61-24)

Q. Can you tell us approximately when that was, with

regard to the 14th of September of '48? A. As I (62) said before, it may have been a few days after, a week or two later. I don't remember. It may even have been longer than that.

Q. And you continued to represent Milmar until this litigation started? A. From then on.

Q. Yes. A. From then on, yes.

Q. Now, when you refer to litigation, you mean the litigation with respect to the dower rights or the litigation with respect to the contract. A. To both, both. I think the dower question came first, if I am not mistaken.

Q. Yes. A. I stepped out then.

Q. That is when you stepped out. A. That's right.

* * *

(commencing at 63-)

Q. No, I mean who was the plaintiff in that suit? A. It must be Milmar, I gather, because it was to acquire title. I think so. Who was it?

Q. Do you know how it came about that Mr. Bierman, Mr. Miller—who still claim to be stockholders of Milmar Estates, Inc.,—as plaintiffs, instituted a suit against this corporation which they control? A. I do not. I had no part of it.

Q. You weren't consulted to respect to that? A. I had no part of it.

Q. Mr. Miller didn't talk to you about that at all? A. Prior to the commencement of it?

Q. Yes. A. No, he did not.

Q. You didn't represent him as his attorney in connection with— A. No, I did not.

Q. —the present interpleader suit? No. I did not.

Q. You didn't know what was going to be done? A. No, I did not.

Q. When did you first learn that this interpleader suit

had been instituted? A. I think shortly after it was instituted.

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Q. Have you at any time read the complaint filed in the present interpleader suit? A. I don't believe I did. I may have, Judge I don't really remember. I knew I would be a witness in the case, and I therefore didn't want to participate in any of the proceedings and wasn't interested in any of the proceedings. I figured they no doubt had able counsel.

Q. Was the theory or the reason for the bringing of the present interpleader suit discussed with you? A. No.

Q. By anybody? A. Never.

Q. You didn't counsel the bringing of this suit? A. I did not.

Deposition of William Miller:

(commencing at 45-22)

Q. I show you photostatic copy of an agreement made and dated April 2, 1946, between the Michael Realty Company and William Miller and Samuel Marcus, which has been marked P-1 for identification on December 19, 1951. Will you look at it, (46) please, and tell me if that is a true copy of your signature?

• • •

(commencing at 46-12)

A. I imagine this is the paper and—I imagine this is the one. I don't know the contents or anything. It is a long paper. I imagine this is the one. I didn't read it when my attorney handed it to me, I signed it, I imagine, being there by counsel, and he told me to sign, this is the agreement—and I believe this is the one—I would sign it without reading the entire thing, because it is a lengthy document, and I very seldom read papers that take a long time to read.

Deposition of William Miller

Q. Well, now, let me ask you this. Is that your signature on there? A. Yes, it is.

• • •

(commencing at 19-19)

Q. So that at least from 1947 on you kept records—or your secretary kept records— A. She may have. I said—

Q. —of your dealings with Mr. Marcus. A. I said sometimes I would give these records to my secretary, and sometimes I did it without records, and most of the time with—Mr. Marcus prepared all the papers, and had them all ready for (20) me to sign, and just said, "Sign this."

Q. And you signed. A. And I signed it.

Q. Do you usually do things that way,— A. Yes.

Q. —sign papers that are given to you to sign? A. Oh, I get in plenty of trouble doing it, but I keep on doing it to this day.

Q. Why do you do that, Mr. Miller? A. I don't know. I wish I knew.

• • •

(commencing at 61-1)

Q. Have you read that contract? A. I never read contracts. I am not a lawyer. • • •

• • •

(commencing at 24-19)

Q. You considered Marcus your partner in Mocombo, Inc.? A. That's correct.

Q. And has that always been your thought? A. Absolutely.

Q. You couldn't possibly be mistaken about that? A. Oh, no.

• • •

Deposition of Abraham Lieberman

Deposition of Abraham Lieberman:

(commencing at 42-24)

Q. Was there ever a meeting of the Milmar Estates subsequent to the 14th of September, 1948, reorganizing that (43) company,— A. Yes.

Q. —to your knowledge? A. Yes.

Q. Were you present? A. Yes. That's the first time I met Al Kevelson.

Q. When was that, as nearly as you can recall? A. Oh, that may have been several weeks later, several weeks after September 14. Maybe a few days later, I don't know. The first time I ever saw Al Kevelson.

• • •

(commencing at 67-6)

Q. I show you what purports to be the minutes of a meeting supposedly held on September 20, 1948, at 1:00 p.m.; Milmar Estates; do you recognize those minutes? A. Yes, these minutes my office prepared.

Q. And do they truthfully represent what happened at that meeting? A. Yes. At that meeting Bierman—Bill Miller was elected one of the officers, I believe he was elected secretary and treasurer, Kevelson was elected president, Al Bierman was elected vice-president. That was the purpose of the meeting and that is what was accomplished at that meeting.

• • •

(commencing at 68-13)

Q. Were they appointed inspectors of election? According to this, they were. A. Yes, they were appointed inspectors.

Q. Do you recall that? A. Yes.

Q. And did they function as such? A. Just that they were told—I took the vote and asked them how they cast

their ballots. And they were there. It was all done orally. A typical informal corporation meeting of a closed corporation.

Q. Well, let me ask you, Judge, these minutes of that meeting of September 20, '48, marked DM-300,— A. Yes.

Q. —do they truthfully represent what happened that day? (69) A. Oh, yes. They were elected officers that day.

Q. No, no. I am not asking that. To the best of your recollection, do these minutes, prepared, as you say, in your office, truthfully represent what actually happened at this meeting of September 20, '48, at 1:00 p.m.? A. Substantially, yes.

• • •

(commencing at 70-15)

Q. I call your attention to the fact that the minutes, DM-300, indicate that the following stockholders were present in person, William Miller, Hudson Terrace, Fort Lee, New Jersey. A. Right.

Q. Right? A. That's right.

Q. And that he represented 500 shares, is that right? A. Are you asking me if it is so, or what it says there?

Q. Yes. A. So it says.

Q. Did he have 500 shares of stock at that time? A. Yes, that's right. Yes, he had 40 per cent of 1,250.

Q. Al Kevelson was present in person, and did he have (71) 500 shares of stock? A. That's right, 40 per cent of 1,250.

Q. I thought half of the stock of Milmar Estates was deposited with you in escrow— A. That's right.

Q. —not to be voted— A. That's right.

Q. —until Marcus' money was fully paid out. A. I think there may have been some provision of that kind. I may have overlooked it at the time.

Q. Isn't that a fact? A. I think there may be some provision in there that said it is not to be voted upon. I

may have overlooked it. It wouldn't have made any difference, because they could have voted the 625. They had sufficient votes to hold the meeting. It didn't make any difference.

Q. But you concede that the minutes, DM-300, are erroneous in that respect? A. Not at all.

Q. Well, Kevelson didn't have 500 shares. A. Of course he did.

Q. And were they available— A. The mere fact that it was in escrow with me didn't matter. That was subject to the fulfillment of the contract.

Q. Even though the contract provided that that stock was not to be voted? A. That's right.

Q. You didn't think that was important? A. I didn't think there was anything wrong in that. Certainly not for the purposes of this meeting. I think the intention of (72) Marcus was—I want to wait until the Judge hears me—all right, Judge, I was continuing to say that certainly not for the purposes of this meeting did it matter whether they voted those shares of stock. I think it was Marcus' intention when he put—and so I understood when we had these conversations, when he was placing the stock in escrow—he didn't want anything done or voted with that stock that would in any way deprive him of any rights that he had in Milmar that he may lose as a result of a vote. But certainly Marcus had no intention of preventing the electing of officers, and I am sure didn't care whether they voted 1,250, 625, or a thousand shares. He wasn't being deprived of anything. And that is all I was interested in, that he shouldn't be deprived of anything, as an escrowee.

• • •

Deposition of William Miller:

(commencing at 122-21)

Q. Did you recall that the stock that was being turned

over to Judge Lieberman was to be held in escrow by him? A. Yes.

Q. And that it was not to be voted? A. That's correct.

(123) Q. How soon after September 14, '48, did you have an organization meeting of Milmar Esates, Inc.? A. Oh, a few days afterwards.

Q. Was there any stock voted at that meeting? A. No.

• • •

Deposition of Abraham Lieberman:

Q. That was your interpretation of your undertaking not to permit that stock to be voted. A. I don't quite understand you.

Q. This statement you have just made in your interpretation of the provisions of the contract, P-4, that the stock deposited with you in escrow was not to be voted? A. That's right. I think what Marcus meant there—and I think I knew pretty well what the intentions of the parties were, because we had so many discussions about it—his intentions were that he should not be deprived of any rights that he may have in Milmar, in the event that it should be placed back in its (73) status quo because of a default. And certainly in the election of officers—they had to function, they had to have officers immediately after he stepped out—it didn't matter if they voted 1,250 or voted 625.

Q. Well, you realize, of course, that if they didn't vote this stock, your stock, they couldn't organize this corporation. A. Couldn't have voted the 625?

Q. It would not have been a majority of the stock. A. Well, it certainly wasn't the intention of Marcus that they shouldn't function, and have no officers. Who would sign checks?

Q. I am asking you whether or not you realize that if you hadn't permitted the stock escrowed with you to be voted they could not have organized this corporation. A. I never took that into consideration.

Q. And they could not have functioned. A. I never took that in consideration.

Q. So notwithstanding the express understanding that you were not to permit this stock to be voted, you permitted it to be voted. A. That's right. And I had it right in there, 1,250 shares, that's correct. And I don't think there was any violation or breach on my part whatsoever.

• • •

Deposition of Al Bierman:

(commencing at 62-4)

Q. Against what? A. Well, in the event that—we were paying money, paying out money—that is Milmar—and supposing Mr. Miller lost his license and—

Q. License to do what? A. To run the Riviera. And the club was closed—we couldn't collect rent—was going bankrupt, they would go in bankruptcy, we wouldn't be able to get any money. We could go bankrupt. Some receiver might come along and want to charge us all that money over again. We wanted protection.

• • •

(commencing at 62-20)

Q. You wanted protection against the money that you had been paying to Mr. Samuel Marcus. A. Yes, sir.

Q. Well, you hadn't paid him any money, had you? A. Well, I certainly have.

Q. Who was paying him the money? A. Mr. Kevelson and I.

(63) Q. How much money had you paid Mr.— A. I don't remember right offhand how much I paid him.

Q. —Mr. Marcus; how much money had you paid him? A. At that particular time?

Q. Yes. A. I don't remember.

Q. The time that you instituted this suit, you authorized

the institution of this suit? A. I don't remember right offhand how much money I had paid in. Mr. Kevelson has a record over there.

• • •

Deposition of Al Kevelson:

(commencing at 71-10)

Q. You were not a party to the original complaint? A. No, sir.

Q. Did you know that this suit was to be filed? A. Yes, sir.

Q. Had it been discussed between you, Mr. William Miller and Mr. Al Bierman? A. Yes, sir.

Q. Why weren't you a party to this original suit? A. Well, because they were the ones on the original contract of September 14.

Q. Incidentally, why weren't you a party to that contract? It was your money that was being spent to buy Marcus' interest. A. No particular reason. I just didn't want to be named in it. I didn't want anybody—I told them to act as my agent and they went.

Q. And, of course, you had a substantial interest in that contract of September 14, 1948. A. That's correct.

• • •

Deposition of William Miller:

(commencing at 104-24)

Q. What was the condition of Bill Miller's Riviera on December 28, 1950, financially; was it in good shape? (105) A. I imagine it was.

Q. You had gotten rid of Marcus and you were running it yourself. I take it that you made a success of it, right? A. I think so.

Q. On December 28, 1950. A. Yes, we were meeting our obligations.

Deposition of Robert J. Schwartz

Q. Were you being threatened with suit by anybody? A. No.

Q. Or with bankruptcy, the filing of a bankruptcy petition against you? A. No.

Q. Now, as a matter of fact, you and Mr. Bierman, and Mr. Kevelson, were actually operating Milmar Estates, Inc., weren't you? A. That's correct.

Q. You did what you saw fit with it, without interference by Mr. Marcus. A. Of course.

Q. And on December 28, 1950, you and Mr. Bierman, and, I take it, Mr. Kevelson, were directors? A. That's correct.

Q. And officers of the corporation? A. Correct.

Q. And you authorized the bringing of this suit, did you? A. Yes.

Q. --against the corporation which you were controlling —A. That's correct.

Q. —because you thought that in a bankruptcy proceeding somebody might be held liable for the payment of this.

• • •

Deposition of Robert J. Schwartz:

Examination by the Court:

• • •

(commencing at 158-24)

> Mr. Kesselhaut: If your Honor please, I appear for Mr. Kevelson, who is one of the stockholders, or hopes (159) that he will be.
>
> The Court: He is extremely unhappy about the manner in which this matter has been handled up to the present; and these proceedings were initiated almost four years ago. • • •

• • •

(commencing at 68-23)

Q. I direct your attention to paragraph three on the

second page of this same exhibit and ask you in whose handwriting the initials RS are? A. I don't know. They might (69) be mine now. It's doubtful. It's hard to say.

Q. And the initials AL? A. Those are Mr. Lieberman's.

Q. Were they signed in your presence? A. Yes.

Q. But you do not know or you are doubtful about the others? A. It doesn't look like my handwriting but it may have been.

• • •

(commencing at 354-4)

Q. You think they did? All right. Who took the corporate books of Milmar Estates, Inc., on the 14th of September, 1948? A. I have no recollection on that particular point.

Q. Were they present? A. I don't know. I have not any recollection. I don't think they were present.

Q. Did you have them in your possession? A. No.

Q. Prior to that time? A. No, if I did it was possibly just for a short period of time, but I didn't have regular possession of them at any time.

Q. Who had them? If you know? A. I don't know. I assume that Mr. Winne's office has them.

Q. At the time that the contract, P-4, was being prepared and the several conferences between you and Judge Lieberman, on any of these occasions were the books of Milmar Estates, Inc., present? A. No.

• • •

Deposition of William Miller:

(commencing at 132-19)

Q. Did Milmar Estates, Inc., borrow any money from Sam Marcus? A. When?

Q. Any time. A. Oh, I think it did, before 1948.

Deposition of Al Kevelson

Q. Remember how much money was borrowed? A. I haven't the slightest idea.

• • •

(commencing at 133-13)

Q. Yes, I know, but at the time that you borrowed money from Sam Marcus, what was the understanding as to the terms upon which you borrowed it? A. I don't know.

Q. You don't know? A. No.

Q. On September 14, '48, did Milmar Estates, Inc., owe Sam Marcus any money? A. I don't know.

Q. Did you owe Sam Marcus any money on that day? A. I don't know.

• • •

Deposition of Al Kevelson:

(commencing at 59-11)

Q. Well, what dealings would there be between Milmar Estates and Bill Miller's Riviera other than this lease? A. Well, I don't know. We would have to check the records, if there was possibly—maybe a loan to one another, and the—

Q. You think that Milmar Estates may have loaned money to Bill Miller's Riviera? A. I would have to check the records. I wouldn't know offhand.

• • •

(commencing at 63-5)

Q. Were there loans made by Milmar Estates, Inc., to Bill Miller's Rivera from time to time? A. I don't remember.

• • •

(commencing at 63-23)

Q. Now, without telling us the amounts, which you say you don't recall, were there any loans made by Milmar Estates, Inc., to Bill Miller's Riviera? A. I can't recollect.

• • •

Deposition of Al Kevelson

(commencing at 45-5)

Q. Didn't the $15,000 additional come from the treasury of the Milmar Estates, Inc., after you and Mr. Miller and Mr. Bierman took over? A. I don't know where it came from. And if it did, it would be charged to Mr. Miller's account.

• • •

(commencing a 51-1)

Q. Now, a great deal of money was borrowed from time to time, wasn't it, by Milmar Estates from this bank? A. When you say 'a great deal', what do you mean by a great deal?

Q. Well, running up into tens of thousands of dollars. A. That's correct.

Q. What was done with that money? A. Oh, we had to pay the mortgage. We paid other bills. I wouldn't remember. It is all a matter of public record.

Q. Did the stockholders or directors get any of that money? A. No.

Q. By way of dividends? A. No, sir.

Q. Or loans? A. Not to my knowledge.

Q. Did any of that money go to pay Mr. Marcus for his stock? A. No, sir.

Q. Are you sure about that? A. Positively.

Q. I think you said that all of the money that went to pay Mr. Marcus came from you. A. That's correct.

• • •

(commencing at 56-18)

Q. Do you know what the carrying charges were on the property owned by Milmar Estates in the year 1948? A. Not offhand.

Q. Or since? A. No, only from records.

Q. And there are records to show that? A. Yes, sir.

Deposition of Al Kevelson

Q. And would you say that the rent paid to Milmar Estates in 1948, and since, was sufficient or insufficient to pay the (57) carrying charges on the Milmar realty? A. Well, at times it was sufficient and at times it wasn't.

• • •

(commencing at 58-7)

Q. Was the rent enough to cover the carrying charges? A. I don't remember. We have to go through the records. I don't remember.

Q. Will you tell me the purpose for which Milmar Estates borrowed money from the bank in Brooklyn? A. To carry on its normal course of business which would also be best answered by the records.

Q. Well, outside of maintaining the real estate at Fort Lee, in which the Bill Miller's Riviera carried on its business, there were no other business dealings carried on by Milmar Estates, were there? A. You will have to check the records. If Milmar Estates made a loan to somebody, or something, I don't know. You will have to check the records on that.

• • •

(commencing at 55-2)

Q. Did Milmar Estates, Inc., have any income whatsoever? A. She had an income from the rental of Bill Miller's Riviera.

Q. And how much was that, in 1948? A. I don't remember. You will have to check the records.

Q. You have no idea how much that rent amounted to? A. No.

• • •

(commencing at 55-14)

Q. Wasn't there a lease dated July 23, 1947, and a lease dated September 14, 1948; didn't you see that? A. I didn't see it.

Q. Well, didn't you inquire whether any rent was being paid by Bill Miller's Riviera to Milmar Estates? A. When, before September 14?

Q. Yes. A. No, I didn't inquire.

Q. Or subsequent to September 14? A. Well, I knew there was a rental being paid.

Q. And do you know how much that rental was? A. Not offhand.

• • •

Deposition of William Miller:

(commencing at 126-13)

Q. How much rent was being paid by Bill Miller's Riviera to Milmar Estates, Inc., subsequent to September 14, '48? A. When you say subsequent, you mean before or after?

Q. After. A. After? I think there was $40,000 a year for two years and then it paid sixty.

Q. Was that rent paid? A. Yes.

• • •

(commencing at 130-20)

Q. What were the carrying charges on the Milmar Estates' real estate— A. I don't know.

Q. —in September, 1948? A. I don't know.

Q. Do you know what they were at any time thereafter? A. No.

Q. Who would know? A. Jack Hoffman, my accountant.

• • •

(commencing at 3-1)

Q. That's the Rivera? A. That's the Riviera, yes.

Q. When did you leave there? A. I can't tell you offhand. It must have been about—

Q. About. A. I imgaine it must have been somewhere about '50, 1950, maybe '49. I don't know.

Q. Now, did you live on the premises? A. Yes, I lived at the Riviera.

Q. And you stopped living there in 1950? A. I believe it was '50. I am not sure. I would have to look.

* * *

Deposition of Samuel Marcus:

(commencing at 415-1)

Q. No. I mean as far as you knew the only business you knew he was in was the night club business, is that right? A. No. He had a big real estate venture, and that he owned Luna Park. He told me he owned Luna Park in connection with a partner, and that there was a several-hundred-thousand dollar deal going on there in the sale of Luna Park.

Q. That was not a residential place? A. I believe there was some residences on there also.

Q. I am referring to Luna Park. A. There was some residences there also.

Q. Did he tell you about any other real estate ventures he was connected with during this conversation? A. He told me he had just sold his interest in a night club in Miami.

Q. Did he tell you about any other real estate ventures? A. He told me about a home he owned out in Hollywood.

* * *

(commencing at 208-12)

A. Well, I had information that Mr. Miller had bought an expensive home in Jersey, that he had bought several cars, that he had given his wife mink coats, that he had purchased a boat, that he was living in a style that was far beyond a man of normal income.

Q. And then you kn w that he had made fraudulent representations to you? A. Then I felt that he had made fraudulent representations to me.

Q. And that was in 1949? A. That was in either 1949 or 1950. I don't recall. I was making quiet investigations at this time. I don't know just exactly when, but I was arriving at those conclusions.

• • •

(commencing at 202-2)

Q. Do you know of any misrepresentations that Mr. Miller or Mr. Bierman made to you? A. Yes, I know misrepresentations were made to me.

Q. Well, what are they? Tell us what they are. A. Mr. Miller advised me in the fall of—no, in late summer of 1948 that he had no money to pay my rent, that business was very bad, and that he would hate like hell to see me hurt, that it looked like the place was folding up, that he had spoken to Mr. Marden and Mr. Marden had told him that he would not reduce the amount of payments on the mortgage, which he had previously done from year to year, and would demand full payment on the mortgage payments.

Relying upon Mr. Miller's remarks, and I had full confidence in Mr. Miller, full confidence in his honesty and operations, I had no reason prior to believe otherwise. He told me, "Sam, I would suggest the best thing you can do is to take what you can get and scram." He says, "You do not have to worry about me. I am taken care of all right. I have a couple of acts which I can manage. I make myself a couple of hundred a week that way on the side. I can take care of myself. But I do not want to see you lose everything you have invested in here. I have a guy who I can bring in here that will take you out"—is (203) the words he used—"That will take you out, and if you take my word for it you will grab it quick before he changes his mind."

And he gave me an approximate figure what the man was willing to pay for my shares of stock.

Well, I told him that was mighty little, considering the value of the building.

He says, "If you hem and haw too much you will lose this guy." And he told me, "Take my word for it; take what you can get and get out."

He paid me no rent for the next couple of weeks, telling me that he did not have the money with which to pay the rent and pay his bills. And at that time I was rather desperate and in bad financial straits in my other business ventures, and I thoroughly believed the situation of the club was bad, that he was going to get out himself and let this fellow take over. And relying upon his representations that the entire Riviera was a flop, was folding up, that he was getting out of it, I told him that I would consider the matter for several days.

He continued calling me on the phone practically every day, pushing me, and telling me I better take this offer quick before the fellow renegs on the deal.

• • •

(commencing at 207-18)

Q. When did you next find out anything about the fraudulent misrepresentations? A. Well, seeing the success the Riviera was enjoying the following years, doing approximately the same volume of business that had been done before, and seeing the success and the affluence all of a sudden that became Mr. Miller, why, I felt I was taken for a ride and it possibly needed a little investigation.

Q. That was the year following the sale of the stock in 1948? A. That was some time in 1949. I would say some time late in 1949 or early 1950; some time (208) around that.

• • •

(commencing at 269-25)

Q. What was the discussion? A. Mr. Bierman said (270) to me, "Sam, why don't you go through with this

deal that Bill is trying to make for you. It is about the only way you can save yourself. And Bill says, 'If you don't do it fast you are liable to lose the sucker he has got,' " words to that effect; in other words, pressing me and pressing me with the importance of closing the deal fast, before the whole place tumbled over.

He also mentioned the fact that Bill told him that he could not pay me any more rent they were liable to lose the whole proposition. And I knew very well that he was a very good friend of mine and I can rely upon him. He told me that Bill does not want to see me get hurt in this transaction, and I better take what I can get before I lose it all.

Q. That is what Al Bierman said to you? A. That's what Al Bierman represented to me a few days. or three or four days, prior to the signing of the contract.

Q. Where was that? A. At the bar at the Riviera.

Q. And what did you say to him? A. I told him that I did not like to do it but I am in a hell of a position, and if I can't wiggle myself out financially in any other way I may have to do it, but in the meantime I want to give it a few days thought.

* * *

(commencing at 271-10)

Q. Will you tell us what Mr. Bierman said and what you said? A. I was sitting there alone. And Mr. Bierman came over to me. And I was probably not looking so good. And he said, "Well, Sam, have you made up your mind about going through with this deal? If you don't take it, you know you are liable to lose it."

And he kept pressing me with the importance of closing this deal because everybody will run out. He told me Miller was going along, Miller was going to take care of him personally for the money he put in so I don't have

to worry about him, and I am too good a guy to get hurt in this thing, so I better take what I can get and get out.

So we had several drinks in there, and finally he convinced me that the only way I could save any of my investment at all was to close this deal quick before they lose their sucker who was willing to put up this money.

• • •

(commencing at 161-14)

Q. What was the deal under which you were giving that receipt? A. To the best of my recollection, we were discussing—Al was telling me how Bill had come to him and told him how rough things were in the place and they were ready to fold up and all clear out. And he said, "Bill said he would take care of me. And about the best thing to do," he said, "to save yourself is to take this offer here from this guy, that Bill ain't worrying about himself, Bill can always take care of himself. He has his acts and agent business, and things like that. But my advice to you, Sam, is take whatever you can get or you are liable to get nothing."

(162) He said, "Ben Marden is not going to renew his reduction of mortgage fees, and, hell, you know damn well you are not going to get any more rent from Bill Miller here."

• • •

(commencing at 23-25)

Finally, one evening I was at the Riviera and Mr. Bierman began working on me, telling me how Bill had told him (264) the place was all washed up and that he was going to take care of Bierman personally, that I don't have to worry about Bierman getting his money back, that "Bill Miller was going to take care of me all right, and I would advise you to take anything you can and get out."

Deposition of Samuel Marcus

That was the time I accepted the $10,000 and agreed to negotiate a deal for sale with this unknown third party.

Based upon this, and I call it misrepresentations, I feel that there has been some misleading statements made to me, and high pressuring me into selling a valuable piece of property for a small part of what it is worth, therefore I felt that I would have my attorneys examine the facts and tell me just exactly what my situation was and what type of justice I could expect in the Courts.

• • •

(commencing at 205-1)

A. I have full belief that Mr. Bierman had been working in cahoots with Mr. Miller, and both working to wear me down, knowing I was in a bad financial situation and bad straits and did not have the money with which to carry on and pay the mortgage on the building, and had got me worried enough to depose of a valuable piece of property for much less than it was worth.

• • •

(commencing at 159-12)

Q. Now, what was that deal? A. Well, the deal was, I believe as later put on the contract, whereby I was to sell my stock for a sum of $125,000, which later was agreed upon for $140,000. That's all I can recall at that time. That was agreed upon, and he gave me the $10,000. I believe that evening he gave me $10,000.

Q. You gave him a receipt? A. I gave him a receipt for it.

• • •

(commencing at 267-6)

Q. Who typed the paper? A. I don't know who typed it.

Q. Where did you first see it? A. When Mr. Bierman

brought it down from the office I was sitting at the bar. Mr. Bierman went up to the office and brought this receipt down for me to sign.

• • •

(commencing at 267-14)

Q. You did not read it when you signed it? A. I wasn't in a very happy frame of mind and I didn't bother then. We had spoken of a certain deal, of the sale of my stock, and he went up and got a receipt and came down with it, and there was hundreds of people milling around, and it was noisy, and he prompted me that night to go through with the deal, and I agreed with it, and he brought this paper down.

• • •

(commencing at 98-20)

Q. Do you have any other claims against Jacob Hoffman relating to Milmar Estates, Inc., or Bill Miller's Riviera, Inc., or Bill Miller, or Al Kevelson, or Al Bierman? A. I don't know at this time.

• • •

(commencing at 96-5)

Q. Then you do not know whether you have any money claim against Milmar Estates, Inc.? A. That's right, I don't know definitely to whom I have to look for money.

• • •

(commencing at 99-22)

Q. Following one year of inquiry you still do not know whether you have any claims against the persons (100) mentioned? A. I don't know against which person I may have my claims. We do have claims.

• • •

(commencing at 100-8)

A. All I was advised by my attorneys is to the effect that

things were in such a hopeless muddle that they could give me no definite advice until matters were clarified.

• • •

(commencing at 100-19)

A. I have been advised by my attorneys that the situation is so muddled up that they could give me no advice of any definite character as to what our claims are, against whom the claims are to be instituted.

• • •

(commencing at 193-12)

Q. Do you make any claim to the moneys deposited in Court in this case? A. I do not know how to answer that question. I will leave that to my attorneys to answer that.

• • •

(commencing at 196-22)

Q. Now, I want to ask you whether you have any claims of any nature against Milmar Estates, Inc.? A. I don't know at this time to whom I must look for my claims.

• • •

(194) Q. Do you make a claim to those moneys? A. As I said before, I do not know whether I make claim to those moneys or not. All I do know, there is money coming to me.

• • •

(commencing at 198-9)

Q. Independent of any advice that your attorneys may give you, do you have any claims against Milmar Estates, Inc.?

• • •

(commencing at 198-18)

A. I do not have enough legal knowledge to know who the

person or persons are that I am to turn to for my money, and therefore I cannot make any type of statement as to whom I must turn to for my money without my attorney's advice.

• • •

(commencing at 200-1)

Mr. Grosman: I object to that. He says he does not know what claims he has until he gets his attorneys' advice.

Mr. Chazin: I object to counsel helping the witness.

Mr. Brigadier: If he will make the statement that the Judge made, that is what I think Mr. Chazin is trying to get at. He has never said he does not know what claims he has.

• • •

(commencing at 201-10)

A. I don't know any definite facts other than what I have told my attorneys. They advised me they cannot help me or advise me until this examination has gone further and they have all the facts on hand.

• • •

(commencing at 200-18)

Q. You say you do not know what your full claims are. Do you know any partial claims? A. I believe there has been a fraud perpetrated on me and until we dig to the bottom and get all the facts I will have to await my attorneys' advice to tell me what my claims are for justice.

• • •

(commencing at 258-6)

Q. For what other purpose did you receive money when you say you are not quite sure what purpose it was for? A. I had made loans to the Milmar Corporation, for which I am entitled to the payment.

Q. What were the loans? A. What were the loans?

Q. How much were they? A. I do not have the total amount at this time.

Q. Have those loans since been repaid? A. They have not.

Q. Is money owing to you by Milmar Estates, Inc.? A. That's right.

Q. How much? A. I do not have the total amount available at this time.

Q. Well, have you records? A. When I see the books of Milmar I will be able to reconcile the amounts more accurate.

• • •

(commencing at 259-7)

Q. So you do not know today whether Milmar Estates owes you money or does not owe you money? A. Oh, I know they owe me money.

Q. How much? A. I don't know at this time.

Q. Do you know approximately how much? A. No, I do not.

Q. Have you made any demand on Milmar Estates, Inc. for payment? A. Not as yet I have not.

Q. Have you any records outside of the checks which you have brought here of moneys loaned by you to Milmar Estates, Inc.? A. I have not been able to locate complete records up to the present time.

Q. Do you have any other records whether you have been able to locate them or not? A. I believe they may be available.

• • •

(commencing at 259-23)

Q. Well, you said you believe they may be. A. Well, because at that time I borrowed money from other sources where people gave me their check and I in turn (260)

endorsed that check over to the Milmar Company when they were in dire need of funds, and until I can find all the loose ends from whom I did borrow money all those times my records are incomplete.

• • •

(commencing at 260-8)

Q. How soon can you complete your search for all records of loans made by you for moneys advanced by you to or on behalf of Milmar Estates, Inc.?

• • •

(commencing at 260-17)

A. I would have to have the books of Milmar Estates, Inc. to reconstruct my records.

• • •

(commencing at 260-21)

The Witness: These checks came from outside sources, and I would have no way of knowing at this date from whom they came unless I can see the recorded entry in Milmar Estates and know the date when the payment was made.

• • •

(commencing at 376-12)

Q. Do you remember whether you made any loans to any other corporations or persons whom I mention? A. Frankly, I believe there are other loans that I had represented on the books of Milmar Estates or the Riviera.

Q. What do you remember about such loans? A. Well, I have a definite recollection that the amount of money I loaned to Miller and to the Riviera is more than that as represented by the checks I produced.

Q. How much more? A. Well, I have no way of know-

ing at this time. I feel those records would be on the books of Milmar Estates and the Riviera.

• • •

(commencing at 377-15)

Q. Do you recall any occasion when the loan was made by cash? A. Well, I know two or three occasions when the loans were made by cash.

Q. Will you tell us the amounts and to whom they were made. A. Well, I don't know the exact amounts right now, but I do know several amounts in cash, which I had to rush to the bank in order to meet a check that was given out to the mortgagee, and we didn't have enough money in the bank and I couldn't give them a check, because the check would not clear. I know I would make a deposit of a thousand dollars or eleven hundred dollars, in amounts of (378) that kind, to be able to have it in the bank when that certain check cleared on the mortgage amortizations.

• • •

(commencing at 378-20)

Q. Made similarly by deposit in the bank? A. No. On one or two occasions I think Mr. Miller would send—either Mr. Hoffman would come over to my office or he would send one of his men over to my office and tell me he needed some money very badly or very urgently to meet a certain thing, and on several occasions I know I gave him (379) amounts of cash.

Q. How much? A. It wond be in amounts of $1000 or $2000.

Q. How many occasions? A. Possibly two or three occasions.

• • •

Deposition of Samuel Marcus

(commencing at 307-1)

A. That's correct. There was a considerable amount of money due to me from Bill Miller on the Riviera.

• • •

(commencing at 307-6)

Q. Well, what is your best recollection as to what it was in payment for? A. There were some settlements to be made with reference to moneys I had loaned to the Riviera.

Q. Well, I am asking you again what is your best recollection as to what these $200 and $400 payments, totalling $9200, were for? A. If you people would let me examine the books, as I requested, I could reconstruct my story to a much better advantage to you. This is something that happened three or four years ago.

We had mutual arrangements and understandings which were to be carried out. And unless I was to see and be permitted to look at the books of the Riviera and the Milmar Estates so I can see where my loans should be represented and the amounts of money due to me should be represented in those books I can't give you an intelligent answer here.

• • •

(commencing at 307-24)

A. I cannot commit myself at this time without being permitted to examine the books of Milmar and the Riviera. I (308) cannot give you an intelligent answer until I have been given an opportunity to check my records with the Milmar and Riviera records to see exactly and know exactly what those payments were for.

• • •

(commencing at 310-21)

A. My only recollection is that I received payments and

I have given you the total amount of the payments I received. Exactly what they were for, I could only answer that if you will give me permission to check my records together with (311) the Riviera and Milmar records, and I will be happy to give you an intelligent answer.

• • •

(commencing at 311-7)

A. I cannot answer that question intelligently without examining the books of the Riviera and the Milmar estates.

• • •

(commencing at 312-14)

A. I made no subdivision of the amounts received. They were merely taken into an accounting of moneys received to be settled at a later date.

• • •

(commencing at 420-5)

Q. What was said? A. I told him, "Well, Bill, of course, a proposition of this kind is too rich for my blood." I said, "I believe I could possibly through myself and my friends raise a hundred thousand, if you could raise the other hundred thousand."

Q. What did he say? A. He said "that's a definite go with me, Sam. You can count on me for $100,000."

• • •

(commencing at 420-16)

Q. But, as far as you can recall, it was definitely understood that you were to raise $100,000, and he the other? A. That's right.

• • •

(commencing at 427-7)

A. And I said, "If you are willing to put up $100,000 on

this deal I think I can swing my end. Why don't you make your final negotiations with Ben Marden and see what the best deal you can possibly make with him is?"

• • •

(commencing at 69-23)

A. • • • And he induced me to go into this transaction on the promise of being able to raise $100,000. And on that promise I put up an (70) initial deposit to buy the property. And when the time came to close this deal, to take title, I asked Mr. Miller where his $100,000 was. He said he did not have it. And I got kind of panicky because I didn't have that kind of money of my own to undertake a purchase and thing of that nature.

He then promised that he could definitely raise $50,000 and we should go through with the purchase, because I was almost ready to drop my deposit and drop the transaction completely, because I didn't have any funds of my own to complete the purchase.

But Mr. Miller definitely promised me that he could definitely raise $50,000.

He said he had a deal where he had owned a piece of property in Luna Park, and he was expecting a $50,000 settlement from that deal, and he would turn that money over to me that he expected right in the very near future.

• • •

(commencing at 71-1)

Relying upon Mr. Miller's being able to raise that $50,000, or $70,000, I proceeded to borrow some money myself, and managed to raise sufficient cash to go through with the contract and purchase.

• • •

(commencing at 68-7)

A. I was to buy the property, and Miller said that Marden

wouldn't sell me the property personally because he was a very good friend of his, and that Marden insisted that he get a piece of that property, and that Marden would not sell to me unless his name appeared as also a purchaser, and that Marden wanted to protect him, to see that he got his proper share of the property, and therefore in taking title we would have to take title in both our names.

• • •

(commencing at 421-24)

Q. You did not suggest at this point that you should contact Mr. Marden, did you? A. No. Mr. Miller had (422) impressed upon me his closeness with Mr. Marden and that he was the only one that could negotiate with Mr. Marden, that Mr. Marden had full confidence in him, and that he was the best man to negotiate the deal.

• • •

(commencing at 408-4)

Q. Did you have any real estate man or anyone else appraise the property for you as to value? A. I did not.

Q. You yourself did not? A. That's right.

Q. Do you know whether Bill Miller had? A. He did. I believe so. He told me.

Q. When did he tell you that he had done so, before you signed the contract? A. Yes.

Q. Did he tell you whom he had consulted? A. He did not.

Q. Did he tell you the figure that was given? A. He did.

• • •

(commencing at 409-19)

Q. He led you to believe that it was someone qualified to appraise the property? A. That's right.

Q. But he did not tell you who the person was? A. That's right.

Q. And he did not tell you whether he was a broker or a real estate agent? A. As a matter of fact, he did (410) tell me. Now that I recall it, he did tell me that it was one of the kitchenware suppliers, one of the big companies who supplied kitchenware.

Q. In New York City? A. That's right, in New York City.

Q. Did he tell you what figure this person had given him? A. Yes. He told me that this company—I can't place the name of the company; it was one of the big suppliers of kitchenware had told him that the equipment in the building was worth at least $300,000. As a matter of fact, he himself would pay from $200,000 to $250,000 for the equipment that the building contained.

Q. When you say he, I assume you mean this man from the kitchenware company? A. This man from the kitchen company, restaurant supply line.

• • •

(commencing at 414-6)

Q. What did you then state to him when he told you about this figure of $500,000? A. He said, "Sam, this is a steal at this price." He said, "We can turn around and hock the equipment for $250,000 to $300,000, which is more than enough to make any down payment on here. You can't lose on this deal here, being a wonderful piece of property like what is out there."

And, as a rule, I am a person that goes into propositions very quickly, without giving it too much thought, which has been my ruination. The enthusiastic way in which he told me about the proposition, I was very intrigued, and based upon his representations that he had got a bonafide offer of $200,000 for the equipment in that place, I couldn't see where we could go wrong in buying a piece of property of that size and location.

• • •

Deposition of Samuel Marcus

(commencing at 418-21)

Q. Now, what did you say to him in the second conversation about your interest in this matter? He reported to you this figure. What did you say? A. I said to him, "This looks quite interesting. If you say that equipment is worth $300,000 and we can safely get $200,000, (419) why, I think this deal is safe. Now, how much will it require?"

Q. What did he say? A. He said it would take about $200,000 in cash.

• • •

(commencing at 8-10)

Q. That $25,000, how was that paid, in cash or by check? A. I don't recall. We put a deposit down of some bond or something, I believe, and the deposit was returned. I don't quite recall the transaction. I will have to refresh my memory exactly what did occur at the time.

• • •

(commencing at 68-22)

Q. At that time Mr. Miller executed a $50,000 note to you? Is that correct? A. Mr. Miller did not (69) execute a note to me until after the deed of purchase had taken place.

• • •

(commencing at 72-18)

Q. What did the note represent? A. That note represented a promise on Mr. Miller's part to pay me $50,000, in which I agreed to sell him "X" number of shares of stock of Milmar Estates.

• • •

(commencing at 52-10)

Q. Who owned the other 500? A. It was issued in Mr. Miller's name. I held it as collateral for a loan.

Deposition of Samuel Marcus

Q. Of how much? A. $50,000.

Q. But Mr. William Miller was the owner of it? A. I wouldn't know legally whether he was or not.

• • •

(commencing at 373-3)

Q. Now, what other papers did you bring in? A. I had Mr. Parris give me some photostats of several checks which he gave me, and which I deposited. Here are two checks (handing). That is moneys that Mr. Parris loaned me.

Mr. Chazin: I would like to have these marked for identification and put in evidence.

Mr. Grosman: Describe them on the record.

Mr. Chazin: The first one is a check of Herzfeld & Stern, to the order of David Parris, in the amount of $9100, bearing the endorsement of David Parris, and showing deposit by Fotoshop, Inc.

(The check above referred to was marked Exhibit P-152, in evidence.)

Mr. Chazin: The second is a check of Herzfeld & Stern, to David Parris, in the amount of $14,078.24, dated June 26, 1946, endorsed by David Parris, in blank.

The Witness: For the record I can tell you that was deposited to the 42nd Street Fotoshop, Inc.

• • •

(commencing at 32-7)

A. • • • Arrangement was made with Mr. Miller that these people who had loaned me this money to go through with the purchase of the property, that they were to get stock in the Riviera, in the operating company known as Riviera, as collateral for their loans to me.

• • •

Deposition of Samuel Marcus

(commencing at 394-14)

A. Upon my foolish advice to Mr. Parris he proceeded to buy into Mocambo with Mr. Miller. Shortly after he became interested in there he advised me how poor the financial status of the club was and how sorely pressed they were for additional sums and would I loan them some money, which I did.

• • •

Cross examination by Mr. Brigadier:

• • •

(commencing at 393-10)

Q. Now, the question I wanted to ask you before: You are positive as of this moment that Mr. Parris did not act as a nominee for you in the sense that you used the word nominee in connection with Mocambo? A. That's correct.

Q. At any time? A. That's correct.

Q. Did you ever act for Mr. Parris in connection with Mocambo? A. I did.

Q. In what capacity? A. Mr. Parris, after he had gone in and invested his money in Mocambo found that getting along with Mr. Miller was very disagreeable, and not being too smart a business man. And, frankly, I felt more obligated because Mr. Parris asked me before going into the Miller venture. Mr. Parris asked me what did I think of it and I was somehow sold on it. I had met Mr. Miller, and he sold me a bill of goods as a personality kid. He told me how great the thing was going. And Mr. Parris was looking (394) for a business venture to go into at that time. And without making too close an examination of the books and the conduct of the Embassy I was sold on Mr. Miller's bill of goods, and I advised Mr. Parris that I thought it was a good investment for him to go into. He proceeded to buy Miller practically out.

• • •

Deposition of Samuel Marcus

(commencing at 395-13)

Q. Also the one that Mr. Hoffman became involved with? A. Yes. And he said to me, "Sam," he said, "will you see what you can do?" He said, "I am washing my hands off the damn thing." He said, "Will you see what you can do in salvaging my investment in here." So that is the story.

Q. So what did you do? A. I did nothing other than to drop into the Embassy two or three nights a week and watched the general conduct of what was going on, and tried to interest people in the purchase of Mr. Parris' stocks, and so forth. I did nothing.

• • •

(commencing at 337-16)

A. The Embassy was closed about—the Embassy was closed in early 1947. It went bankrupt in early 1947.

• • •

(commencing at 440-12)

Q. You now notice from the agreement that the only stock that you could have been selling was some stock other than Anton and Parris, right? A. From that agreement—the intentions when that agreement was drawn was that Mr. Miller was going to sell his stock.

Q. And Parris and Anton were to remain, right? A. Not to remain, no. Parris was going to remain and Anton was going to buy in.

• • •

(commencing at 439-17)

A. I was acting as agent for undisclosed principals. Now, the principals were Miller and Parris. Those were the principals for whom I was acting for.

Q. You were selling fifty per cent of the stock, right? A. I was not selling fifty per cent of the stock.

Deposition of Samuel Marcus

Q. As agent? A. That's right.

• • •

(commencing at 439-1)

A. In this particular case the original party first decided he did not want Mr. Miller as a partner. Therefore, based upon this first agreement, Miller was going to sell his shares of stock and Mr. Parris and Mr. Anton were going to remain with Mr. Binder.

• • •

(commencing at 438-10)

A. No, they were not in Mocambo representing me at all. This agreement was never carried through.

Q. We will get through quicker if you just confine your answers to the questions. A. No. I was acting as an agent. As a matter of fact, at this particular time I was also authorized by Mr. Miller to act as his agent also, so that I could either sell all stock of Mocambo, or Miller's shares of Mocambo, or Parris' shares of Mocambo, whichever I could manage to work out with some interested party.

Q. Now, actually you were selling a half interest, right? A. Actually this particular party was interested in purchasing a half interest.

• • •

(commencing at 395-23)

Q. You did interview various perspective purchasers? A. I tried to, in acting as an agent for Mr. Parris, I (396) tried to do my best in selling his stock in the corporation.

Q. You acted as an agent for him? A. That's right.

Q. Under no circumstances was he an agent or nominee for you in connection with Mocambo? A. That's right.

Q. Now, as a matter of fact, you did negotiate a sale of his interest, didn't you? A. That's right.

Deposition of Samuel Marcus

Q. To whom did you negotiate that sale? A. I negotiated that sale with a Mr. Binder.

Q. And that resulted in litigation that was brought against you? A. That's right.

Q. Individually, right? A. That's right.

Q. In that litigation you asserted that you had acted merely as agent? A. That's right.

Q. And that you had made known to Mr. Binder that you had acted as agent? A. That's right.

Q. But the court found against you, did it not? A. Well, I don't know how or what they found against me. The jury decided that they left that poor Mr. Binder should have his money back. I don't know what particular court threw it out. An unintelligent jury found the fact that poor Mr. Binder should have his money back, but the court decided otherwise and threw it out.

• • •

(commencing at 397-11)

Q. Did Mr. Parris testify on your behalf in that case? A. I do not believe Mr. Parris testified in my behalf, no.

Q. Did you call him as a witness? A. I don't believe I did.

Q. Did he testify at all in the case? A. Mr. Parris testified in his own case.

Q. I am talking about the Binder case. A. Mr. Parris had an individual case against Mr. Binder for damages.

Q. I am talking about the case that Binder tried against you. A. They were both tried together.

Q. You do not recall Mr. Parris being called as a witness in your behalf? A. I don't recall Mr. Parris being called as a witness in my behalf.

Q. But you do recall his testifying? A. I do (398) recall him testifying in his own behalf.

• • •

Deposition of Samuel Marcus

(commencing at 183-14)

Q. When did you first find out that that agreement which you had signed provided for the sale of all of the issued and outstanding capital stock of Milmar Estates, Inc., consisting of 1250 shares? A. I found that out after your clients instituted some type of action against me, and I got the files from Mr. Schwartz's office and turned them over to Judge Grosman. That's the first time I saw the contract after signing it.

• • •

(commencing at 180-3)

Q. What was that discussion? A. The discussion was I was selling my 625 shares of stock.

Q. And it was made clear that that was all you were selling? A. I believe it was made clear. At least, I made it clear to my attorney what the sale was to be.

Q. You made it clear to your attorney that the papers that were being drawn were to sell only 625 shares of stock? A. That's correct.

• • •

(commencing at 65-20)

Q. You read that contract, Exhibit P-1, before it was signed, didn't you? A. I don't think I did. There was an attorney there at the time, and he did the handling and reading of all legal matters. I didn't know (66) anything about things of that nature and didn't waste time reading it. I understand the English language, but I do not understand the phraseology of the law and just what they meant by certain words.

• • •

(commencing at 369-1)

Q. You relied entirely on Mr. Schwartz to see that the contents of the papers were correct? A. I did.

Q. And he was your attorney? A. That's correct.

• • •

(commencing at 443-21)

Q. When you say collateral, you mean the loans that you testified during the last hour that you made? A. I made a number of personal loans to Mr. Miller, other than what I made to Mocambo for which he gave me his stock as collateral.

• • •

(commencing at 226-12)

A. I asked him—I told him that I couldn't locate in my safe or in my office the shares of stock which I purchased from him, and I asked him is it possible that he never turned over those stocks to me? He said to me, "Your secretary called me up." That is my former secretary. "Your secretary had called me up and asked me for that stock quite some time ago, and I delivered them to her."

• • •

(commencing at 347-25)

Q. Now, Mr. Marcus, was Robert Schwartz entitled to (348) any part of the $30,000 which you received upon the sale of stock in Milmar Estates, Inc., on September 14, 1948? A. He was not.

Q. Was Robert Schwartz entitled to any part of the deferred balance of $90,000 on the sale of stock in Milmar Estates, Inc., by you on September 14, 1948 A. He was not.

Q. Was Robert Schwartz entitled to any part of the $15,000 note which Bill Miller executed to you on September 14, 1948? A. He was not.

• • •

(commencing at 64-14)

Q. Did he discuss with you at that time a suit that was

pending by Milmar Estates, Inc., against your wife, Sarah Marcus, with relation to the dower situation? A. I think something was mentioned there, and I told Mr. Kevelson that I had nothing whatsoever to do with Mrs. Marcus' acts, that there had been friction arisen between us due to my night club connections, as a result of not consulting her, and we weren't getting along on speaking terms, although we were living together, and she wasn't taking me in her confidence in her business, neither was I (65) taking her in my confidence in my business. So whatever she did was strictly on her own. If I gave her any advice she wouldn't listen to it anyway.

• • •

(commencing at 189-1)

Q. Yes. A. I wasn't notified of any suit to be commenced. I knew nothing about the suit until it was in action. The people who prepared the suit never conferred with me about it.

• • •

(commencing at 357-24)

Q. I want to ask you the same question with regard to certificate No. 19 for 125 shares. A. This appears (358) to be my signature.

Q. Mr. Marcus, do you remember signing this certificate No. 17? A. I do not have any recollections of signing them.

• • •

(commencing at 357-9)

Q. I show you a photostatic copy of certificate No. 17 of Milmar Estates, Inc., purporting to be made to Samuel Marcus for 500 shares, dated September 14, 1948, and purporting to bear the signature of Samuel Marcus, President, and Robert J. Schwartz, Secretary-Treasurer, and purporting to have an endorsement in blank of Samuel

Marcus. I want to ask you whether the signatures on the front right-hand corner bottom and on the back are your signatures? A. I believe they are.

• • •

(commencing at 358-16)

Q. Do you have any recollection at all as to how your signature came on the back of these certificates? A. At this moment I have no recollection of signing these certificates.

• • •

(commencing at 359-3)

Q. Do you recall signing any other papers on September 14, 1948? A. Oh, I signed a raft of papers that day.

• • •

(commencing at 366-14)

Q. Do you recall signing anything concerning Mr. Miller's liability on the $15,000 paper in case the contract of September 14, 1948 was not performed? A. I don't recall what I signed on that date. There was many, numerous papers that were presented for my signature, and I signed them all.

• • •

(commencing at 365-17)

Q. Did you have some conversation to the effect that in case a certain contract dated September 14, 1948 was not performed that Miller was not to be liable on that $15,000 paper? A. Frankly, some conversation took place whereby Miller had said that he does not want to be personally liable for this thing if the Kevelson deal fell through, or something of that nature. That's all I recall at that moment that took place.

• • •

Deposition of Samuel Marcus

(commencing at 172-12)

Q. Well, you would remember if you signed any new certificates of stock, would you? A. That is very difficult to say, what I would remember, something that happened three years ago. I know I signed an awful lot of papers that day.

* * *

(commencing at 228-23)

Q. Did you at any time during the year 1948 sign certificates of stock of Milmar Estates, Inc.? A. I can't place the last day, but all I do know the last (229) shares of stock which I did sign was the 20 shares of stock given to Al Bierman.

Q. And after you signed the certificate for 20 shares to Al Bierman you signed no further certificates of stock of Milmar Estates, Inc.? A. To the best of my recollection, I did not.

* * *

(commencing at 241-1)

Q. Did you sign certificate No. 17 for 500 shares to Samuel Marcus ? A. I don't recall signing that certificate.

Q. Do you believe that you did or did not sign it? A. I don't recall signing any such certificate.

* * *

(commencing at 242-16)

Q. Did you ever endorse certificate No. 17 in blank? A. I have no recollection of signing certificate 17 in any fashion.

Q. Front or back? A. Front or back.

* * *

(commencing at 285-1)

Q. And you have no recollection at all of having en-

dorsed any other certificate of stock of Milmar Estates, Inc. on or about September 14, 1948? A. I have no recollections of endorsing any other stock.

Q. And does the same answer stand for the month of August and the month of September, 1948? A. That's true.

Q. Now, have you also searched and probed your memory as to whether or not you signed as an officer of Milmar Estates, Inc. any new certificates of stock on September 14, 1948? A. I have no recollections of signing any new certificates on that date.

* * *

(commencing at 187-5)

Q. Did you sign a paper which was a resignation as officer of Milmar Estates, Inc.? A. From the appearance of your exhibits it evidently appears that I did.

* * *

(commencing at 359-19)

Q. I show you a photostat of a paper dated September 14, 1948, purporting to be a resignation by you as an officer and director of Milmar Estates, Inc., and I ask you whether that is your signature? A. That appears to be my signature.

* * *

(commencing at 360-10)

Q. Do you recall any discussion about your resigning on that date? A. I do not.

Q. Was it part of the deal on September 14, 1948 that you were to resign as an officer? A. I don't recall that conversation at all.

Q. Well, is it your recollection that it was or was not part of the deal? A. My recollection—there was no discussion made on that subject at all to the best of my recollection.

* * *

Deposition of Samuel Marcus

(commencing at 17-13)

Q. Did you set up the purchase price on the books of Milmar Estates, Inc.? A. Frankly, I didn't handle any of the books of Milmar Estates, Inc.

Q. Were the books in your custody? A. They were not; for a very short period of time.

Q. I am referring to the books of Milmar Estates, Inc.? A. They were not in my custody.

Q. They never were in your custody? A. They were for a short time.

Q. How short a time? A. Oh, I don't believe the complete books were ever in my custody. The accountant (18) brought them in at one time to show me some figures. But the books were never in my custody. The stock certificate book and the minute book were in my custody.

• • •

(commencing at 293-7)

Q. Who is your accountant? A. Herman Dobkin.

Q. What is his address? A. He is at 25 West 43rd Street.

Q. How long has he been your accountant? A. About three to four years.

Q. Who was your accountant before that? A. I had a Mr. I. Rosenblum.

Q. Was that immediately prior to Mr. Dobkin? A. No. For one year Mr. Jacob Hoffman handled my books for me.

• • •

(commencing at 107-15)

Q. Did you know of the financial condition of Bill Miller's Riviera, Inc., at the time that it filed a petition in the Federal Court for a reorganization? A. I only know by hearsay, what was told to me by Mr. Miller and Mr. Hoffman.

Q. What did you know? A. They merely told me that the business had lost a lot of money.

Q. Did they tell you how much money the business had lost? A. I don't recall exact figures, but they told me (108) the business had lost a tremendous amount of money.

Q. Did they tell you approximately how much it was? A. Oh, I know it was a figure well over a hundred thousand dollars, or something of that nature.

• • •

(commencing at 141-18)

Q. Did you at any time ever know what the percentage of the stock ownership of Al Bierman was in Milmar Estates, Inc.? A. Nothing definite, other than I was told by Mr. Miller that Mr. Bierman was going to buy a percentage of his stock.

Q. Did he tell you what percentage? (142) A. No. I don't recall. I think there was something mentioned about 10 per cent, or some words to that effect. But I don't know it with any definiteness.

Q. Was that 10 per cent of the Milmar stock or 10 per cent of the entire stock of the corporation? A. It could not very well be the entire stock. I had no agreement with Mr. Bierman so it could not very well be the entire stock. What arrangement Mr. Miller had with Mr. Bierman was his own business, not mine.

• • •

(commencing at 354-11)

Q. Referring to the question in the form suggested by Mr. Tepper, did you know at the time you signed this lease that it contained the language stating that the original stock of Samuel Marcus or associates in Milmar Estates, Inc. was approximately 62 per cent of the stock? A. I understood that I rightfully had a right to dispose of—that is me and my associates—had a right to dispose of and talk for 62 per cent of the stock because of my previous arrangement with Mr. Miller to hold the balance of the stock for his purchase.

• • •

List of Exhibit Numbers Mentioned in the Preceding Depositions with their Corresponding Numbers as Set Forth in the Original Transcript of Testimony

Exhibit numbered DM-303 is the same as DME-40.

Exhibit numbered DM-226 is the same as DME-1.

Exhibit numbered DM-225 is the same as DME-2.

Exhibit numbered DM-208 is the same as DME-25.

Exhibit numbered DM-203 is the same as DME-7.

Exhibit numbered P-5 is the same as DME-7.

Exhibit numbered P-4 is the same as DME-22.

Exhibit numbered P-8 is the same as DME-22.

Exhibit numbered DM-214 is the same as DME-14.

Exhibit numbered DM-228 is the same as DM-32.

Exhibit numbered DM-229 is the same as DME-52.

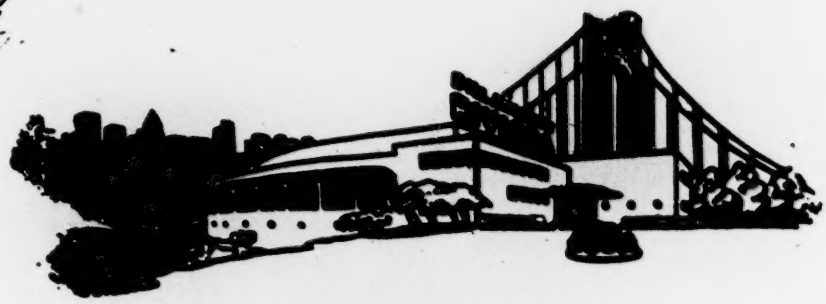
Mr. Lieberman's Letter is the same as DME-8.

Exhibit DME-1
(Photostat)

(Opposite) ☛

1 Dr. 22 E.

DME 1



BILL MILLER'S **RIVIERA** FORT LEE, N. J.

TELEPHONE: FORT LEE 8-2000

August 27, 1948

$10,000.00 (SL) W.B.

Received from Al Beirman check for ~~$[illegible]~~ * as deposit pending negotiations for the purchase of my stock of the Milmar Estates, Inc., which includes all outstanding stock excepting that stock owned by William Miller and Al Beirman.

In the event that a written contract is not entered into within 10 days from date of this letter, satisfactory to my attorney, I will return this deposit without obligations to either party.

* Received two checks at $5,000 each (SL) W.B.

~~and $[illegible]~~ (SL) W.B.

[signature]

DME 1

Sample Miss Bergler's Writing - DM1

Received two checks at 5000 each

Exhibit DME-2

August 26th 1948.

Mr. Sam Marcus,
18 E. 42nd St.,
New York City.

Dear Sir:

The undersigned, Al Bierman, does hereby offer to purchase all of your shares in Milmar Estates, Inc., consisting of approximately 62½% of the outstanding shares (described as all those shares not held by Bill Miller or Al Bierman) for the sum of $125,000. payable as follows:

$19,000. on execution of this agreement, receipt whereof is hereby aeknowledged.

$11,000. upon execution of the necessary papers called for in this agreement.

$ 3,000. each month on the first day of each and every month that the Riviera (or successor).

$ 1500. each month of the first day of each and every month that the Riviera is closed; and for the purpose of this clause, the question of whether or not the Riviera is open or closed, shall be the state of affairs that prevail on the 1st day of each month.

The shares in question shall not be transferred until the sum of $125,000 shall have been paid in full, plus interest at 4% on the unpaid balance of $95,000.

All security and escrow agreements now in existence between the Landlord and the tenant shall remain in force until the entire amount called for in this agreement is paid. In the event of default in the terms of this agreement, you may, at your option, cancel this agreement by registered mail addressed to the undersigned, retaining all payments received as liquidated damages.

Exhibit DME-3

The undersigned acknowledges that no representations whatsoever have been made by you, and further acknowledges that he has read each and every contract, lease, deed etc., involving the property owned by the corporation. You are authorized to pay all outstanding loans, obligations, taxes, etc., of the corporation; and to turn over any surplus at the time of transfer when the $125,000 shall have been paid in full. Adjustments of the corporation shall be computed at the time of transfer of title.

Your attorney shall be permitted to prepare (within 30 days) a formal agreement containing usual clauses, at your option.

Exhibit DME-3

August 18, 1948

Agreement made this day between William (Bill) Miller hereinafter called party of the first part also known as the buyer and Sam Marcus hereinafter called party of the second part also known as the seller. The party of the first part agrees to purchase all right title and interest including all outstanding stocks, notes, I.O.U.'s options, agreements and any other transactions that the party of the second part has participated in with the party of the first part including the agreements in the following company 's and corporations.

1. William (Bill) Miller
2. Milmar Realty Corp.
3. Bill Miller's Riviera, Inc.

The party of the second part herewith agrees to sell all of the above mentioned assets which he now claims he is the sole owner and agrees to the following terms of payment for all of the above mentioned items.

Exhibit DME-6

The purchase price for all of the items herein mentioned is One Hundred and Twenty-five Thousand Dollars ($125,000) to be paid as follows:

The party of the first part agrees to pay $5000.00 to the party of the second part upon the signing of this agreement.

Dollars to be paid by the party of the first part to the party of the second part upon final signing of all papers releases and whatever other documents that will be necessary to be signed to release Bill Miller and all of the other companies and corporations herein mentioned.

The balance of Dollars to be paid as follow.

First payment of Three Thousand Dollars shall be paid one Month from date the final documents shall be signed and delivered. Thereafter a payment of Three Thousand Dollars shall be made each month that Bill Miller's Riviera shall be open for business.

In the period that Bill Miller's Riviera shall be closed and not open for business a payment shall be made each month of One Thousand Five Hundred Dollars.

Upon the signing of this agreement it shall be a legal and irrevocable contract.

L.S._____

L.S._____

Witness_____

Date_____

Exhibit DME-5

This exhibit is the same as the photostatic exhibit annexed to the opinion of the Court at page 138a of this Appendix.

Exhibit DME-6

(Photostat)

(Opposite) ☛

~~E-DM 216~~ 2

10

September 14, 1948

Milmar Estate, Inc.
18 East 42nd Street
New York, N.Y.

Gentlemen:

This is to confirm our understanding that I will deposit with Abraham Leiberman, Esquire, at least fifty (50%) per cent of all of the stock of Milmar Estate, Inc., ~~which shall~~ consist of my own and Al Bierman's.

and 50% of Bill Miller's Pennsylvania Inc.

I further agree that until a certain contract of purchase, dated September 14, 1948, shall have been paid in full that I will not vote the said stock without the written consent of Samuel Marcus.

Very truly yours,

Willie Miller

U S DISTRICT COURT
FOR NEW JERSEY

JAN 20 1953

EXHIBIT NO. D - ME-6

Exhibit DME-7

(Photostat)

(Opposite) ☛

September 14, 1948

Mr. Samuel Marcus
18 East 42nd Street
New York, N.Y.

Re: Bill Miller's Riviera, Inc.

Dear Mr. Marcus:

This is to acknowledge that I hold the following instruments in escrow:

1. Resignations of officers and directors of Bill Miller's Riviera, Inc.

2. -625- shares of Milmar Estates, Inc., ~~being all of the shares of the said corporation authorized and outstanding.~~

3. Lease between Milmar Estates, Inc. and Bill Miller's Riviera, Inc., dated July 23, 1947. and lease dated September 14, 1948.

4. Letter from Samuel Marcus to Bill Miller, dated September 14, 1948.

5. Letter from Milmar Estates, Inc. to Bill Miller's Riviera, Inc., dated September 14, 1948.

6. Letter from Al Bierman to Samuel Marcus, re: purchase of stock, dated September 14, 1948.

7. -50- shares of Bill Miller's Riviera, Inc.

In the event of new corporation being formed to hold title to the premises, such new stock to be deposited with me in escrow.

The undersigned acknowledges that all of the above instruments are held in escrow pending the full and complete performance of each and every covenant of a certain contract of purchase executed the 14 day of September, 1948, between Milmar Estates, Inc. and Al Bierman. In the event that the contract is fully performed, then and in that event the undersigned will turn over all of the above described papers held by him in escrow to the proper parties.

In the event that there is a default in the terms of the said contract, then upon written notice to me, I will immediately return all of the above applicable documents and papers to Robert Schwartz, Esq., 9 East 40th Street, New York City.

Very truly yours,

Exhibit DME-8

September 27, 1948.

Robert Schwartz, Esq.,
9 East 40th Street,
New York City, N. Y.

Re: Milmar Estate, Inc. Agreement

Dear Bob:—

Confirming telephone conversation with you on Friday of last week, it is understood that you made the corrections on the copy of the Agreement in your possession dated September 14th, 1948, between Milmar Estate, Inc. and Al Bierman and William Miller, as follows:

In Paragraph 5 in the first line you inserted after the word "stock" the words "up to 50%".

In Paragraph 10 in the fourth line from the bottom, x out after "that" the word "all" and insert the words "at least 50%".

I am making the same changes on my copy and we will consider it as part of the Agreement. I have initialed mine and I understand you have initialed yours likewise.
Thanking you, and with kindest regards,

Sincerely yours,

ABRAHAM LIEBERMAN

L*M

Exhibit DME-9

(Photostat)

(Opposite) ☛

12

September 14, 1948

Mr. Al Bierman
c/o Bill Miller's Riviera, Inc.
Fort Lee, New Jersey

Dear Mr. Bierman:

This is to confirm our understanding that the undersigned corporation represents that it will pay all of the presently outstanding obligations of the corporation consisting of the corporation's obligations for legal fees and loans to Samuel Marcus personally.

The corporation also states that it will defend any litigation and pay any judgments which may be obtained against the said corporation in connection with any obligations due as of this date or prior thereto.

Very truly yours,

MILMAR ESTATES
By:

U. S. DISTRICT COURT
FOR NEW JERSEY

JAN 20 1955

EXHIBIT NO. D-Me-9

Exhibit DME-10

(Photostat)

(Opposite) ☛

~~Ex DM-223~~ R

September 14, 1948

Milmar Estate, Inc.
18 East 42nd Street
New York City, N.Y.

Gentlemen:

I herewith represent that I, William Miller, have a power of attorney to act for Al Bierman in connection with a certain contract for the purchase of certain premises known as Bill Miller's Riviera.

I further agree that when Al Bierman returns to New York City I will arrange for him to sign all of the documents which are involved in connection with the said sale, where his signature is required.

~~I further agree on behalf of Mr. Bierman that upon the assignment of the said contract and the formation of a new corporation, that I will arrange to have all of the stock of the said new corporation placed in escrow with Abraham Lieberman, Esquire, and agree not to issue any additional shares other than those placed in escrow with him, and that the said new corporation will indicate its approval and acceptance of each and every document entered into in connection with the said sale.~~

Very truly yours,

William Miller

William Miller

Abraham Lieberman

U. S. DISTRICT COURT
FOR NEW JERSEY

JAN 20 1955

EXHIBIT NO. D 40

Exhibit DME-11

(Photostat)

(Opposite) ☛

September 14, 1948

Mr. Al Bierman
Wm. Miller

Dear Mr. Bierman and Mr Miller

This is to confirm our understanding in relation to a certain bond and mortgage in the sum of $95,000 which you have executed on September 14th, 1948.

In the event of a default in the terms of said bond and mortgage, the undersigned corporation agrees to look only to the land, building and chattels and not to hold you personally liable under the terms of the said bond and mortgage.

Very truly yours,

MILMAR ESTATES, INC.

By: [signature]

Attest:
[signature]
Sec

DMe 11

Exhibit DME-12*

(Photostat)

(Opposite) ☛

* Back and acknowledgments omitted.

N. A. STATUTORY MORTGAGE IND. TO IND. Ga CORP.
NO. 142 (CHAPTER 888, LAWS 1918)

THE CHISHOLM PRINTING COMPANY, 468 PEARL ST., N. Y.

This Mortgage,

made the 14th day of September, nineteen hundred and forty-eight

Between AL BIERMAN, residing at Fort Lee, New Jersey

and WILLIAM MILLER, residing at Fort Lee, New Jersey

the Mortgagor S,

and MILMAR ESTATE, INC., a domestic corporation, having its its principal place of business at Fort Lee, New Jersey.

D-ME 12

, the Mortgagee

Witnesseth, that to secure the payment of an indebtedness in the sum of NINETY-FIVE THOUSAND ($95,000.00) - - -

D-ME 12

, the Mortgagor

Witnesseth, that to secure the payment of an indebtedness in the sum of NINETY-FIVE THOUSAND ($95,000.00) - - -

East, along the centre line of Hudson Terrace, eighty-eight and four tenths (88.4) feet; thence (3) south forty-four degrees and thirty-three minutes East, seven hundred and sixty (760) feet to the edge of the Palisades; thence (4) southerly along the edge of the Palisades to the end of the first course. Containing one acre and fifty hundredths of an acre. Bounded northerly by lands of said Isaac R.Vreeland and Gertrude Vreeland, his wife, southerly by land conveyed by Isaac R. Vreeland and wife to William Cook; easterly by the edge of the Palisades and westerly by the centre line of Hudson Terrace.

SECOND TRACT:
BEGINNING at the most westerly corner thereof in the center line of Central Avenue and distant three hundred eleven (311) feet northerly along said center line from the southerly line of the farm formerly owned by Isaac R. Vreeland; thence (1) North 21° 23' East along the center line of Central Avenue, three hundred and eighteen feet and five tenths of a foot (318.5); thence (2) South 45° 40' East four hundred and seventy-six feet and five tenths of a foot (476.5) to the center line of Hudson Terrace; thence (3) South 32° 12' West three hundred (300) feet along said center line; thence (4) North 45° 40' West four hundred fifteen feet and four tenths of a foot (415.4) to the place of beginning.
EXCEPTING THEREFROM so much of the above described premises as was conveyed by Andrew Bowers, unmarried, to Isaac R. Vreeland by deed bearing date September 27, 1881, and recorded in the Bergen County Clerk's Office September 29, 1881 in Book Z-10 of Deeds at page 528; and more particularly bounded and described as follows: BEGINNING at the northwesterly corner thereof in the center line of Central Avenue and distant six hundred twenty-nine feet and five tenths of a foot (629.5) northerly along the said center line from the southerly line of the farm of the said Isaac R.Vreeland,and from thence running South 45° 40' East four hundred seventy-six feet and five tenths of a foot (476.5) to the center line of Hudson Terrace; thence along the same South 32° West seventy-five feet and six tenths of a foot (75.6) thence North 45° 40' West four hundred sixty-one feet and one-tenth of a foot (461.1) to the center line of Central Avenue; thence along said center line North 21° 23' East eighty feet and two tenths of a foot (80.2) to the place of beginning. Containing 8/10ths of an acre of land be the same more or less.

The above premises are bounded on the north by lands of Isaac R. Vreeland on the south by lands of Andrew Bowers; on the East by center line of Hudson Terrace and on the west by the center line of Central Avenue

TOGETHER with all the furniture, fixtures and equipment now located in or on, or used, or intended to be used in connection with the operation of the real estate, and as set forth in a certain chattel mortgage.

The parties hereto agree that no building on the premises shall be removed or demolished without the consent of the mortgagees.

IT IS UNDERSTOOD AND AGREED between the parties hereto that in the event the parties of the First Part sell the herein described property that upon the execution and recording of the instrument evidencing said sale, the entire principal with all accrued interest on this mortgage shall forthwith become due and payable. Provided, however, that this clause shall not apply to a sale or conveyance to a corporation in which the parties of the first part have a [illegible]

[illegible] so much of the above described premises as was conveyed by Andrew Bowers, unmarried, to Isaac R. Vreeland by deed bearing date September 27, 1881, and recorded in the Bergen County Clerk's Office September 29, 1881 in Book Z-10 of Deeds at page 528; and more particularly bounded and described as follows: BEGINNING at the northwesterly corner thereof in the center line of Central Avenue and distant six hundred twenty-nine feet and five tenths of a foot (629.5) northerly along the said center line from the southerly line of the farm of the said Isaac R.Vreeland,and from thence running South 45° 40' East four nundred seventy-six feet and five tenths of a foot (476.5) to the center line of Hudson Terrace; thence along the same South 32° West seventy-five feet and six tenths of a foot (75.6) thence North 45° 40' West four hundred sixty-one feet and one-tenth of a foot (461.1) to the center line of Central Avenue; thence along said center line North 21° 23' East eighty feet and two tenths of a foot (80.2) to the place of beginning. Containing 8/10ths of an acre of land be the same more or less.

The above premises are bounded on the north by lands of Isaac R. Vreeland on the south by lands of Andrew Bowers; on the East by center line of Hudson Terrace and on the west by the center line of Central Avenue.

TOGETHER with all the furniture, fixtures and equipment now located in or on, or used, or intended to be used in connection with the operation of the real estate, and as set forth in a certain chattel mortgage.

The parties hereto agree that no building on the premises shall be removed or demolished without the consent of the mortgagees.

IT IS UNDERSTOOD AND AGREED between the parties hereto that in the event the parties of the First Part sell the herein described property that upon the execution and recording of the instrument evidencing said sale, the entire principal with all accrued interest on this mortgage shall forthwith become due and payable. Provided, however, that this clause shall not apply to a sale or conveyance to a corporation in which the parties of the first part have a controlling stock interest. In this latter event, namely, a conveyance to a corporation in which the parties of the first part have a controlling interest, default referred to herein will not be affected so long as the parties of the first part retain a controlling interest in said corporation.

[illegible]

Pm E1 ✓

And AL BIERMAN and WILLIAM MILLER,

*the Mortgagor*S *covenant with the Mortgagee as follows.*

1. *That the Mortgagor warrant*S *the title to the premises.*

2. *That no owner of the mortgaged property shall be entitled to any credit by reason of the payment of any tax thereon.*

3. *That* AL BIERMAN and WILLIAM MILLER *will pay the indebtedness as hereinbefore provided.*

4. *That the buildings on the premises shall be kept insured against loss by fire for the benefit of the holder hereof.*

5. *That the whole of the principal sum shall at the option of the holder of the mortgage become due after default in the payment of any installment of principal or interest for* five (5) *days or after default in the payment of any tax, water rate or assessment for* fifteen (15) *days or in default in keeping the buildings insured against loss by fire for the benefit of and to the satisfaction of the Mortgagee.*

6. *That the Mortgagor within* ten (10) *days, upon written request of the holder hereof will furnish at the expense of said holder a statement of the amount due on this mortgage.*

7. *That no building on the premises shall be removed or demolished without the consent of the Mortgagee.*

8. The Mortgagee agrees that the Mortgagor may replace the present first mortgage with a new first mortgage in a sum not greater in amount than two hundred thousand ($200,000.00) dollars

9. In the event that AL BIERMAN and WILLIAM MILLER shall no longer be associated with the operation of BILL MILLER'S RIVIERA, or in the event of a contract for the sale of the said premises, or in the event of the sale or assignment of the shares of stock of the corporation which is formed to hold title to premises by the said WILLIAM MILLER or AL BIERMAN, then and in that event this mortgage shall become due and payable immediately.

In Witness Whereof, *the said Mortgagor*S *have* hereunto set their *hand*S *and seal*S *the day and year first above written.*

Al Bierman.

the Mortgagee .

8. The Mortgagee agrees that the Mortgagor may replace the present first mortgage with a new first mortgage in a sum not greater in amount than two hundred thousand ($200,000.00) dollars

9. In the event that AL BIERMAN and WILLIAM MILLER shall no longer be associated with the operation of BILL MILLER'S RIVIERA, or in the event of a contract for the sale of the said premises, or in the event of the sale or assignment of the shares of stock of the corporation which is formed to hold title to premises by the said WILLIAM MILLER or AL BIERMAN, then and in that event this mortgage shall become due and payable immediately.

In Witness Whereof, *the said Mortgagors have hereunto set their hands and seals the day and year first above written.*

Signed, Sealed and Delivered
In the presence of

Arthur L. Hubbard
Notary Public As to Al Bierman
My commission expires: ~~March 1949~~
My Commission Expires August 9th, 1952

Al Bierman
X Al Bierman L.S.
Al Bierman

William Miller L.S.
William Miller

Abraham Lubman
As to William Miller

PT. DME 12

Exhibit DME-13*

(Photostat)

(Opposite) ☛

N. J. MORTGAGE ON GOODS AND CHATTELS WITH INS. CLAUSE—500A THE CHISHOLM PRINTING COMPANY, 400 PEARL ST., N. Y. 1000

Know all Men by these Presents:

That AL BIERMAN

and WILLIAM MILLER

of the Borough *of* Fort Lee, *in the County of* Bergen *and State of* New Jersey, *party of the first part, for securing the payment of the money herein mentioned, and in consideration of the sum of One Dollar to* him *duly paid by* MILMAR ESTATES, INC.,

of the Borough *of* Fort Lee, *County of* Bergen *and State of* New Jersey, *party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do* es *bargain and sell, unto the said party of the second part,* its *executors, administrators and assigns, all the goods and chattels mentioned in the schedule hereunto annexed and now in* premises known as

BILL MILLER'S RIVIERA, Hudson Terrace, Fort Lee, New Jersey.

U. S. D[illegible] [illegible]T
F[illegible] [illegible]Y

D-Me-13

To Have and to Hold, *all and singular the said goods and chattels above bargained and sold or intended so to be, unto the said party of the second part* its *executors, administrators and assigns, forever.* **And** *the said party of the first part, for* his *heirs, executors and administrators, all and singular the said goods and chattels above bargained and sold, unto the said party of the second part,* its *executors, administrators and assigns, against the said party of the first part, and against all and every person or persons whomsoever shall and will warrant and forever defend.*

Upon Condition, *that if the said party of the first part, shall and do* es *well and truly pay unto the said party of the second part,* its *executors, administrators and assigns,*

NINETY-FIVE THOUSAND ($95,000.00) DOLLARS, payable as follows:

THREE THOUSAND ($3,000.00) DOLLARS on the first day of October, 1948, and a further
THREE THOUSAND ($3,000.00) DOLLARS on the first day of each and every month that the premises in question located at Fort Lee, N.J. are open for business;
FIFTEEN HUNDRED ($1,500.00) DOLLARS on the first day of each and every month that the premises are closed for business.

For the purpose of the above payment date, the state of affairs that prevails on the fist day of each and every month at the premises known as Bill Miller's Riviera, Inc.

D-Mlc-13

To Have and to Hold, *all and singular the said goods and chattels above bargained and sold or intended so to be, unto the said party of the second part* its *executors, administrators and assigns, forever.* **And** *the said party of the first part, for* his *heirs, executors and administrators, all and singular the said goods and chattels above bargained and sold, unto the said party of the second part,* its *executors, administrators and assigns, against the said party of the first part, and against all and every person or persons whomsoever shall and will warrant and forever defend.*

Upon Condition, *that if the said party of the first part, shall and do* ess *well and truly pay unto the said party of the second part,* its *executors, administrators and assigns,*

NINETY-FIVE THOUSAND ($95,000.00) DOLLARS, payable as follows:

THREE THOUSAND ($3,000.00) DOLLARS on the first day of October, 1948, and a further
THREE THOUSAND ($3,000.00) DOLLARS on the first day of each and every month that the premises in question located at Fort Lee, N.J. are open for business;
FIFTEEN HUNDRED ($1,500.00) DOLLARS on the first day of each and every month that the premises are closed for business.

For the purpose of the above payment date, the state of affairs that prevails on the fist day of each and every month at the premises known as Bill Miller's Riviera, Inc. shall determine whether the premises are oper or closed for the month in question.

After each twenty-five thousand ($25,000.00) dollars shall have been paid on account of this mortgage, the mortgagee agrees to release 50% or twelve thousand five hundred ($12,500.00) dollars of the chattels which are the subject of this mortgage.

then these presents shall be void. **And** *the said party of the first part, for* his *heirs, executors, administrators and assigns, do* es *covenant and agree to and with the said party of the second part,* its *executors, administrators and assigns, that in case default shall be made in the payment of the said sum above mentioned, or in case the said party of the first part shall, at any time before the day of payment herein provided for, remove, secrete, sell, destroy or exchange the said goods and chattels, or any of them, without the written consent of the mortgagee or permit or suffer any attachment, lien or other process against property to be issued against or permit or suffer any judgment to be entered up against*

then the said sum of money herein mentioned shall become instantly due and payable, and then it shall and may be lawful for, and the said party of the first part do hereby authorize and empower the said party of the second part, executors, administrators and assigns, with the aid and assistance of any person or persons, to enter

dwelling-house, store and other premises, and such other place or places whatsoever in which the said goods and chattels, or any of them, are or may be placed and take and carry away the said goods and chattels and to sell and dispose of the same for the best price they can obtain; and out of the money arising therefrom, to retain and pay the said sum above mentioned, and all charges touching the same, rendering the overplus (if any) unto the said party of the first part. heirs, executors, administrators or assigns.

And it is expressly agreed by and between the parties to these presents, that the said party of the first part, heirs, executors, administrators and assigns shall and will keep the goods and chattels in said mortgage schedule set forth, insured against loss and damage by fire, by insurers, and in amount approved by the said party of the second part heirs and assigns, and assign the policy and certificates thereof to the said party of the second part heirs and assigns, and in default thereof, it shall be lawful for the said party of the second part heirs and assigns, to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged goods and chattels, added to the amount of the said mortgage or obligation, and secured by these presents, and payable on demand with interest at the rate of per cent, per annum.

All of the covenants and conditions hereinabove contained shall be for the benefit of and shall apply to and bind the said parties hereto and their respective heirs, executors, administrators, successors and assigns.

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the 14th day of September in the year of our Lord One Thousand Nine Hundred and forty-eight

Sealed and Delivered in the Presence of

Al Bierman

Al Bierman L.S.

Al Bierman

Notary Public As to Al Bierman

~~My commission expires: March, 1949~~

William Miller L.S.

William Miller

My Commission Expires August 9th, 1952

State of New Jersey,

County of } SS.

the mortgagee in the foregoing mortgage named, being duly sworn, on oath, say that the true consideration of said mortgage is as follows, viz:

[illegible] premium and premiums paid for effecting the same shall be a lien on the said mortgaged goods and chattels, added to the amount of the said mortgage or obligation, and secured by these presents, and payable on demand with interest at the rate of per cent, per annum.

All of the covenants and conditions hereinabove contained shall be for the benefit of and shall apply to and bind the said parties hereto and their respective heirs, executors, administrators, successors and assigns.

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the 14th day of September in the year of our Lord One Thousand Nine Hundred and forty-eight

Sealed and Delivered in the Presence of

Al Bierman

Al Bierman L.S.

Al Bierman

Notary Public as to Al Bierman

My commission expires: March, 1949.

William Miller L.S.

William Miller

My Commission Expires August 9th, 1952

State of New Jersey,

County of

SS.

the mortgagee in the foregoing mortgage named, being duly sworn, on oath, say that the true consideration of said mortgage is as follows, viz:

...

and deponent further says that there is due and to grow due on said mortgage the sum of

besides lawful interest thereon from the day of

Sworn and subscribed this day of A. D. 19 before me, at

DME 13

Exhibit DME-14

(Photostat)

(Opposite) ☛

September 14th, 1948

11

Milmar Estates, Inc.
c/o Samuel Marcus, Esq.
18 East 42nd Street
New York City

Gentlemen:

This will confirm our understanding that all of the letters, papers, documents, stocks and other securities which are held in escrow in connection with certain agreements executed in connection with the lease for Bill Miller's Riviera, dated various dates on or about July 23, 1947, shall all remain in escrow ~~as they presently are.~~ [illegible], Esq.

In the event that there is a default in connection with the terms of a certain contract of sale dated September 14th, 1948, then and in that event, all of the said papers, documents, stocks, etc., shall regain their former status.

If the above is correct, will you kindly indicate in the lower left-hand corner under the word "Accepted".

Very truly yours,

BILL MILLER'S RIVIERA, INC.

By: Bill Miller
Pres

ACCEPTED:

By: [signature]
MILMAR ESTATES, INC.

Robt J Schmitz
Sec

U.S. DISTRICT COURT
FLORIDA
JAN 20 1950

EXHIBIT NO. D Me 14

Exhibit DME-15

(Photostat)

(Opposite) ☛

Mr. William Miller
% Bill Miller's Riviera, Inc.
Fort Lee, New Jersey

Dear Mr. Miller:

This will confirm our understanding arrived at September 2, 1948 to the following effect:

1. It is presently contemplated that a second mortgage will be executed and recorded in favor of Milmar Estate, Inc. as second mortgagee, covering the premises known as Bill Miller's Riviera, Fort Lee, New Jersey.

2. In the event that there is a default in meeting the terms of the said second mortgage, and in the event that the lease between Milmar Estate, Inc. and Bill Miller's Riviera dated July 23, 1947 is reinstated, without litigation on the part of William Miller, I agree to credit you personally with (37½%) twenty-seven and one-half per cent (27½%) of all net receipts received by Milmar Estate, Inc. or myself, which said credit shall be applied towards the Fifty thousand ($50,000.00) dollars note which you have executed in my favor.

3. In the event of a default by the purchaser of a certain agreement dated September 14th, 1948, and in the event that the lease of July 23, 1947 is reinstated and after giving the credit to you provided for in paragraph 2 above, then the balance remaining due on the said Fifty Thousand ($50,000.00) Dollars promissory note shall again be reinstated; with the understanding that payments of Five Hundred ($500.00) Dollars weekly shall thereafter be due and payable, commencing with two (2) weeks after the opening of any season of the Riviera. The sum of Seven thousand ($7,000.00) Dollars, which is presently due, shall, in addition, be paid in five (5) equal instalments on the 1st day of June, July, August, September and October.

4. In the event that the contract of purchase, dated September 14th, 1948, is fulfilled, the said note of Fifty thousand ($50,000.00) Dollars is to be returned to you and we agree to exchange mutual releases.

Very truly yours,

Exhibit DME-16

$50,000.00 June 1, 1947

June 1 1948 after date I promise to pay to the order of Samuel Marcus

Fifty Thousand - - - - - - 00 Dollars

Payable at Bill Miller's Riviera, Hudson Terrace, Fort Lee, N. J.

Value received

Payable $500. weekly commencing June 1, 1948; in the event of a default of any one payment, the entire unpaid balance will fall due.
Interest at 4%

No. ..... Due .....

(Sgd.) William Miller

Subject to agreement dated July 23 1947.

Exhibit DME-17

September 14, 1948.

For value received, I, William Miller, promise to pay to Samuel Marcus, the sum of Fifteen Thousand ($15,000.-00) Dollars, together with interest at four per centum (4%) per annum on the entire unpaid principal, payable as follows:

1. Two hundred ($200.00) dollars per week commencing with May 15, 1949, and
2. Two hundred ($200.00) dollars each and every week thereafter that the premises known as Bill Miller's Riviera, Inc. (or any other establishment located at the said premises) shall be open for business until the entire unpaid balance shall have been paid in full.

Exhibit DME-22

In the event of a default, or in the event of the sale by William Miller of his stock in the corporation operating the said premises, of the payment of any instalment herein provided for, then and in that event, the entire unpaid balance shall become due and payable.

In connection with the fifteen thousand ($15,000.00) dollars note dated September 14th, 1948, which I have executed, this is to advise you that in the event that I become disassociated with the premises presently known as Bill Miller's Riviera, Fort Lee, New Jersey, other than by the sale of my interest in the said premises as owner or operator, in that event any unpaid balance called for in the said note will be released and discharged, but if any relations of William Miller or Al Bierman remain in connection with the operation of the premises, or in the event that William Miller's name remains in connection with the operation, even though William Miller leaves the premises, then this note shall remain in full force and effect.

(Sgd.) Wm. Miller

Exhibit DME-22

September 14, 1948

Mr. Samuel Marcus
18 East 42 St.
New York, N. Y.

Dear Mr. Marcus:

This is to confirm our understanding that all of your tabs and checks signed by you at Bill Miller's Riviera, Inc., Fort Lee, New Jersey, are hereby cancelled and marked paid in our records.

Very truly yours,

Bill Miller's Riviera, Inc.
By: (sgd.) William Miller, Pres.

Exhibit DME-23

September 14th, 1948

Milmar Estates, Inc.
18 East 42nd Street
New York City

Gentlemen:

The undersigned hereby resigns as an officer and director of the corporation, effective immediately.

Very truly yours,

(Signed) SAMUEL MARCUS

Exhibit DME-24

September 14, 1948

Milmar Estates, Inc.
18 East 42nd Street
New York City

Gentlemen:

The undersigned hereby resigns as an officer and director of the corporation, effective immediately.

Very truly yours,

(Sgd.) ROBT. J. SCHWARTZ

Exhibit DME-25

September 14th, 1948

Mr. Samuel Marcus
18 East 42nd Street
New York, N. Y.

Dear Mr. Marcus:

I herewith offer to purchase from you twelve and one-half per cent (12½%) of the outstanding stock of Milmar Estates, Inc. based upon a five hundred thousand ($500,000.00) dollar valuation of the corporation, in the event that there is a default in the purchase by myself of my contract to purchase the premises known as Bill Miller's Riviera, Inc. under agreement dated September , 1948.

It is understood that in the event such default occurs, you will notify me of such default in writing and give me thirty (30) days in which to pay for the said twelve and one-half (12½%) Per cent of outstanding stock in cash.

If the above is satisfactory to you, will you kindly indicate by signing at the place provided for on the lower left-hand side under the word "Accepted".

In the event that I, Al Bierman, pay the amount provided for in this agreement, and provided that the lease dated July 23, 1947 is reinstated, then paragraph "47" of the said lease of July 23, 1947 will be deleted from the said lease.

Very truly yours,

(Sgd.) Al Bierman
(Sgd.) by Will Miller, Atty.

Accepted
By:
(Sgd.) Samuel Marcus
Samuel Marcus

Accepted: Milmar Estates, Inc.
By:
(Sgd.) Sam Marcus, Pres.
Robt. J. Schwartz, Sec.

Exhibit DME-26

September 14th, 1948

Bill Miller's Riviera, Inc.
Fort Lee, New Jersey

Gentlemen:

This is to confirm our understanding that in the event of a default in the terms of a certain contract to purchase premises known as Bill Miller's Riviera entered into September 14th, 1948 between Milmar Estates, Inc. and Al Bierman, that in the event of such default the undersigned corporation, Milmar Estates, Inc., agrees to accept during the year of the default, and in lieu of the rent provided for in any given year in the lease dated July 23, 1947, the following payments:

25% of the rent provided on July 15, pursuant to the lease of July 23, 1947, and
The balance of the rent provided for in said lease of July 23, 1947 in equal monthly installments on the 15th days of August, September, October, November and December of the year of the default.

It is understood that this letter will be placed in escrow with Abraham Lieberman, Esq. and is to be turned over to Bill Miller's Riviera, Inc. only in the event of a default in the contract of purchase dated September 3, 1948.

Very truly yours,

MILMAR ESTATES, INC.
By (Sgd.) SAM MARCUS
Pres.

Attest:
(Sgd.) ROBT. J. SCHWARTZ
Sec.

Exhibit DME-27

(Photostat)

(Opposite) ☛

September 14, 1948

Mr. William Miller
Fort Lee, N.J.

Dear Sir:

This is to confirm our understanding regarding a certain note which you have executed on September 14, 1948 in my favor.

dated Sept 14, 1948

In the event that the contract for the sale of Bill Miller's Riviera, Fort Lee, New Jersey, is not fulfilled, then, and in that event, the undersigned agrees to release you from the terms of the said note.

Very truly yours,

Bill Miller

DME:1

Exhibit DME-28

(Extracts)

THIS AGREEMENT between MILMAR ESTATES, INC., a New Jersey Corporation, as Landlord and BILL MILLER'S RIVIERA INC., a New Jersey Corporation, as Tenant

WITNESSETH: The Landlord hereby leases to the Tenant the following premises: located in the Borough of Fort Lee, in the County of Bergen, State of New Jersey, as is more fully described in SCHEDULE "A" attached hereto, together with the chattels more fully described in SCHEDULE "B" attached hereto, both of which schedules describing the property and chattels leased respectively are made a part hereof, *which inventory is to be mutually taken within three weeks as a condition of this lease* (RJS. AL) for the term of five years commencing May 19, 1947 to commence from the 19th day of May one thousand nine hundred and forty-seven and to end on the 30th day of December one thousand nine hundred and fifty-one to be used and occupied only for a high class restaurant and cabaret and for no other purpose upon the condition and covenants following:

1st. That the Tenant shall pay the annual rent for the years 1947, 1948 of forty thousand dollars ($40,000) per annum, payable two thousand dollars ($2,000) each week for twenty weeks commencing with the first Monday after the opening of each season's operation in any year and each subsequent Monday thereafter until the sum of forty thousand dollars ($40,000) shall have been paid, with due allowance to the Tenant for all payments made during February of each year as hereinafter mentioned; and for the years 1949, 1950 and 1951, the tenant shall pay the sum of sixty thousand ($60,000) dollars per annum, payable three thousand dollars ($3,000) each week for twenty weeks commencing with the first Monday after the opening of each season's operation in any year and each subse-

Exhibit DME-28
(Extracts)

quent Monday thereafter until the sum of sixty thousand dollars ($60,000) shall have been paid, with due allowance to the Tenant for all payments made during Feb. of each year.

• • •

40th. Any additional monies necessary for the payment of interest and amortization on the first mortgage covering the premises herein described, and real estate taxes and insurance charges over and above the amount paid as rent to the Landlord, is to be paid for by the Tenant out of its profits provided, however, that the Tenant shall make such payments as aforesaid only if available out of the profits of its operation in each year. If there are insufficient profits, then the Tenant shall pay all of its profits towards the said obligations; and in any event even if there shall be no profits, the Tenant shall be required to pay 50% of all monies needed for the above mentioned purpose. For the purpose of this paragraph, the salary of Bill Miller shall be limited to $375; per week and no other officer of the Tenant corporation is to draw salaries for the purposes of this computation. For the purposes of this paragraph, profits shall be described as of income less expenses and before depreciation and taxes.

• • •

47th. Commencing with January 1, 1949 and annually thereafter, the Landlord herein shall have the right at its sole option and at any time during each of the said years, to require the Tenant herein to purchase from Samuel Marcus, or associates, (a stockholder of the Landlord) one-seventh of Marcus' original stock in Milmar Estates, Inc. (approximately 62% of Milmar Estates, Inc.) for the sum of $30,000 for each one-seventh portion of Marcus' (or associates) original shares. It is a condition of this lease that the Tenant shall comply with such payment on the part of the Corporation within thirty days of the mak-

ing of such demand. The shares of stock to be sold to the Tenant herein shall be free and clear of any encumbrances.

• • •

IN WITNESS WHEREOF, the parties have interchangeably set their hands and seals (or caused these presents to be signed by their proper corporate officers and caused their proper corporate seal to be hereto affixed) this 23rd day of July 1947.

Milmar Estates, Inc.,
[SEAL] By: (sgd.) SAM MARCUS, Pres. L.S.

Bill Miller's Riviera, Inc. L.S.
[SEAL] by (sgd.) WILLIAM MILLER, Pres. L.S.

Signed, sealed and delivered
in the presence of
[SEAL] (Sgd.) J. B. HOFFMAN

Excerpts from Exhibit DME-30

{THIS LEASE placed in escrow with Abraham Leiberman,
Esq. pursuant to Agreement dated September , 1948.}

THIS AGREEMENT between MILMAR ESTATES, INC., a New Jersey Corporation, as Landlord and BILL MILLER'S RIVIERA INC., a New Jersey Corporation, as Tenant

WITNESSETH: The Landlord hereby leases to the Tenant the following premises: located in the Borough of Fort Lee, in the County of Bergen, State of New Jersey, as is more fully described in SCHEDULE "A" attached hereto, together with the chattels more fully described in SCHEDULE "B" attached hereto, both of which schedules describing the property and chattels leased respectively are made a part hereof, which inventory is to be taken mutually within three weeks, as a condition of this lease, for the

Excerpts from Exhibit DME-30

term of seven (7) years commencing September 3, 1948, to commence from the 3rd day of September, one thousand nine hundred and forty-eight and to end on the 31st day of December, one thousand nine hundred and fifty-five, to be used and occupied only for a high class restaurant and cabaret and for no other purpose,
upon the conditions and covenants following:

1st. That the Tenant shall pay the annual rent of forty thousand dollars ($40,000) per annum, payable two thousand dollars ($2,000) each week for twenty weeks commencing with the first Monday after the opening of each season's operation in any year and each subsequent Monday thereafter until the sum of Forty Thousand dollars ($40,000) shall have been paid
said rent to be paid in equal monthly payments in advance on the day of each and every month during the term aforesaid, as follows:

• • •

In Witness Whereof, the parties have interchangeably set their hands and seals (or caused these presents to be signed by their proper corporate officers and caused their proper corporate seal to be hereto affixed) this 14th day of September 1948.

Milmar Estates, Inc.,
[seal] By: (sgd.) Sam Marcus, Pres. L.S.

Bill Miller's Riviera L.S.
[seal] By: (sgd.) William Miller, Pres. L.S.

Signed, sealed and delivered
in the presence of
[seal] R. J. Schwartz, Sec.

Exhibit DME-35

(Photostat)

(Opposite) ☛

Exhibit DME-40

April 1946

Mr. William Miller
149 East 57th Street
New York City, N. Y.

Dear Bill:—

This is to confirm our understanding with respect to our agreement concerning the Embassy Club and the Riviera. You are to be President of the new corporation, Bill Miller's Riviera, Inc., and to devote your full and complete time to the business of the corporation and to have no other outside employment of any nature whatsoever. Your approximate hours will run from 5:00 P.M. to closing on the Riviera premises. No purchase, expenditure or commitment of any nature exceeding $100.00 is to be made by either of us without consultation and consent of the other party. Any commitments and expenditures of a large amount is to be okayed by an approved signature by both parties.

Embassy and Milwar Realty part of your duties (SM, WM.)

The policy of both clubs with respect to food, liquor, entertainment, etc., will be set jointly.

I am to act on behalf of the corporation and look after general business and management affairs. I will devote sufficient time to assist in the development of the business in every way possible. My duties will be daytime duties running from approximately 9:00 A.M. to 6:00 P.M., but I will be available at all times, day or night, for all necessary business matters. It is understood, of course, I am to be permitted to devote part of my time to my other business interests as well as to the affairs of the corporations.

Each of us is to draw the sum of $250.00 per week as compensation for the above duties.

A bank account is to be opened on which any two of the following signatures will be necessary on all issued checks:

Exhibit DME-50

Jack Hoffman, Sam Marcus, William Miller.

We agree to appoint Oscar Schimmerman in charge of food, table service, etc. with general management powers subject to our joint approval.

You are to deposit with me as collateral security all stock issued to you in Mocambo Inc. and Milmar Realty Corp. and Bill Miller's Riviera Inc. in connection with notes to be given to me relative to the investment in the said corporations.

If the above is satisfactory, will you kindly sign your name at the place indicated at the lower left-hand side of this page.

Very truly yours,

Accepted: (Sgd.) WILLIAM MILLER
(Sgd.) SAM MARCUS

Exhibit DME-50

42ND ST. FOTOSHOP

18 East 42nd Street,
New York 17, N. Y.
June 30th, 1947

SPECIAL DELIVERY
REGISTERED RETURN RECEIPT REQUESTED
Mr. Bill Miller
c/o Bill Miller's Riviera Inc.
Fort Lee, New Jersey

Dear Bill:

As you know your note for fifty thousand dollars was recently presented for payment, payment refused and the note protested. To date, no payment has been made on account of said note and it is presently in default.

This is to notify you that I will liquidate my claim by selling, or otherwise disposing of the stock in Bill Miller's

Exhibit DME-54

Riviera Inc. which I presently hold. This sale will take place at my office at 18 East 42nd Street, New York City on Wednesday, July 2nd, 1947 at 11:00 A.M.

Should you desire to pay this obligation prior to this date, you may do so by communicating with me and paying the said fifty thousand dollar obligation.

Very truly yours

/s/ SAM MARCUS
SAM MARCUS

SM:AP

Exhibit DME-52

May 13, 1948.

Mr. Robert J. Schwartz
9 East 40th Street
New York City.

Dear Mr. Schwartz,

I hereby agree to purchase your interest in Milmar Estates, Inc., for which you paid $11,250., consisting of all of the shares held by you.

The purchase price is $7875.00 payable as follows:

$1000.00 per month commencing May 1, 1949, with interest at 4% until the entire amount is paid.

If this is satisfactory, kindly indicate by signing your name at the place specified.

Very truly yours,

/s/ SAM MARCUS

Accepted:
/s/ ROBERT J. SCHWARTZ

Exhibit DME-54

(Photostat)

(Opposite) ☛

THE PUBLIC NATIONAL BANK
AND TRUST COMPANY
of New York

In account with

Milman Kobler, Inc.

JUL 19 1948		$ 2000	—				
JUL 20 1948		$ 7500	Paid				
JUL 26 1948		$ 2000	—				
AUG 4 1948		2 000	—				
AUG 17 1948		2 000	—				
[illegible]		$ 2000	—				
SEP -8 1948		$ 2000	—				
SEP 17 1948		10 000	—				
NOV 2 [illegible]		$ 1000	—				

U. S. DISTRICT COURT
FOR NEW JERSEY

FEB 9 1955

EXHIBIT NO. DME 54

THE PUBLIC NATIONAL BANK
AND TRUST COMPANY
of New York

In account with

Milman Kobler, Inc.

				DEC 12 1947	Cert	$ 6000	—

9/2 - Rec 2000
[illegible]
Cert [illegible] 1000
9/8 - 100 cert [illegible]
4003 [illegible]
9/30 1100 - Personal
11/1 [illegible] from P.L.
320 - cert [illegible]
12/2 - 3500 - cert P.L.
2000 Personal
12/16 1800 Personal
1/3 600 "

[illegible] Bill [illegible] note [illegible]
[illegible] for collection [illegible]
[illegible] 1/01/48.

[illegible] Ely [illegible] 1/3 - 2000
1/3 3500

THE PUBLIC NATIONAL BANK
AND TRUST COMPANY
of New York

In account with Milman Kobler, Dr.

			7868	23			
JAN 27 1947			3000		JUN 1 1947		2500
FEB 6 1947			700		JUN 1 8 1947		2500
FEB 24			1727	23			
			3000				6000
MAR 5 1947			1100				
			1500				2000
MAY - 8 1947			500				2000
			500				2000
MAY 15 1947			500				2000
			400				2500
			2000		AUG 22 1947		1500

			3500		APR 5 1948		2000
SEP 8 1947			2600		MAY 4 1948		2000
SEP 12 1947			1500		MAY 17 1948		2000
			1500				
SEP 30 1947			4000		MAY 27 1948		1000
OCT 7 1947			2500		JUN 2 1948		2000
OCT 16 1947					JUN 9 1948		1501
NOV 5 1947			8300		JUN 17 1948		1300
DEC 12 1947			2591				2000
			500		JUN 23 1948		
DEC 16 1947			1500				2000
FEB 3 1948			600		JUL 8 1948		1000

Exhibit DME-60

FOTOSHOP, INC.
18 East 42nd St.
New York 17, N. Y.

June 14 1946

I hereby acknowledge receipt of 28½ shares of stock of Bill Miller's Riviera, Inc., and 500 shares of stock in Milmar Realty Inc., made out to the order of Mr. William Miller and which is being assigned to me and held by me as collateral for the re-payment of certain demand notes which I hold.

(signed) SAM MARCUS

[Attachment giving certificate numbers and number of shares omitted.]

Exhibit DME-64

March 3, 1952

Alfange & Friedman, Esqs.
9 East 40 Street
New York, N. Y.

Dear Sirs:

This is to advise you that I do not have any claim whatsoever nor do I intend to make any claim in connection with any matter or thing relating to or arising in connection with your representation of me or any company in which I may have been a stockholder of or owned a controlling interest in with respect to the following corporations:

Milmar Estates, Inc.
Bill Miller's Riviera, Inc.

Very truly yours,

/s/ SAM MARCUS

Exhibit DME-65

This exhibit is the same as Exhibit DME-64 except that it is addressed to Robert J. Schwartz, Esq.

Excerpts from Exhibit DME-68

STATEMENT OF AFFAIRS

EXHIBIT II

(For Bankrupt or Debtor Engaged in Business)

• • •

2. *Books and records.*

a. By whom, or under whose supervision, have your books of account and records been kept during the two years immediately preceding the filing of the original petition herein? William Greenman, from May 1, 1946 to date.

b. By whom have your books of account and records been audited during the two years immediately preceding the filing of the original petition herein? Jacob B. Hoffman, 11 West 42nd Street, New York, N. Y. Monthly from June 1, 1946 to date.

c. In whose possession are your books of account and records? At the premises—Bill Miller's Riviera, Inc., Hudson Terrace, Fort Lee, New Jersey.

• • •

9. *Prior bankruptcy or other proceedings; assignments for benefit of creditors.*

a. What proceedings under the Bankruptcy Act have been brought by or against you during the six years immediately preceding the filing of the original petition herein? (Give the location of the bankruptcy court, the nature of the proceeding, and whether a discharge was granted or refused, or a

composition, arrangement or plan was or was not confirmed.)

None.

b. Was any of your property, at the time of the filing of the original petition herein, in the hands of a receiver or trustee? (If so, give the name and location of the court, nature of the proceeding, a brief description of the property, and name of receiver or trustee.)

None.

c. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your creditors, within the two years immediately preceding the filing of the original petition herein? (If so, give dates, the name of the assignee, and a brief statement of the terms of assignment or settlement.)

None.

10. *Loans repaid.*

a. What repayments of loans have you made during the year immediately preceding the filing of the original petition herein? (Give the name and address of the lender, the amount of the loan and when received, the amount and date when repaid, and, if the lender is a relative, the relationship. If the bankrupt or debtor is a partnership, state whether the lender is or was a partner or a relative of a partner, and, if so, the relationship. If the bankrupt or debtor is a corporation, state whether the lender is or was an officer, director or stockholder, or a relative of an officer, director or stockholder, and, if so, the relationship.)

None.

Excerpts from Exhibit DME-68

11. *Transfer of property.*

a. What property have you transferred or disposed of other than in the ordinary course of business, during the year immediately preceding the filing of the original petition herein? (Give a description of the property, the date of the transfer or disposition, to whom transferred or how disposed of, and, if the transferee is a relative, the relationship, the consideration, if any, received therefor, and the disposition of such consideration.)
None.

12. *Accounts receivable.*

a. Have you assigned any of your accounts receivable during the year immediately preceding the filing of the original petition herein? (If so, give names and addresses of assignees.)

None.

13. *Losses.*

a. Have you suffered any losses from fire, theft or gambling during the year immediately preceding the filing of the petition herein? (If so, give particulars, including dates, and the amounts of money or value and general description of property lost.)
None.

(If the bankrupt or debtor is a partnership or corporation the following additional questions should be answered.)

14. *Withdrawals.*

a. What personal withdrawals, including loans, have been made by each member of the partnership, or by each officer, director or managing executive of the

corporation, during the year immediately preceding the filing of the original petition herein? (Give name of each person, whether a partner, officer, director or manager, the dates and amounts of withdrawals, and nature or purpose thereof.)

None.

15. *Members of partnership; officers, directors, managers, and principal stockholders of corporation.*

a. What are the names and addresses of each member of the partnership, or the names, titles and addresses of each officer, director and managing executive, and of each stockholder holding 25 per cent. or more of the issued and outstanding stock, of the corporation?

a. The names and addresses of each officer, director, manager and principal stockholder of the corporation are:

A. William Miller, President, director and stockholder, holding 40% of the common stock Hudson Terrace, Fort Lee, New Jersey.

B. David Parris, Secretary, treasurer, director and stockholder, holding 40% of the common stock. Hudson Terrace, Fort Lee, New Jersey.

C. Evan Anton, Director and stockholder, holding 10% of the common stock.

D. Oscar Schimmerman, General Manager. Sheridan Hotel, Newark, New Jersey.

Bill Miller's Riviera, Inc.
By (sgd.) William Miller
William Miller, Debtor

Exhibit DM-2

STATE OF NEW JERSEY }
COUNTY OF BERGEN } ss.:

WILLIAM MILLER, being duly sworn, deposes and says that he is the President of BILL MILLER'S RIVIERA, INC. the debtor named in the foregoing statement of affairs and is duly authorized to make said statement on its behalf, and that the answers therein contained are true and complete according to the best of his knowledge, information, and belief.

/s/ WILLIAM MILLER
WILLIAM MILLER

Subscribed and sworn to before me
this 19th day of December, 1946.

(Notarial signature illegible)

Exhibit DM-2

MEMORANDUM OF AGREEMENT made in Fort Lee in State of New Jersey on this 23rd day of July, 1947 between SAMUEL MARCUS, residing at 685 West End Avenue, New York City, and WILLIAM MILLER, residing at Fort Lee, New Jersey.

WITNESSETH:

WHEREAS, there is a certain note in the sum of Fifty Thousand ($50,000) dollars which Miller has executed to Marcus, and which said note is in default, and

WHEREAS, Miller has pledged his shares of stock of MILMAR ESTATES, INC. with MARCUS as security for the payment of the said note of fifty thousand ($50,000) dollars, and

WHEREAS, both Miller and Marcus are desirous of entering into an agreement with respect to the said note and stock, and with respect to future purchase rights in the stock of MILMAR ESTATES, INC.

NOW THEREFORE, in consideration of One ($1.00) Dollar, each to the other in hand paid and for good and valuable consideration, it is mutually agreed, as follows:

Exhibit DM-6

1. The fifty thousand ($50,000.00) dollar note, which is presently in default, will be destroyed, and a new note for fifty thousand ($50,000.00) dollars due June 1, 1948, payable $500 weekly thereafter every seven days, interest at 4%, acceleration and default clause, will be executed by Miller in favor of Marcus. This said note will be dated June 1, 1947. Upon payment of $50,000.00 and interest, note to be cancelled and Milmar stock turned over to Miller. Marcus agrees to look only to Miller's shares of stock in MILMAR ESTATES, INC. in the event of any default under the terms of the said note and also to the stock of BILL MILLER'S RIVIERA, INC. holding in escrow under another agreement.

2. In accordance with the terms of the lease, between MILMAR ESTATES, INC. and BILL MILLER'S RIVIERA, INC., all monies advanced by Miller and Marcus for taxes, amortization, and interest will be considered as a loan to MILMAR ESTATES, INC., and MILMAR ESTATES, INC. will execute non-interest-bearing 5 year notes as evidence of indebtedness, repayable from surplus funds only.

In the event that either party to this agreement shall desire to sell Milmar's stock to a third party, it is herewith agreed that such stockholder shall first offer his stock to the other party by notice in writing, giving the other party thirty (30) days in which to acquire the stock of the disposing stockholder. The notice of intention to sell shall state the sale price of the said stock, and the other stockholder, if he elects to acquire the said stock, may do so at the price stated in said notice.

Exhibit DM-6

(Photostat)

(Opposite) ☛

Cash in Fort Lee Trust Co.
General Account

DM 6.

1948						1948					
April	1	Forward	CL	00	8392 45	Apr	30	5005 20	6	19749 01	
	30		CR	4	6291 31	May	31	10629 59	24	17376 43	
May	31		✓	6	168205 04	June	30	11413 28	44	19351 16	
June	30		✓	7	227301 53	July	31	11298 26 CD	61	22815 22	
July	31		✓	8	171613 54	Aug	31	12412 13	77	17149 52	
Aug	31			9	146519 40	Sept	30	14,544.42	91	14763 32	
Sept	30			11	152897 80	Oct	31	5,840 61	CD105	15603 09	
Oct	31			CR 11	133302 40	Nov	30	6,803.86	CD110	12459 59	
Nov	30			CR 12	31762 45	Dec	31		CD111	32725 78	
Dec	31		2,030.70	CR 13	13868 31	1949 Jan	31	58 56	112	50 33	
Jan	31		CR	14	5447 85	Feb	28		114	7537 11	
Feb	28			14	845 —	Mar	31	880 70	115	1722 50	
Mar	31			15	5387 50					5332 14	
	31	Balance		✓	880 70						
					1072785 33					1072785 33	
1949						1949					
Apr	1	Trans	CL	1	880 70	Apr	1	Balance	✓	880 70	

Petty Cash Fund

DM 6 3

1948					1948			
Apr	30	[illegible]	6	622 51	Apr	30	10	589 –
May	31	33 9 63	12	4094 05	May	31	11	3789 11
June	30	500 –	44	2554 6[illegible]	June	30	12	[illegible]
July	31	750 C D	61	7281 99	July	31	13	7031 99
Aug	31	750 –	77	2993 98	Aug	31	14	[illegible]
Sept	30	750 –		1837 32	Sept	30	15	[illegible]
Oct	31	750.00	CD103	3311 25	Oct	31	Pc 16	3311 25
Nov	30	76.34	CD110	1117 75	Nov	30	Pc 17	1791 41
Dec	31	–	CD111	37 29	Dec	31	Pc 18	113 63
Jan	31		112	128 93	Jan 1	To		
Feb	28		114	13 10	Mar	31	9	147 78
Mar	31		115	10 75				
				26998 58				26998 58

Deposits as Security

1948						1948					
Apr.	1	Public S. Elec. O.L.	10	a	1500 –	May	31	Public Service Gas & Ele.	11	a	2000 –
	1	" " "	✓	a	500 –						
	1	N. J. Tel Co 14903 10939 10940	✓		520 –	Oct	31	AGVA paid Jack Cole	J 9	a	2785 68 4785 68
	1	N. J. " 136248	✓		150	Nov	30	Public Service	CO 110		2000 00 6785 68
	30	N. J. Bell Telephone	✓		30 –	Dec	31	AGVA	CR 13	a	2214 32 7000 00
May	31	A.G.V.A	N	a	5000 –	Mar	31	Trans	N.L. 5		2100 –
	31	P.S. Elec & Gas	✓		1500 – 6200						
June	30	P.S. Elec 9200 – CO 44 A			1000 – 3200						
July	31	P.S. Elec 8400 – 8400	62		500 – 800						
	31	Hackensack Jr Water Co	✓		400 – 1100						
					11100 –						11100 –

9100
6304.32
5914.32
2100 –

Accounts Receivable DM6 P6

1948						1949				
Apr	1	Forward O.L.	111		1767.75	Oct 31		J9	5	446.65
May	31		J1		5566.70	Nov 30		J"	2	689.50
July	31		2		4926.89	"		J"	3	6017.35
Aug	31		J4		659.81	"		J"	6	765.25
Sept	30		J5		2493.35	"		J"	1	600.00
Oct	31	16,543.10	J9		1375.05	"		J"	7	327.35
Nov	30		J12	3	160.00	"		J"	8	2990.00
	"	3,391.40	J12		45.00	"		J"	9	1965.25
		1,908.35								13801.35
1949						Dec 31		CR 13	4	1483.05
Jan	30		J14	1	600.-	Jan 31		15	3	160.-
	30		15	4	689.50	Mar 31		16	10	43
	31		✓	3	6017.35	31		16		1945.10
	31	Transf	L.P. 70	4	1483.95	31				
Mar	31	10538.25	J16		2598.[illegible]	31	Balance	✓		15044.65
	31		16	5	446.65					
	31		"	6	765.25					
	31		"	7	327.35					
	31		"	8	2990.-					
	31		"	9	1965.25					
					32477.15					32477.15
1949 Apr	1	Balance	✓		15044.65	1949 Apr 1	Transf	N.L. 6		15044.65

1948							1948						
Apr	1	D Branson	OL	11		100 —	Apr	1	Rose Schneider	OL	11	4	200 —
	1	John Brewery	NC	✓		200 —		1	Greenfield		✓	5	3000 —
	1	Krasnoselsky	NC	✓		100 —		1	D Bleicher		✓	39	131 90
	1	Mac Elrod	NC	✓		201 40		1	J W.		✓	39	50 —
	1	Bill Ficks	100	✓		215 —		1	Rose Fiscella		✓	55	100 —
	1	Phil Kaplan		✓		200 —		1	Hoho Lyn	2	11	C	✓		16 —
	1	A Leventhal		✓		200 —		30	A Brennan				✓	@	3000 —
	30	H. Greenberg		✓	5	1000 —		30	Guild Photo			6			2000 —
	30	H. Greenberg		✓	5	2000 —	May	31	Typo due Waiters			6	55		843 60
	30	Strikes		10	7	10 —		1	Typo strikes				7		10 —
May	31	Rose Schneider		6	4	200 —		1	Rabin			✓			200
	1	H. Johnson	ADV	✓	13	200 —		1	Week End Bank			✓	1		2500 —
	1	J Gutman		✓	10	12 40		1	H G Check Reinman			✓	2		10 —
	1	Show Labs		✓	10	23 95		1	D Bleicher			✓	39		100 —
	1			✓	10	33 75		1	H G Check Elrod			✓			100 —
	1	Photo Guild		✓	6	2000 —		1	Muller			✓	8		50
	31	H. L. Greenfield	R.M.	24	@	6996 50		1	Madison			✓	9		100
	1	Week End Bank		✓	1	1000 —		1	Typo			✓	✓		10 13 10
	1	H. G. Reinman		✓	2	2500 —		31	Show Labs			24	10		20 7 10
	1	Woodruff		✓	12	10 —		1	H. Johnson			✓	13		70 0
	31	Typo	PC	11		35 —		31	P.R.F.	PC	11		3		60 —
	31	P.R.F.		✓	3	1 5460									1 55 50 9
		Abe Vine		✓	11	5888	June	30	Waiters typo			6	21		890 —
	1	Muller		✓	8	80 —		30	Abe Vine			✓	11		80 —
	1	Madison	Hol 15	✓	9	50 —		30	Gibraltar Corr. Typ.			✓	55		100 —
						100 —		30	S Marks			✓			1138 —
June	30	Show Labs		4RB	14	11 9 73 6		30	M Krims			✓			7990 —
	30	Stanley Marks		44A		686 50		30	M Klaber			✓	15		100 —
	1	M. Klaber		✓	15	1 7 89 — 4		30	Woodruff			✓	12		35 —
	1	M Berkson		✓		100 —		30	Deposits no fee			✓	18		315 —
						75 —									
						12667 48									1

7

DM6-7

1948						1948					
					13667 43						13324 73
June	30	S Kross NG	44A	16	100 -	June	30	Syd. Bleicher	CR6	39	75 60
	✓	J. Lavan	✓		10 -		✓	Eli Quain	✓	53	184 50
	✓	J. Kneeland	✓		50 -		✓	S. Kross	✓	16	100 -
	✓	Wk. End Bank	✓	17	1500 -		✓	Wk. end Bank	✓	17	1500 -
	✓	Dep. on Res.	✓	18	325 -		30	Jackie Miles	44A	20	250 -
					15652 48		✓	Commiss.	✓	25	60 -
	30	Vagabonds	PC.12	33	1350 -		✓	Shaw tabs	✓	19	686 50
	✓	Res. Y.W.L.T.S.	✓	38	50 -		✓	" "	✓	17	420 55
		Sam Bramson	✓		350 -		✓	Vagabonds	✓	33	1059 -
		Jackie Miles	✓	20	250 -						14380
		Herman Mahler	✓		100 -	July	31	M. Reinis	CR7		143 80
					19952 48		✓	J. Stein	✓		51 -
July	30	Shaw tabs	CR7	27	250 32		✓	Lanbrow	✓	25	51 -
	✓	Vagabonds	✓	52	6 95		✓	Eli Quain	✓	53	7 50
	✓	Shaw tabs	✓	19	420 55		✓	Bleicher	✓	39	100 -
	✓	Nieman	✓	51	77 30		✓	Uflman	✓	31	42 -
					18569 60		✓	Aquatog	✓	40	200 -
	31	Lips	CD63	21	890 -		✓	M. Johnson	✓	13	140 -
	✓	WK. End Banks	✓	41	8500 -		✓	WK. End Banks	✓	41	7000 -
	✓	Geo Wood	✓	22	650 -		✓	P.R.	✓	26	332 24
	✓	L. Morin	✓	24	68 07		✓	Geo Wood	✓	22	650 -
	✓	M. Brady	✓	25	50 -		✓	S. Marks	✓		50 -
	✓	Vagabonds	✓	33	670 -		✓	H. Marder	✓	27	100 -
	✓	P.R.	✓	26	332 24		✓	M. Brady	✓	25	50 -
	✓	Commissions	✓	23	600 -		✓	L. Morin	✓	24	68 07
					35269 91		✓	Hadassah	✓	46	100 -
	31	Vagabonds	PC.13	33	300 -		31	~~J. Miles~~ Vagabonds	CR63	33	700 -
	✓	I. Danuff	✓		100 -		✓	Vagabonds	✓	33	1590 -
	✓	H. Marder	✓	27	100 -		✓	Olandres	✓	28	300 -
	✓	Vagabonds	✓	33	1025 -						
		Olandres	✓	28	300 -						
		Slate	✓	28	900 -						

CREDIT LIMIT BUSINESS

Krans + Eschger (P) DHL

Date 1948		Items	Folio	✓	Debits	Date 1948		Items	Folio	✓	Credits
July	31	Ullman	PC 13	31	42	July	31	Slate Bros	CD 63	29	700 -
	✓	Youngman	✓	30	150 -		31	Youngman	✓	30	150 -
	✓	Geo Wood	✓		350 -		31	Shawstabs	✓	27	250 32
	✓	Bill Miller	63	32	500 -		31	" "	✓	52	476 80
	31	6/30 Quain Adjustment	21	53	41 25		31	B Miller	PC 13	32	500 -
	31	6/30 Lips PC	12		625 30		31	6/30 Lips	CR 6		446 -
	31	Lips	13		953 50		31	Lips	2		660 50
Aug	31	Lanbraw 206885 CR	9	42	51 -	Aug	31	Lips	9		809 25
	✓	Hoffman	✓		23 70		✓	Week End Banks	✓	41	6000 -
	✓	Aquatogs	✓	40	500 -		✓	Brookdale	✓		74 35
	✓	Bleicher	✓	39	407 50		✓	Blumer (Blume)	✓		12 70
	✓	Shaw Labs	✓	44	461 28		✓	Radin	✓	34	100 -
	✓	Social Security	✓	54	33		✓	Dorelli	✓		100 -
	✓	Un Insurance	✓	54	33		✓	Mac Elrod	✓	37	25 -
	✓	Wirth Lodging	✓	54	260		✓	Gottlieb	✓	36	70 50
	31	Week End Banks CD	77	41	4500 -		✓	Pomeroy	✓	33	100 -
	✓	Horwitz N.G.	✓	43	120 -		✓	Eli Quain	✓	53	15 80
	✓	" "	✓	43	200 -		✓	" "	✓	53	12 60
	✓	E Weiner	✓		50 -		✓	Arden	✓		68 35
	✓	Pomeroy	✓	37	100 -		✓	Payroll Exchange	✓	55	30 -
	✓	Mac Elrod N.G.	✓	37	25 -		✓	Horwitz N.G.	✓	43	320 26
	✓	Mahler Herman	✓		85 -	Aug	31	B Youngman CD	77	35	150 -
	31	Lips PC	14		976 85		✓	Olandel Com	✓	56	100 -
	✓	E Quain	✓	53	54 90		✓	Shaw Labs	✓	44	461 28
	✓	Youngman	✓	35	150 -		31	Wm Miller CD	77	55	[illegible]
	✓	Radin	✓	34	100 -	Sept.	30	Lips	CR 10		[illegible]
	✓	Bierman	✓		100 -		✓	Week End Banks	✓	[illegible]	5000 -
	✓	Gottlieb 1248	✓	36	70 50		✓	Chico AR	✓		30 [illegible]
Sept.	30	Wm Miller	CR 10	55	3000 -			R Richards N.G.	✓	46	[illegible]

ACCOUNT NO. _____ SHEET NO. _____

NAME

ADDRESS

BUSINESS

TERMS

RATING

CREDIT LIMIT

Loan & Exchange DM6 P7

DATE 1948		ITEMS	FOLIO	✓	DEBITS	DATE 1948		ITEMS	FOLIO	✓	CREDITS
Sept.	30	Show tabs	CR10		19690	Sept.	30	[illegible]	CR10		2000 —
	30	Wk-End Banks	CD92	45	5000 —		✓	[illegible]	✓		3000 —
	✓	Lubin	✓	47	75 —		✓	Cress Courtney NR	✓		146 10
	✓	Horwitz	✓		70 —		✓	M. B. Kaye NG	✓	49	125 —
	✓	Geo ?	✓	50	25 —		✓	Lubin NG.	✓	47	25 —
	✓	Richards	✓	46	35 30		✓	Nieman A.R.	✓	51	77 30
	✓	Olanders	✓	56	70 —		✓	C. Ramirez A.R.	✓		56 10
	✓	Milmar	✓		10000 —		✓	M. Elrod N.G.	✓		50 —
	✓	Russell NG. —	✓		50 —		✓	Rev. Dep. 10/8 Goldberg	✓		150 —
	✓	M. B. Kaye	✓	49	125 —		✓	Wm. Miller	✓	55	50 —
	30	Lips	P.C.15		597 80		✓	Low Bacon A.R.	✓		15 85
	✓	H. Mahler	✓		50 —		✓	Geo ? N.G.	✓	50	25 —
	✓	Pal. Chap. Hadassah	✓	48	100 —		✓	Winston N.G.	✓	55	100 —
	✓	Irving Danuff	✓		200 —		✓	Sabatini A.R.	✓		41 40
	30	Eli Quain	J.5	53	96 25		30	Show tabs	CD92		114 30
					6232 5 20						5359 69
	30	Show tabs	CR10	52	468 85		30	Lips	CB10		7 50
	30	E. Quain	J5	53	28 —		30	Lapes	J5.	54	3 26
	30	P.R.	J5	55	30 —		30	Wm. Miller	J5	55	1711 40
	✓	Olanders	✓	56	30 —		30	Balance	✓		8059 20
					6338 3 05						6338 3 05
	1.	Bal.	✓		8059.20	Oct.	1.	Trans. to Ind. accs.	✓		8059 20

SHEET NO. _____ ACCOUNT NO. 7A

TERMS

RATING

CREDIT LIMIT

NAME Loans and Exchanges

ADDRESS N. G. Checks

BUSINESS

DM6-7A

LINE	DATE 1948	ITEMS	FOLIO	✓	DEBITS	DATE 1948	ITEMS	FOLIO	✓	CREDITS
		Sam Bramson	✓		10.–	Oct. 31	M. Berkson	CR 11	B	75.–
		John Breweries			200.–	Nov 30	H. Marder	CR 12	A	500.00
		Krasnodebsky			100.–	"	Freitag See Tabs.	CR 13	X	100.00
		Mac Elrod			51.40	"		J 13	2/	1195.00
		Stanley Marks			600.–	1949				2521.40
		Maury Berkson		B	75.–	Jan 30		J 14	1	600.–
		Jerry Lavan			10.–	31	Trans. – Lt	135		4296.40
		Kneeland			50.–	Nov 31	Wiener – Trans Lt	7X		100.70
		Weiner		2/	50.–	31		J 17		4396.70
		Horwitz			70.–					50.–
		Russell			50.–					4446.40
					1356.40					2371.40
	Oct. 31	Robt Kelly	CD 106		100.–					6817.80
	31	S. McBride	"		240.–					
	31	H. Marder	"	A	500.–					
		2121.40			2136.40					
	Nov 30	Martin Steinberg	CD 110		300.00					
		Elias Bayer	CD 110		100.00					
		George Woods	CD 110		500.00					
		1921.40			2096.40					
			J 13		600.00					
	30	Transf.	CR 70	X	3696.40					
					600.–					
	1949 Jan 30		J 14	2/	2521.40					
					6817.80					6817.80

SHEET NO. _____ DM 6 ACCOUNT NO. _____

TERMS

RATING

CREDIT LIMIT

NAME Loans and Exchanges

ADDRESS Cash Advances 7B

BUSINESS

DATE 1948	ITEMS	FOLIO	✓	DEBITS	DATE 1948	ITEMS	FOLIO	✓	CREDITS
	Bill Ficks			215-	Oct. 31	Danuff	CR 1	1	200-
	Phil Kaplan			200-	31	Mahler	CD 106		50-
	A. Leventhal			200-	"		J 9		250 / 28 70 / 273 70
	Sam Bramson			350-	Nov 30	I. Danuff	CR 12	1	100 00 / 373 70
	Herman Mahler			235-	"				600
	I. Danuff		1	100-	"		J 10	2	1600 00
	" "		1	200-	1949 Jan 31		J 15	1	1973 70 / 23 70 / 1997 40
	George Wood			350-	Mar 31		17		1600- / 2370 40
	Al Bierman			100- / 1950-					
	1700.00 / 1676.30 / 1576.30								
Nov 30		J "	1	2370 / 1873 70					
Jan 31		J 15	2	1600- / 3573 70					
Mar 31	Loans 1596.30	L.P. 7E		2370 / 3597 40					3597 40
	1600-								

CREDIT LIMIT BUSINESS [illegible] 7D

Show Tabs of accounts Rec

DML 7D

Date 1943		Items	Folio	✓	Debits
		Robert King		f	2650
Oct.	31	C. Courtney	CR 11	a	14610
	31	Blume	"	b	1270
	"	Stein	"	c	81–
	"	Reinis	"	d	22370
	"	L. Bacon	"	e	1585
	"	A. Gross	"	k	60–
	"	Jos. Marcus	"	M	80–
	"	Best Farms	"	Q	40–
	"	Galsworthy	"	G	40–
	31	Jos. Funk	PC 16	P	100–
	"	Stayback	"		80–
		L. Bacon	"		80–
		M. Fuller	"	J	120–
		Bonwick	"	I	12–
		Sabatini	"	L	3050
		Pepper Frocks 37005	"	N	80–
					152935
Nov	30	Sabatini	CR 12	N	4140
	"	Brookdale	CR 12	O	7435
					134410

Date 1943		Items	Folio	✓	Credits
		Radin			220
		Martin Reinis		d	7990
		" "		d	14380
		J. Stein		a	81–
		Brookdale		o	7435
		Blume		b	1270
		Arden, Geo.			6835
		Chico			30–
		C. Courtney		a	14610
		Lou Bacon		e	1585
		Sabatini		N	4140
					69565
Oct.	31	Phil Kaplan	CR 11		3615
	"	Jos. Arden	"		100–
	31	R. King	CD 106	f	2650
					55830
Nov	30	Galsworthy	CR 12	G	40.00
	"	Pepper	CR 12	N	80.00
	"	Bonwick	CR 12	I	12.00
	"	M. Fuller	CR 12	J	120.00
	"	A. Gross	CR 12	K	60.00
	"	Sabatini	CR 12	L	30.50
	"	Joseph Marcus	CR 12	M	80.00
	"	Joseph Funk	CR 12	P	100.00
	"	Best Farms	CD 110	Q	40.00
	"	Dale	"		57.80
		Doerfler	"		30.25
		Mayflower	"		27.85
		Merolla	"		51.50
		G. Wallace	"		70.00
		Cesin Bros.	"		36.00
					1[illegible]

SHEET NO. _____ ACCOUNT NO. _____ 7a

TERMS

RATING

CREDIT LIMIT

NAME Loans and Exchanges

ADDRESS Tips advanced to Waiters.

BUSINESS

DM6-70

LINE	DATE 1949		ITEMS	FOLIO	✓	DEBITS	DATE 1949		ITEMS	FOLIO	CREDITS
	May	31				54060	May	31			20715
	June	30				625.30	June	30			440-
	July	31				953.50	July	31			66050
	Aug	31				676.85	Aug	31			80925
	Sept	30	664.25			597.80	Sept	30			599.40
	Oct	31	1,615.00			1507.85	Sept	30		J5	750
	1949						Oct	31		CR11	55710
	Jan	31	1615 — J15		✓	1615 —	1949			J9	161500
			1596.50			6516.90	Mar	31		J17	3850
								31	Balance	✓	157650
						6516.90					6516.90
	1949 Apr	1	Balance	✓		157650	1949 Apr	1	Loans	N.L.	157650

ACCOUNT NO.

NAME

ADDRESS

BUSINESS

SHEET NO. 70

70

TERMS Loans and Exchange

RATING Short Tele and Cement Coverable

CREDIT LIMIT

DATE 1949	ITEMS	FOLIO	DEBITS	DATE 1949	ITEMS	FOLIO	CREDITS
	Forward		1[illegible]10		Forward		1697 00
Nov 30		Jr	[illegible]	Nov 30	[illegible]	[illegible]	57 75
1949					[illegible]	"	92 85
Jan 31					[illegible] 529 50	"	[illegible]
Nov 31	Trans	L.P. 15	[illegible]	"			[illegible]
		9X			Trans [illegible]	[illegible]	[illegible]
31	Balance	✓	[illegible]	30	Erritag [illegible]		[illegible]
				30	#1-13 Trans	L.P. 76	[illegible] 35
				1949 Jan 31		J 15	68 50
				31	Trans L.P.	6	1483 05
				Nov 31	#22-26	15	408 80
				31	Apuzzo	✓	24 20
				31	Prezo 9102 99	1	40 —
				31	Trans L.P.	7X	[illegible]
				31			[illegible]
					9923 55	17	[illegible]
			12117 15		9623 55		12117 15
1949 Apr 1	Transf	L.L. 9	9623 55	1949 Apr 1	Balance	✓	9623 55

SHEET NO. _____ ACCOUNT NO. _____ 9

TERMS

RATING

CREDIT LIMIT

NAME Loans and Exchanges

ADDRESS

BUSINESS

DM6 7E

Voucher Line	Date 1948		Items	Folio	✓	Debits	Date 1948		Items	Folio	✓	Credits
			J. B. Hoffman			2370			Globarlyn			16 –
			Milmar Estate			10000 –			Borelli – Pro.			100 –
	Oct.	31	Goldberg	PC 11	a	150 –			Al Bierman MILMAR			2000 –
		"	Borelli	"	b	100 –			Cash			3000 –
		"	Abe Vine	"		9.39			Goldberg 10/8		a	150 –
		"	N. Morin	"	c	200 –	Sep	30	Milmar	J 8		10 757 70
	Sept	30	459.39	J 7		6000.00	Nov	30	N. Morin	CR 10	c	200 00
	Nov	30		J 11		6017 35		"	Abe Vine	CR 10	d	9 39
		"		J 11		4750 00		"	Milmar Estate	CR 10	e	6000 00
		30	Loans L.P.	70	F	6017 35	1949	"	#1-13 – Tobo 10,767.35	CR 13	F	6017 35 Tobo
	Mar	31		J 18		19757 70	Jan	31		J 15	1	6017 35
		31		J 18				31		"	2	4750 –
							Mar	31	Loans L.P.	7B	3	
								31		J 18	4	
						44041 49						44041 49

SHEET NO. _____ ACCOUNT NO. 7X

TERMS

RATING

CREDIT LIMIT

NAME Loan and Exchange Deposit on Reservations

ADDRESS

BUSINESS

DMG 7X

LINE	DATE	ITEMS	FOLIO	✓	DEBITS	DATE	ITEMS	FOLIO	✓	CREDITS
	1949					1949				
	Mar 7	G Woods	11	1	500 –	Jan 4	Shaw Lab. #19 CR	14	3	56 25
	31	Transf – L.P.	7A	2	50 –		Weiner	✓	2	25 –
	31	Transf L.P. 129285	7D	3	74285		Apuzzo	✓	3	50 –
		Minus 550 –				14	Radberg	✓	3	25 –
							Jackie Briles #20	✓	3	60 95
						17	Radberg	✓	3	25 –
							Apuzzo	✓	3	25 –
						18	Lips. #21	✓	3	130 65
						20	Wiener	✓	2	25 –
						28	Radberg	✓	3	25 –
						Feb 4	Judge Pashman	14	3	300 –
						9	Geo Woods	✓	1	500 –
							A. Fuzzo 129285	✓	3	45 –
					129285					129285
	1949 Apr 1	Trans	7L	10	300 –	Mar 31	Trans Judge Pashman	7D		300 –

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CREDIT LIMIT — BUSINESS — Accounts Payable — DM b 51

DATE 1948	ITEMS	FOLIO	✓	DEBITS	DATE 1948	ITEMS	FOLIO	✓	CREDITS
Apr 30		6		67 08 78	Apr 1	Balance	2nd		61 02 24 89
May 31	Greenfield	6		300 -	30		1		28 28 11 18
31		26		56 73 592	May 31	Quaker	6		300 -
31		P.C	11	85 55	31		1		50 33 09
31		P.C	11	61 03 23					
31	(Payroll)	P.C	11	1465 6	June 30		21		85 281
June 30		CR9		85 -	July 31		21		63 25 09 2
30		C.D	44	97 04 354	July 31	Quaker	9		
30		P.C	14	39475	31		3rd		63 58 155
July 31		C.D	61	67 81 738	Sept 30		CR 11		36 33
31		P	13	16 35 62	30		43		51 84 2 14
Aug 31		C.D	77	50 54 29 5	Oct 31		CR 12		265 44
31		P.C	14	82 85			8th		32 85 7 28
Sept 30		E.D	91	56 94 33	Nov 30		CR 12		194 98
		P.C 15		12387			9th		1057 12
Oct 31		C.D 109		35 99 371	Dec 31		CR 13		62 96
		P 16		1366	1949		50		585 47
Nov 30		C.D 110		27 20 037	Jan 1	To			
Dec 30		J 17		1 96 525	Mar 31		52		453 50
1949 31		C.D 111		1 91 13	31		J 16		18 4 2
Jan 31		112		1461 11					34 47
Feb 28		114		15 -					
Mar 31		115		1 62 5 24					
31	Balance	✓		48 33 2 65					
				456 94 7 24					456 94 7 24
1949					1949				
Apr 1	Journal	J. C 51		48 33 2 65	Apr 1	Balance	✓		48 33 2 65

SHEET NO. _____ ACCOUNT NO. 2

TERMS

RATING

CREDIT LIMIT

NAME Accounts Payable - Old DM6 52

ADDRESS

BUSINESS

DATE 1948		ITEMS	FOLIO	✓	DEBITS	DATE 1948		ITEMS	FOLIO	✓	CREDITS
June	30	CD	44		1214.27	Apr	1	Forward O L	202		1808.66
	30	PC	12		175.10		30		4		291.36
					1389.37						1537.86
July	31	CD	61		1184.18	May	31	19.01.98	6		233
	31	P	13		105.19	Oct	31	15.22.61	J9		1840.35
					1678.74			14.42.58			2005.42
Aug	31	CD	77		1247.92			12,548.65			
	31	PC	14		49.30			11,267.14			
Sept.	30	CD	91		3975.97						
	"	P	43		1380.07						
	"				487.36						
		PC	15		9.30						
					5852.70						
Oct	31		CD 105		1281.51						
	"				7134.21						
			J9		12816.21						
					20050.43						
					20050.42						20050.42

ACCOUNT NO. 57

TERMS

RATING

CREDIT LIMIT

NAME Leonard Taylor

ADDRESS

BUSINESS

DATE	ITEMS	FOLIO	✓	DEBITS
1948				
Apr 30		6		2508 16
May 31		24		47189 47
1 31		P.C 11		34 31
June 30		C.R 44		64 00 5 22
30		106		29 37 1 40
30	Contra.	1	A	27 26 8 6
July 31		C.D 61		52 692 11
31				23 200 —
Aug 31				51 337 47
31		77		28 79 6 —
31	1/31	3		30 39 283
Sept 30		91		55 977 81
				200 877 0
				45 223 65
Oct 31		CO105		32 615 66
		CO105		9 51 0 08
Nov 30		CO110		
		PC8		450 00
		301		56 976 31
				57 2 53 99
Dec 31		CO111		57 3 53 99
1949 Jan 31		114		1152
Feb 28		114		705 —
Mar 31		115		1175 —
				57 6 28 8 79

DATE	ITEMS	FOLIO	✓	CREDITS
1947				
Apr 1	Forward	22		19754
30		20		2104
May 31		P.R 1		84 53 7 6
31		P.C 11		8 14 5 6
June 30		P.R 106	A	57 22 8 6
30		106		8 24 4 6
30		P.R 145		37 3 09 5
July 31		P.R 3		4 53 1 5
31		P.R 193		99 4 41 14
Aug 31		95		1 2 4 6
31	(2 mos. Jury)	1947		66 70 8 97
Sept 30		97		1 5 5 27
				1 8 3 3
Oct 31		P.R 175		8 6 3 58
		176		5 1 2 50
Nov 30		176		57 3 6 3 33
1948 Jan 1				
		4		2789 30
Mar 31		116		5 —
Feb 28				30 35
Mar 31		P.P 53		134 87
		4		306 28
		54		19 2
		57		5 1 6 5
		118		57

ACCOUNT NO. DM 61

SHEET NO.

NAME William Miller - Personal

ADDRESS

BUSINESS

TERMS

RATING

CREDIT LIMIT

DATE		ITEMS	FOLIO	✓	DEBITS	DATE		ITEMS	FOLIO	✓	CREDITS
1949					55150 97	1949					59650 97
Jan	31		113		4676	Jan	31		J 14	1	2521 40
	31		J 15	2	2370		31	3800 00	15	2	1600 —
	31	609 00	"	3	4250	Mar	31		16	1	765 25
Mar	31		16	4	43 —		31		"	1	327 35
	31	Markowitz	17		6000 —		31	9608 25	17	5	10757 70
	31		18		3000 —			6608 25			
	31	Balance	✓		6608 25						
					75629 67						75629 67
1949						1949					
Apr	1	Bal Transf G.L. 59			660824	Apr	1	Balance	✓		660824

CREDIT LIMIT

BUSINESS W. M. Miller DM 6 61

LINE	DATE 1978	ITEMS	POLIO	✓	DEBITS
	Apr 30	a	J		500 -
	30	b	7		80234
	May 31	c	6		200 -
	31	d	24		169560
	31	e	P.C	11	3337
	July 31	Fabian O.	CD	62	1500 +
	31	g	CR	8	2990
	June 30	"	CD	H/A	113899
	30	Fabian ⑪	H/A		1500 -
	30	j	PC	1 ✓	15570
	July 31	k	CD	6 ✓	229829
	31	l	P	13	25 -
	Aug 31	m	CD	77	152665
	31	n	PC	1L	34294
	Sept 30			9 ✓	4011
	"			PC 15	500
	"			J 7	2422257
	-			J 8	1057770
	Oct 31			CD 10 6	46918
	"			J 9	46817
	Nov 30	Melfa		CR 12	30000
	"			CD 110	38219
	"			PC 8	32400
	"			CR 96	100000
	"			J 12	76525
	"			J 14 ✓	32735
	"			J 13 1	252140
	"			J 8 ✓	1600000

DATE 1979	ITEMS	POLIO	✓	CREDITS
Apr 1	Forward O.L.	221		2536001
May 31		6		80000
June 30		9		3336667
July 31		8		3331667
				3300899
	Salaries	J 2		107500 -
		4		250000
		J 6		4525455
				3999998
		J 9		4915298
				4850000
		J 10		5025512
		J 11	3	4750 00
		J 11	2	2370
		J 11	4	4500
		J 13		8465
		J 14		5515797
				45000

SHEET NO. _____ ACCOUNT NO. UMG 63

TERMS

RATING

CREDIT LIMIT

NAME Surplus

ADDRESS

BUSINESS

LINE	DATE	ITEMS	FOLIO	✓	DEBITS	DATE	ITEMS	FOLIO	✓	CREDITS
	1948 Apr 1	Deficit O.L.	305		149042022	1948 July 31	Hackensack Water Co	J 2		400 -
	1949 Mar 31	Loss fiscal Year 148042022 ended 3/31/49	J 20		488228	1949 Mar 31	Balance	✓		153524 50
					153924 50					153924 50
	1949 Apr 1	Balance	✓		153524 50	1949 Apr 1	Trans N.L.	62		153524 50

SHEET NO. [illegible]

TERMS [illegible]

RATING

CREDIT LIMIT

NAME Old [illegible] Co.

ADDRESS [illegible] New Jersey

BUSINESS

ACCOUNT NO. DM6 65

DATE		ITEMS	FOLIO	DEBITS	FOLIO	CREDITS
1958						
June	30	S. M. I.	[illegible]	[illegible]	17	470506
	30	✓		[illegible]	19	119953
Aug	31		[illegible]	[illegible]		590[illegible]
Sept	30		[illegible]	[illegible]		
Oct	31	1199[illegible]	[illegible]	[illegible]		
				[illegible]		590459
				[illegible]		

ACCOUNT NO. 103

NAME Wiles

DMG

RATING

ADDRESS

CREDIT LIMIT

BUSINESS

DATE 1948	ITEMS	FOLIO	✓	DEBITS	DATE 1948	ITEMS	FOLIO	✓	CREDITS
Oct 31	P. L	J 9	✓	1615 00	May 31		CR 6		164072 40
Mar 31		J 20		993384 38	31		J 1		5566 70
					June 30		7		169639 19
					30		✓		132680 96
					July 31		8		91591 53
					Aug 31		9		393911 59
					31	7/31	J 2		169575 89
					31		J 1		565487 [illegible]
					Sept. 30		J 5		148833 24
					"		CR. 10		4926 89
					Oct 31		CR. 11		859 81
					1949	991769.38	J		718107 [illegible]
					Jan 31	993384 38	J 15	✓	2493 35
				994999 38					148581 96
									[illegible]
									122826 60
									[illegible]
									7375 05
									993384 38
									1615 —
									994999 38
									994999 38

Analysis of Sales

DM 6 p 100

	Food	Liquor	Front Bar	Cafeteria	Minimum Charges	Misc
1	94347 98	52977 37	12018 95	1111 70	3616 40	
2						5566 70
3	132680 96	72672 18	13022 10	1130 55	4766 70	
4	92128 51	57749 53	10442 20	1073 75	3181 90	
	[illegible]	[illegible]	35483 25	3316 00	11565 60	5566 70
5	86620 50	50098 39	8504 80	885 55	2724 —	4922 89
6	410999 95	233499 40	43988 05	4201 55	14289 —	859 81
						11353 40
7						2493 35
8	82256 63	53507 63	8494 20	754 60	2768 90	
	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	13846 75
9						
10	67279 85	44409 65	7929 85	843 75	2363 40	
	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
11						1375 05
						15331 80
12						1615 00
						16606 80
13						1615 —
						[illegible]
14	560814 43	331714 75	60412 20	5799 90	19421 30	15221 80
15						
16						
17						
18						
19						
20						
21						
22						
23						
24						
25						
26						
27						

SHEET NO. _____ ACCOUNT NO. DM6 101

TERMS

RATING

CREDIT LIMIT

NAME Other Income

ADDRESS

BUSINESS

DATE 1948		ITEMS	FOLIO	✓	DEBITS	DATE 1948		ITEMS	FOLIO	✓	CREDITS
Apr	30		4		2000 -	Apr	1	Concession O.L.	411		12500 -
Oct	31		J10		13000		30	"	4		2500 -
1949					15000		30	"	"		10500 -
Jan	31		J4		500 -		30	"	"		1500 -
Mar	31	P.L.	20		15500		30	" 25000	"		12000
					35523 04	May	31	Eli Quain Conc.	6		5000 -
						June	30	Costumes 30000	7		32000
							30	Grease P	21		2500 -
											538 10
						Aug	31	Grease 33031.10 P	36		35038 10
											1484 63
						Sept	30	34522 03 P	43		36522 03
											409 33
								34,932 06			36932 06
						Oct	31	Concession Inc.	CR.12		13500 00
							"	Grease	P48		269 66
											50697 72
						Nov	30	Misc 35,697.72	CR12		151 52
							"	Grease Income 35,978.12	P49		129 08
											50978 12
						Dec	31	Telephone Inc.	CR.13		7 98
							"	Grease Inc.	CR50		36 94
											51023 04
					51023 04						51023 04

35523 04
30168 20
3450640

CREDIT LIMIT BUSINESS Purchases P102 DMb 102

DATE 1948		ITEMS	FOLIO	✓	DEBITS	DATE 1948	ITEMS	FOLIO	✓	[illegible]
Apr	30		4		18566.14	Oct 31		CP110		[illegible]
	30		10		81.50	"		P49		100.87
May	31		11		38528.61	"		P49		605.96
	31		11		381.06	"		P49		[illegible]
	31		11		499.93	"		P49		[illegible]
	31		11		50.–	1949 Mar 31	P. L	20		28046.41
June	30		P 21		65190.72					
	30		PC 12		659.47					
July	31		P 29		43429.54					
	31		"		356.71					
	31		P 13		690.47					
Aug	31		36		48859.50					
	31		"		287.64					
	31		PC 14		606.87					
Sept	30		15		1716.49					
	30		CR 11		35.00					
	30		9		55.00					
	30		P 43		346.86					
	30		PC 15		159.53					
	"		P 43		37451.27					
Oct	31		CR 12		1400					
	"		P 49		24190.13					
	"		PC 16		172.20					
1949	"	279554.83	P 48		194.58					
Jan	1	To								
Mar	31	280462.41	52		907.58					
					283332.71					283332.71

DMb

	Milk & Cream	Dairy Products	Ice Cream	Tea & Coffee	Bread Rolls Cake	Fish
1		944.06	233.30		125 –	1291.61
2						13.15
3		2778.65	592.65		755.04	3268.33
4				381.06		
5			8.75			
6						
7		3810.69	851.90	448.38	965.96	5633.20
8		34.72				39.39
9		3309.10	456.70		853.02	4183.78
10				356.71		
11		35.07				
12		10012.29 / 3245.20	2143.30 / 498.45	1186.15	2699.02 / 878.97	14429.46 / 2848.36
13		11.85		287.64		8.75
14		13969.34	2641.75	1493.99	3577.99	17286.57
15				346.86		
16		2565.98	442.65		791.68	3034.12
17						
18		18.42				3.50
19		16553.94	3088.40	1820.65	4369.67	20324.19
20		1741.97	321.90		711.58	1804.99
21		12.09		194.58		99.51
22		18307.80	3406.30	2015.23	5081.25	22228.69
23		100.38 / 18207.43	3406.30	2015.23	5081.25	22228.69
24						
25						
26		18207.43	3406.30	2015.23	5081.25	22228.69
27						
28						
29						
30						

Analysis of Purchase P102

DM6

	Liquor	Beer	Soft Drinks	Meat	Poultry	Veg.	Groceries	Butter	Eggs	Misc
1	146729	9450	53745	1098490		106621	202187			
2		1260				3694	1881			
3	457833	23560	79277	1825173		311716	415885	Analysis of		
4			43989			1150	3979	Purchases		
5		—								
6		50 —						1946 Plan		
7	1143889	54830	45865	3186274		521837	394964			
8			55173			697	2666			
9	631273	40321	64905	200197		463046	261299			
10	3794714	13[illegible]	59814	[illegible]		141124	140660			
11	838287	47712	49137	2547852						
12	—	—	—	—		37253	316403			
13			50674			3598	43554			
14	3217961	185133	501857	10699019		1938756	1409674			
15			55—	171640						
16				2500						
17	793788	40635	54310	1654310		290774	227871			
18			82270			14400	40921			
19	[illegible]	[illegible]	[illegible]	[illegible]		2079430	[illegible]			
20	493736	10870	20824	1134956		178178	123005			
21						2219	3841			
22	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]	[illegible]			
23	[illegible]	[illegible]	[illegible]	[illegible]		225987	[illegible]			
24	90758									
25	[illegible]									
26	4596243	230436	566806	13373153		2259827	1905886			
27										
28										
29										
30										

SHEET NO. _____ ACCOUNT NO. _____

TERMS)

RATING

CREDIT LIMIT

NAME Other Entertainment Expense

ADDRESS

BUSINESS

DMG 111

LINE	DATE 1948		ITEMS	FOLIO	✓	DEBITS	DATE 1948		ITEMS	FOLIO	✓	CREDITS
	Apr	30	Misc	7		225 -	Aug	31		OR 9		1000 -
	May	31	Costumes 6775	24		7000 -	1949 Mar	31	P & L	J 20		11637 35
	Sept	30	H Marton 6,725.00	92		1225 200 -						
	1949 Jan	31		13		7425 00 3590 28						
	Feb	28		114		95 28						
	Mar	31		115		1506 79						
		31	11637 35	"		20 -						
						12637 35						
						12637 35						12637 35

DM6

Analysis of Other Entertainment Expense

	Bohemia	Misc	Costumers	H Morton	Copa City	Beachcombers	Wm Morris
		225 –	6000 –	200 –			
	250 –	2595 –			300 –	350	9528
		9528					
		150679					
		20 –					
		444207					
		444207	6000 –	200 –	300 –	350 –	9528

SHEET NO. ____ ACCOUNT NO. 114

TERMS

RATING

CREDIT LIMIT

NAME Water, Ice and Refrigeration

ADDRESS

BUSINESS

DMG 114

LINE	DATE 1948		ITEMS	FOLIO	✓	DEBITS	DATE 1949		ITEMS	FOLIO	✓	CREDITS
	Apr	30		4		18.-	Mar	31	P-L	J 20		68493
	May	31		11		833.-						
	June	30	P	21		896-						
		30		"		264-						
	July	31		29		957.60						
		31		"		270.96						
	Aug	31	P	36		1,173.20						
		31		"		217.92						
	Sept	30	P	43		4,630.68						
	Oct	31		P48		855.48						
		"		P48		842.80						
	Dec	31		P.50		369.24						
	1949					54.00						
	Jan	1	To									
	Mar	31		52		97.20						
						68493						68493

SHEET NO. _____

TERMS

RATING

CREDIT LIMIT

ACCOUNT NO. DM 6 115

NAME Maintenance Engineer

ADDRESS 33 Piano

BUSINESS

LINE	DATE 1948		ITEMS	FOLIO	✓	DEBITS	DATE 194	ITEMS	FOLIO	✓	CREDITS
	Apr	30		7		50 —	Apr 2				9 40 35
		30		4		2 83 30	149				30 —
		30	31 Cr Ns	10		1 97 66	Mar				15 35 35
	May	31		11		1 38 [illegible]					
		31	55 olio PC	11		1 57 [illegible]					
	June	30	P.	21		1 61 8 61					
		30	1 51 00 5 PC	17		3 25 34					
			P	29		8 30 30					
	July	31				1 65 7 65					
		31	93 74 4	1		1 55 7 5					
			P	36	9 M	10 1 1 7 30					
	Aug	31				3 18.63					
		31	1 00 1318 PC	14		3 67 10					
	Sept	30	P	43		10 80 3 43					
		"				1 1 9 12 7					
			11,560.11	PC 15		3 55 66					
						12 3 50 36					
	Oct	31		CO 10		50 50					
		"		PC 16		2 15 67					
			12.385.41	P 48		55 9 13					
						13 1 7 5 61					
				P 49		40 032					
	Nov	30									
		"	12,353.68	PC 8		14 5 67 9 35					
						14 3 43 43					
	Dec	31		P 50		12500					
		"									
	1949		13 [illegible] 56	PCn		102 58					
	Jan 1	To				14 3 1 41					
	Nov	31		9		1 44 78					
		31	15 4.5 13	5		1 56 9 09					
						16 0 8 5 38					16 0 8 5 38

Analysis of Maintenance Expense

	Rubbish Removal	Washing & Clean. Supp.	Elec Bulbs	Elec Wiring & Repairs	Medical Supplies	Misc Repairs & Equip.	Kitchen Supplies	Air Conditioning	Fire Prevention	General
1	10-	400 04	39706	78497		500-		105605	145-	
2						45906				
3										
4	155-	27841	12719			66965				
5						52337				
6	140-	31233		85785		35+				33343
7				5160						27374
8	475-	41142	5254	28378		75244				35
9		14022		19720		15675				
10	140-	8470	5893			39948				64219
	6750	14866	5353	13978		36710				3500
11	14000	32374	41195	39760		344638	18-	105605	145	67917
12						35566				
13	76000	181062	69543	25775		382304	1800	105605	14500	67717
							5050			
14						31567				
15	17500	5825		2688		21500				3500
16	93800	186887	69543	26526		1251 71	6850	105603	14500	71217
						40022				
17						56795				
18						52198				
19						12500				
20						10258				
						1771382				
21						176142				
22	935-	186887	69543	26526		76142	6850	105605	145-	71217
23										
24										
25										
26										

Telephone and Telegraph

DM6-120

1948																							
Apr	30			✓				10	5	31	1948												
May	31			466	13	11		3	5	9	40	May	31	Summer	CR	6				20	67		
June	30			770	18	21		3	6	4	8	June	30	✓	✓	7				7	6		
July	31			99	77	29		3	5	1	8	July	31	✓	✓	8				9	8		
Aug	31			139	47	P 36		3	8	2	4	Aug	31			9				1	8		
Sept	30			1,616	12	P 43		4	6	3	0	Sept	30			11				2	7		
Oct	31			1,896	43	P 48		1	6	5	6	Oct	31			CR 12				3	6		
Nov	30			2,211	41	P 49		1	3	3	7	Nov	30			CR 12				4	3		
Dec	31			2,318	64	P 60		1	3	1	5	Dec	31			CR 12				4	5		
1948								2	3	4	8	1949								2	8		
Jan	1	To						2	3	3	8	Jan	30	3	P. L.	20				2	9		
Mar	31			2934	71	52		2	1	7	7	Mar	31							3	4		
								2	1	6	0												
								3	3	8	0									3	3	8	8
								3	3	8	0												

1061

DM6 121

Light. Heat Power

1948						1949				
Apr	30		4	231	40	Mar	31	P&L	120	7856 33
May	31		11	823	11					
June	30		21	1054	51					
July	31		29	1150	43					
Aug	31	P	36	1204	69					
Sept	30	P	43	3400	08					
Oct	31		P48	1093	16					
Nov	30		P49	4502	19					
Dec	31		P50	1046	30					
1949				5548	49					
Jan	1	To		1115	80					
Mar	31		S2	6664	27					
				410	43					
				7074	72					
				159	68					
				7234	40					
				621	93					
				7856	33					
				7856	33					7856 33

Rent

DM6 173

1945						1948				
Apr	30	Milmar		1	6000 -	Sept 30 1949		P-P	J 20	6000 00
	30			7	2000 -	Mar 31				40000 -
May	31			24	8000					
					4000 -					
June	30		C.D.	44A	10000 -					
July	31			62	8000					
Aug	31			77	4000 -					
Sept	30			92	4000 -					
Oct	31		36,0000	CA 106	2000 00					
	"		40,000	J 9	2000 00					
					4000 00					
					46000 -					46000 -

30

Interest Expense

DM6 - 126

1948					1949				
May	31	Interest Penalties	34	1175 39	May	31		11	50 79
June	30	" on Loans 12460 Cp	44A	369 55	June	30	Telephone	6	9 —
	30	159540 P	21	90 25	Sept	31	Int [illegible]	cans	5 79
				1685 19	1949				55 [illegible]
July	31	272540	Jr	1150 —	Mar	31	[illegible]	J 21	95 31
		2689.88		2785 19					2689 88
				2785 19					2785 19

General Expense

DM6 1257

P127

1948					1948				
		Forward		4338.47			Forward		911.42
Nov	30		CD110	52.35	Nov	30	Mess & Repairs	Ch.	1949
	"		P49	1.69		"		P49	58.00
	"	3,873.03	Pc8	469.43	Dec	31		CD111	9 88 91
				4 86 [illegible]	1949				38.00
Dec	31		~~CD111~~	~~[illegible]~~	Mar	31	P & L	J21	10 13 91
	"								6999.44
	"	Bank Charges	CD111	18.66					
	"	Charge Exp 4,567.69	CD111	700.00					
1949				5 580.60					
Jan	31	X Mess gifts	113	250.-					
	31	Misc	"	751.33					
Feb	28		114	452.02					
Mar	31	6821.88	115	800.84					
	31	6999.44	118	7 834.79					
				177.56					
				8012.35					8012.35
				8012.35					

1948						
Apr	30		7			50 65
	30	Freight Exp.	10			3 94
						53 60
May	31		24			65 77
	31		11	⊗		96 25
	31	Sound System	"			1850 -
	31		"			62 37
	31	Bar Exp	"			377 -
						3105 08
June	30	Bank charges	CD 44A			109 77
	30	Misc	P 21			28 -
	30		PC 12			254 80
	30		"			5 95
						9036 00
July	31	Bank Charges	62			153 12
	31		P 13			2 25
	31		"			6 05
						3065 02
Aug	31		CD 77			113 63
	31	Bulbs	P 36			58 93
	31	Clean	"			84 70
	"	Garbage Removal	"			140 -
	"	Exterminating	"			35 -
	"	Maint 3197 98	"			4 15
						3581 43
Sept	30	Misc.	92			88 94
	"	Garbage Removal	P 43		F	140 00
	"	Exterminating	"			323 72
	"	Misc 3183 26	PC 15			40 59
						4094 68
Oct	31	Gen Exp	CR 12			15 00
	"		CO 106			128 48
	"		PC 16			1 20
	"					6 25
		3427 05				92 86
						1333 07

1948		General Expense				
		P/27				
Aug	3		CR	9		4 82
	31	Lions	L.P	1151	✓	318 63
						323 45
Sept	30	E. Quain	J.5	⊗		96 25
	30	"	J5	×		28 -
	30	Contra	✓		(F)	463 72
						911 42

DM 6

SHEET NO. _____ ACCOUNT NO. DM6 128

TERMS

RATING

CREDIT LIMIT

NAME Miscellaneous Taxes.

ADDRESS

BUSINESS

VERNON LINE	DATE	ITEMS	FOLIO	✓	DEBITS	DATE 1949	ITEMS	FOLIO	✓	CREDITS
	May 31		24		27 50	Mar 31	P. L	21		~~[illegible]~~
	June 30		44		32 -					
	Sept 30		J		1098 05	31	P. L	21		1369 80
	Oct 30		✓		1350 -					
	Nov 30		✓		307 30					
	1949 Mar 31		J	19	1270 85					
					987 95					
					1369 80					1369 80

Analysis of Taxes DM6 P128

	1948				F.O.A.	State Unemp	Federal Unemp	State Franchise		Misc
1			Transfer					32 00		27 50
2	Sept	30		J7	3281 99	2000 00				
3		"		J7		1000 00				
						4705 06				
4	Oct	31		J9	3281 99	7705 06		32 00		27 50
						1350 00				
5	Nov	30		J11	3281 99	9055 06		32 00		27 50
					83 05	224 25				
6					3365 04	9279 31		32 00		27 50
7					3365 04	9279 31		32 —		27 50
8										
9										
10										
11										
12										
13										
14										
15										
16										
17										
18										
19										
20										
21										
22										
23										
24										
25										
26										

Officer's Salaries

DM6 132

1948						1949				
July	31	Jan. 1 to Apr 30	17x250	J2	10750 —	Mar	31	P & L	J21	19750 —
		May 1 to July 31	13x500 —							
Aug	31	Aug	5x500 —	J4	2500 —					
Sept	30	Sept.	4x500	J6	13250					
1949					2000 00					
Jan	31			J14	15250 00					
					4500 —					
					16750					
					19750 —					19750 —

Wm. Mills

With Tax.

Jan. 1 - Mar. 31	483.60
Apr. 1 - June 30	753.60
July 5 - Sept. 30	873.60
	2,110.80

SHEET NO. _____ ACCOUNT NO. JM6 135

TERMS

RATING

CREDIT LIMIT

NAME Bad Debts

ADDRESS

BUSINESS

DATE 1948		ITEMS	FOLIO	✓	DEBITS	DATE 1948	ITEMS	FOLIO	✓	CREDITS
[illegible]	31		J2	2	2990.00	Dec 31 1949		CR.13	1	100.00
1949	"	2974.65	J13		8465	Mar 31		J16	2	2990-
Jan	31	Transf: L.R.		1	3077.65	31		15		16-
Mar	31	3074.65	J16		100- 3177.65	31	P & L	J21		3106
	31	Bad checks	17		194510					6101.45
	31	Cash Advances	"		2371.40					
	31	Tips to Waiters	"		1600-					
	31	6101.45	"		3850					
					7789					
					9207.45					9207.45

SHEET NO.

TERMS

RATING

CREDIT LIMIT

DM 6/36
ACCOUNT NO.

NAME Depreciation Expense

ADDRESS

BUSINESS

DATE	ITEMS	FOLIO	✓	DEBITS	DATE	ITEMS	FOLIO	✓	CREDITS
1949					1949				
Mar 31		J 19		7104	Mar 31	P. & L.	J 21		383924
31		J 19		376750					
				383924					383924

	General Debit		30 Sept 48		General credit
	2600.00	(129)	Legal and Accounting J. B. Hoffman (to accrue accounting services from April 1, 1948 to Sept 30, 1948)	(60)	2600.00
	6000.00	(75)	(2) Loans and Exch. Mulmar Rent Expense (to adjust rent exp. a/c)	(123)	6000.00
	3281.99	(129)	(3) Federal Old Age Tax		
	(2000.00)	(129)	New Jersey Unempl Ins Federal Old Age Tax Payable (to accrue federal payable as of 9/30/48)	(53)	5281.99
	1866.10	(64)	Federal Old Taxes Payable Federal Withold Tax Payable (to accrue Fed tax payable)	(57)	1866.10
	1983.63	(107)	Entertainment Wages Accrued Payroll (to adjust)	(59)	1983.63
	4705.06	(128)	New Jersey Unempl Ins Tax N. J. Unempl Ins Payable (Old Tax Fund) (to accrue N.J. Payable)	(65)	4705.06
	(1000.00	(128)	New Jersey Unempl Ins Tax N. J. Unempl Ins Payable (to accrue tax payable)	(54)	1000.00

DM6

8

September 1948

	General Debit			General Credit
	24 22 2 57	(61)	William Miller L&E Old Taxes paid - Federal (to adjust)	(64) 24 22 2 57
	10 757 70	(61)	William Miller L&E L&E - Wilmar (to adjust	(71) 10 757 70

Dec 31, 48 — UM 6

	General Debit				General Credit
			①		
1	12916.21	(52)	Accounts Payable - Old		
2	1031.89	(53)	Taxes Payable - Fed Unempl Ins		
3	596.28	(56)	- Cabaret		
4	83.90	(57)	Withholding Tax		
5	468.17	(61)	William Miller		
			TAXES PAYABLE NJUI / FORB	(54) (53)	623764 / 46817
6			Accounts Payable Old	(52)	804907
7			William Miller	(61)	250.04
8			Old Taxes - Paid Federal	(64)	5292.00
9			Old Taxes - State of N.J.	(65)	1199.53
10			(to adjust old liability)		
11			②		
12	300.00	(60)	Accounting Exp. Payable		
13	170.35	(134)	Commissions on Sales		
14			Accounts Receivable	(6)	446.65
15			Cash Advances	(70)	23.70
16			(to adj. a/c rec & payable expense)		
17			③		
18	1050.00	(129)	Accounting Expense		
19			Accounting Expense Payable	(60)	1050.00
20			(to accrue accounting expense		
21			to March 31, 1949)		
22			④		
23	1375.06	(6)	Accounts Receivable		
24			Sales	(100)	1375.05
25			(to adjust a/c rec. control)		
26			⑤		
27	1615.00	(100)	Sales		
28			L & E - Cash Advance	(70)	1615.00
29			(to adjust L & E - Cash adv.)		
30					

DM 6

October 31, 1948

General Debit	#			General Credit
		(6)		
278568	(110)	Entertainment Contracts Deposits as Security (to record ADDR Security, partly used to pay Jack Cole & Dancers) (7)	(5)	278568
400000	(122)	Rent Expense Accrued Rent Payable (to record rent due, not paid) (8)	(60A)	400000
135000	(129)	New Jersey State Unempl. Ins. Tax William Miller (to show correct liability) (9)	(61)	135000
1300000	(110)	Other Income Deferred Income 1949 Season (to record unrealized income)		1300000

November 30, 1948 DM6 P11

General Debit		Adjusting Entries		General Credit
		①		
8305	(120)	F.O.A.B. Tax		
		F.O.A.B. Tax Payable	(53)	8305
		(to accrue employer 1% Sat. Nov 1948)		
		②		
224.25	(129)	New Jersey Unempl. Ins.		
		New Jersey Unempl. Ins. Pay.	(54)	224.25
		(to accrue employer 2.7% Sat. Nov. 1948)		
		③		
2785.68	(57)	Accrued Payroll		
		Entertainment Contracts: Jack Cole Dance	(110)	2785.68
		(to correct amount charged to exp. a/c twice)		
		④		
689.50	(70)	Show Tabs and a/c Rec.		
		Accounts Receivable Control	(6)	689.50
		(to transfer)		
		⑤		
6017.35	(72)	Loans and Exch. #1-13		
		Accounts Receivable Control	(6)	6017.35
		(to transfer)		
		⑥		
4750.00	(79)	Loans and Exch.		
		William Heller	(61)	4750.00
		(to close L&E a/c)		
		⑦		
2370	(78)	Loans and Exch. Cash Adv.		
		William Heller, pers.	(61)	2370
		(to show correct bal.		

DM6 P1

General Debit	Adjusting Journal Entries	General Credit
76525	(8) (61) William Miller A/c Receivable contr (to adj.)	(6) 76525
600.00	(9) (7A) N.Y. Checks Accounts Receivable (to adj)	(6) 600.00
160.00	(10) (6) Accounts Receivable Loans and Exch (to close)	(70) 160.00
43.00	(11) (6) Accounts Receivable William Miller (to close)	(61) 43.00
327.35	(12) (61) William Miller Accounts Receivable (to close)	(6) 327.35
2990.00	(13) (133) Bad Debts A/c Receivable (to charge off.	(6) 2990.00
1965.25	(14) (51) A/c Payable Accounts Receivable (to transfer)	(6) 1965.25

Nov 30, 1948 DM 6 P13

	General Debit		Adjusting Journal Entries		General Credit
1			(13)		
2	2521.40	(61)	William Miller ~~W Check~~		
3			W Check	(70)	2521.40
4			(to transfer)		
5			(14)		
6	1600.00	(61)	William Miller		
7			Cash Ad.	(70)	1600.00
8			(to transfer)		
9			(17)		
10	84.65	(135)	Bad debts		
11			William Miller	(61)	84.65
12			(to transfer)		
13					
14					
15					
16					
17					
18					
19					
20					
21					
22					
23					
24					
25					
26					

January 1949 DM6 P14

500-	101	Other Income Defend Income To correct Oct 31st Entry	61B	500-	
27000-	61	Defend Income Wm Miller - Special Transfer (For Fly Train)	66	27000-	
4500-	13	Officers Salaries Wm Miller To credit the latter with Salaries as follows: October 1948, 5X500- 2500- Nov. 4X250- 1000- Dec 4X250 1000- 4500-	61	4500-	
600-	6	Accounts Rec Loan Exchange To reverse entry on page 12	7A	600-	
252140	7A	Loan Exchange William Miller To reverse entry on page 13	61	252140	

January 1949 DM 6 P5

1			2370		61	William Miller		
2						Loan Explorer	7B	2370
3						To reverse entry on page 11.		
4								
5								
6			1600-		7B	Loan Explorer		
7						William Miller		1600-
8						To reverse entry on page 12.		
9								
10			1615-		7C	Loan Explorer		
11						Sales	10	1615-
12						To reverse entry on page 9.		
13								
14			68950		6	Accounts Rec		
15						Loan Explorer	7D	68950
16						To reverse entry on page 11.		
17								
18			160-		7D	Loans Rec		
19						Accounts Receivable	6	160-
20						To reverse entry on page 12.		
21								
22			60735		6	Accounts Rec		
23						Loan Explorer	7E	60735
24						To reverse entry on page 11.		
25								
26			4750-		61	William Miller		
27						Loan Explorer	7E	4750-
28						To reverse entry on page 11.		

16/

Mar 31, 49

DM6 P.16

44665	6	Accs. Rec.			
	129	Legal & Accounting	129	44665	
		To reverse entry on P.9			
		31			
76525	6	Accs. Receivable			
		Wm. Miller	61	76525	
		To reverse entry on P.12			
		31			
32735	6	Accs. Receivable			
		Wm. Miller	61	32735	
		To reverse entry on P.12			
		31			
2990-	6	Accs. Receivable			
		Bad Debts	135	2990-	
		To reverse entry on P.12			
		31			
196525	6	Accs. Receivable			
		Accs. Payable	51	196525	
		To reverse entry on P.12			
		31			
43-	61	Wm. Miller			
		Accs. Receivable	6	43-	
		To reverse entry on P.12			
		31			
194510	135	Bad Debts			
		Accs. Receivable	6	194510	
		To write off uncollectable			
		Acc.			

per schedule & work sheets

March 31 1949

1			237140		135	Bad Debts		
2						L-E - N.B. Chks.	7A	237140
3						To write off bad checks		
4						31		
5			1600-		135	Bad Debts		
6						L-E. Cash Adv.	7B	1600-
7						To write off uncollectible loans.		
8						31		
9			3850		135	Bad Debts		
10						L. E. Tips Advanced to Waiters	7C	3850
11						To write off tips advanced to		
12						waiters that cannot be col-		
13						lected from customers		
14						L. Bays 3.50		
15						Gerwitz 12.-		
16						Haskell 5.-		
17						R. Marks 3.-		
18						B. D. Stein 5.-		
19						W.B. Steiner 5.-		
20						38.50		
21						31		
22			7780		135	Bad Debts		
23						L. E. - Sales	7D	7780
24						To write off the following		
25						accts. Lou Bacon DR. 80.-		
26						Radin CR. 2.20		
27						77.80		

18/

March 31, 1949 DMG 18

6000.-	61	Wm. Miller Loans - Exchanges To charge Mr. Miller with this amount which he presumably loaned from Markovitch Ent. during 1946.	75	6000-	
		31			
1075770	75	L. E. Milmar Wm. Miller To reverse entry on P. 8	61	1075770	
		31			
16	75	L. E. Elobarlyn Bad Debts To write off Elobarlyn acc.	135	16-	
		31			
17756	127	General Expense Accrued Payroll To close out unaccountable balance in Acc. P.R. account	59	17756	
8500 -	61	Deferred Income Ely Quain This amount was advanced by the latter and credited to former.	66	8500-	

March 49 DMG P19 19

3000 –	61	William Miller Concessioner Concessioner paid this amount to Bill Miller	61	3000 –	
7174	136	Depreciation Expense F & F Reserve for dep. 10% on Cost 47174	10	7174	
3767.50	136	Depreciation expense Improv. Reserve for depr. To write off improvements and kitchen wars over a five (5) year period of lease Improvements 28895 Kitchen wars 1478103 4) 1506998 3767.50	13	3767.50	
98795	128	Taxes Fed. Unemp tax payable Unemployment tax for 1948 1st quarter payroll 428809 2nd " " 11909427 3rd " " 16076465 4th " " 4517059 32931760 3/10 of 1% – 98795	56	98795	
7829.19				7829.19	

Mar 49 DM 6 P20

1203176	8	Inventory - New		
99338438	100	Sales		
3552304	101	Other Income		
14512	103	Short and Over		
488298	63	Net Loss For The Year		
		Inventory - Old	8	3471369
		Purchases	102	28046241
		Wages - Dining Room	104	9392117
		" Kitchen	105	7428429
		" Maint & Police	106	2277421
		" Entertainment	107	1175397
		" Banquet	108	1400 -
		" Office	109	1174303
		Entertainment Contracts	110	[illegible]
		Other Entert. expense	111	1163735
		Publicity & Adv.	112	4201233
		Laundry & Linens	113	1185561
		Water, Ice & Refrig	114	684932
		Maint. & Repairs	115	1529513
		Flowers, Plants & Decor.	116	24650
		Menu printing	117	433014
		Postage	118	27346
		Telephone & Tel	120	293471
		Light Heat & Power	121	785633
		Fuel	122	265263
		Rent	123	40000 -
		Insurance	124	632199
		License & permits	125	2975 -
[illegible]				[illegible]

1941

March 31, 1949 DM 6 21

	Forward		7303094
	Interest expense	126	268988
	General "	127	6999.44
	Taxes	128	1369180
	Legal & Account	129	315535
	Contributions	131	585.50
	Officer's Salaries	132	19750-
	Office supplies	133	982.46
	Commission on sales	134	3167.91
	Bad debts	135	610145
	Depreciation expense	136	353924
	To close the accounts for the fiscal year ended March 31, 1949.		105399377
105399377			105399377

DM 6 P.22

5000	10	Other Income Deferred Income To transfer payment from concessionaire 31	130	5000
2000	7	Loans and Exchanges Deferred Income To transfer payment made by concessionaire 31	130	2000
5000	62	Key Quain Deferred Income To Transfer 31	130	5000
10000	7	L. E. E. Quain To Transfer 31	62	10000
278-60	110	Schedule Ent Contracts Adjustment to surplus To transfer and cancel a/c Pay to D. Arden	61A	278-60

Transferred to New Mod

Exhibit DM-14

(Photostat)

(Opposite) ☛

First National Bank. Fort Lee, N. J. [redacted]

TLESS FLAT OPENING LEAF PRINTED IN U.S.A.
FORM 88P—1367—1

1946				1946			
May 31		C-1	10000 -	May 31		C-2	7[illegible]1212
July 31		C-5	1086667	June 30		C-4	261917
Aug 31		C-7	500 -	July 31		C-6	1048667
Sep 30		C-9	3600 -	Aug 31		C-8	393145
Oct 31		C-11	739346	Sep 30		C-10	366028
Nov 30		C-13	700 -	Oct 31		C-12	361115
Dec 31	[illegible]	C-15	12690 -	Nov 30		C-14	414398
				Dec 31		C-16	904672
				1947 Jan 31		C-18	14800
				Mar 31	Balance	✓	24059
			4506013				4506013
1947 April 1	Balance	✓	24059	1948 March 31		C-22	5216553
1948 Mar 31	34040	C-21	5226534	31	Balance	✓	34040
			5250593				5250593
1948 Apr 1	Balance	✓	34040	1948 Sept 30		CD2	4515631
Sept 30		CR1	4481591				
			4515631				4515631
			4515637				

Accounts Receivable [redacted]

ESS FLAT OPENING LEAF PRINTED IN U.S.A.
FORM 88P-1367-1

1946				1946			
Dec 31	Bill Mitchell Riviera 1513933	J-2	40000 -	May 31		ch 1	10000 -
Jan 31	Oil 1528133	C-18	4014800	July 31		ch 5	1066667
				Aug 31		ch 7	50000
				Sep 30		ch 9	350000
				1947 Mar 31	Balance	✓	1528133
			4014800				4014800
1947 Apr 1	Balance	✓	1528133	1948 Mar 31		J 3	1226534
				31	Balance	✓	301599
			1528133				1528133
1948 Apr 1	Balance 2,700.08	✓	301599	1948 Apr 30		cr 1	15201
Oct 31		J 5	400000			cr 1	16570
			701599				31571
				Oct 31		J 5	270008
				1949 Mar 31		J 6	301599
				31	Balance	✓	1000 -
			701599				701599
1949 Apr 1	Balance	✓	1000 -	1949 Apr 1	Transf	N.L. ✓	1000 -

DM 1.4

Loans Payable S. Marcus

FLAT OPENING LEAF — PRINTED IN U.S.A.

1947 Mar 31	Balance	✓	26677 52	1946 Oct 31		Cl 11	7000 -
				Nov 30		Cl 13	700 -
				Dec 31		Cl 1	12100 -
				1947 Jan 30		J 2	19800
				Feb 28		J 2	344419
							343333
			26677 52				26677 52
1948 Mar 31		J 3 A	5000 -	1947 Apr 1	Balance	✓	26677 52
31	Mocambo	J 4	5000 -	1948 Mar 31		21 A	5000 -
31	Balance	✓	21677 52				31677 52
			31677 52				31677 52
1948 Sept 30	St. Wilson	C01	500000	1948 Apr 1	Balance	✓	21677 52
	Peace Products	C01	1025 56	Oct 31	15,651.96	Chr	44 53
		C01	6025 56		15,607 43		21722 05
			44 53		12,651.96	J 5	86 710
Oct 31		① C6	607 00	Oct 31			2589 15
			300 00	1949 Mar 31	Cap. Stock 19,[illegible]	J 7	62500 -
			707 00		6581898		85089 15
1949 Mar 31		J 5	370 00				
		J 7	1170 17				
31	Balance	✓	7500 -		22589 15		
			13270 17		8770 17		
			65818 98		15,818.98		
			85089 15				85089 15
1949 Apr 1	Transf	M.L. 6	65818 98	1949 Apr 1	Balance	✓	65818 98

SHEET NO. _____

ACCOUNT NO. 12

RATING

BUSINESS

CREDIT LIMIT

NAME Loans Payable

ADDRESS

[redacted]

DATE	ITEMS	FOLIO ✓	DEBITS	DATE	ITEMS	FOLIO ✓	CREDITS
1948 Mar 31		3	9265 34	1948 Mar 31		21	7265 34
Mar 31		6	3000 —	1948			
31	Balance	✓	11000	Nov 5		7	3000 —
				Dec 6		"	3000 —
				1949 Jan 4		"	3000
				28		"	2000 —
				Mar 4		"	3000 —
			14000 —				14000
1949 Apr 1	Transf N.L.	9	11000 —	1949 Apr 1	Balance	✓	11000 —

Mortgage Payable

[redacted]

1946				1946				
July 29		C-6	5000 -	May 5	Riviera	277500 - 277500	J-2	300000 -
Aug 30		C-8	2500 -					
Sept 30		C-10	2500 -					
Oct 31		C-12	2500 -					
Nov 30		C-14	2500					
Dec 31		C-16	2500 -					
1947			1750					
Jan 30		J-2	2500					
Feb 28		J-2	2500 -					
Mar 31	Balance	✓	2250 -					
			277500					
			300000 -					300000 -
1947				1947				
Apr 30		22	2500 -	Apr 1	Balance	277500	✓	277500 -
May 31		✓	2500 -					
June 30		✓	2500 -					
July 1		✓	2500 -					
Aug 1		✓	5000 -					
Sept 1		✓	5000 -					
Oct 31		✓	5000 -					
Nov 30		✓	5000 -					
Dec 31		✓	5000 -					
1948								
Jan 5	Note	✓	2500 -					
Mar 5	✓	✓	2500 -					
31	Balance	✓	237500 -					
			277500 -					
								277500 -
1948				1948				
Sept 30		C-2	30000000	Apr 1	Balance	207,500	✓	237500 -
Nov 1		8	1500 -					
Dec 1		"	1500 -					

Mortgages Payable

[redacted]

1949						1949			
Jan 1	Forward	✓		33000		Mar 31		200000	231500
31			8	1500				J 7	7500
Mar 1			4	1500					
31				1500					
31	Balance	✓		207500					
				245000					245000
1949						1949			
Apr 1	Forward		CR 7	207500		Apr 1	Balance	✓	207500

Interest on Mortgage Payable.

[redacted]

1946				1949			
July 31		e-6	386667	Mar 31	P&L	J1	1057752
Aug 30		e-8	98333				
Sep 30		e-10	97500				
Oct 31		e-11	96667				
Nov 30		e-12	95833				
Dec 31		e-16	950 -				
1947			1700 -				
Jan 30		J-2	94419				
Feb 28		J-2	93333				
			1057752				1057752
1948				1948			
Mar 31	Mortgage	22	881108	Mar 31	P&L	J4	967818
31	Loans	J3	86710				
			967818				967818
1948				1949			
Oct 30	Mortgage	co2	709168	Mar 31	P&L	J8	1274931
1949	Loan	co2	9600				
Mar 31	Loans		718768				
31	Mortgage	7	30333				
31	Loans	8	345835				
			179995				
			1274931				
			1274931				1274931

Capital Stock Issued & Outstanding

[redacted]

1946 Mar 31	Treasury Stock	J 7	62500 —	1946 May 5	Journal	N.L. 12		125000 —
Apr 1	Journal	N.L. 11	125000 —	Apr 1				62500 —

Capital Stock Authorized

[redacted]

1946 April 1	Unissued	J 1	125.0000	1946 April 1	Authorized	J 1		1250000

NTLESS FLAT OPENING LEAF PRINTED IN U.S.A.

Surplus U/C [redacted]

DM 1.4

21

1947 Mar	31	Loss 3/31/47	J 1	40560	1948 Mar	31	Balance	✓	152569
1948 Mar	31	Loss 3/31/48	✓	112009					
				152569					152569
1948 Apr	1	Balance	✓	152569	1949 Mar	31	Balance	✓	431289
Mar	31	Loss 3/31/49	J 8	278720					
				431289					431289
1949 Apr	1	Balance	✓	431289	1949 Apr	1	Loss	NL 13	431289

Exhibit DM-15

(Photostat)

(Opposite) ☛

15

Cash Receipts December 1946

DM15 - P. 15 CASH RECEIPTS DECEMBER 1946

	1946		Cash	S. Marcus Loans	
1	Dec 4	S. Marcus	3500	3500	1
2	28	S. Marcus	5100	5100	2
3	31	S. Marcus	3500	3500	3
4			12100	12100	4
5			1	10	5
6					6

13.

Cash Receipts November 1946

DM15 - P. 13 CASH RECEIPTS NOVEMBER 1946

	1946		Cash	Loans' Endorsers	
1	Nov 13		700	700	1
2			700	700	2
3			1	10	3
4					4
5					5

Cash Receipts [illegible] OCTOBER 1946

DM15 - P. 11 CASH RECEIPTS

	1946		Cash	Loans S. Marcus	General Amount	Item	
1	Oct 1	S. Marcus	3500	3500			1
2	30	S. Marcus	3500	3500			2
3			39346		39346	Refund [illegible]	3
4			739346	7000	39346		4
5			1	10	40		5
6							6

DM 15 [redacted]

Cash Receipts Fiscal Year Ending March 31, 1948

		Cash	Rent	General
1947 June 2	Riviera Rent	2000 -	2000 -	
30	✓ ✓	2000 -	2000 -	
Jul 31	✓ ✓	16000 -	16000 -	
Jul 30	✓ ✓	8000 -	8000 -	
Sept 30	✓ ✓	8000 -	8000 -	
Oct 31	✓ ✓	4000 -	4000 -	
	Loans Payable S. M. 5000 - contra	1226534		1226534
		5226534	40000 -	1226534
		(1)	(31)	
	S. Morris			(10) 5000 -
	Misc			(12) 726534

DM 1.5

[redacted] Cash Disbursements. Fiscal Year ending March 31, 1948 22

	1947			Cash	Amortization of Mtge	Interest on Mtge		General	
1	Apr	30	Michael Realty	3425 -	2500 -	925 -			
2	May	31	" "	3416 67	2500 -	916 67			
3	June	30	" "	3408 33	2500 -	908 33			
4		30	Lackawanna Warehouse Int	16 75		16 75			
5	July	1	Michael Realty	3400 -	2500 -	900 -			
6		18	Phila Agency Insur.	2220 -			40	Insurance	2220 -
7		31	State of N.J. Franchise Tax	85 75			41	Franchise Tax	85 75
8		31	J.B. Hoffman	500 -			43	Auditing	500 -
9	Aug	1	Michael Realty	5891 67	5000 -	891 67			
10		10	Lackawanna - Warehouse	28 70			45	Rent Storage	28 70
11		12	Modern Bank. Int	45 -		45 -			
12		12	Time Clocks	120 -			45	Misc Exp.	120 -
13	Sept	1	Michael Realty	5875 -	5000 -	875 -			
14		1	Sidney Swordel - Legal	300 -			43	Legal	300 -
15		1	Sidney Swordel "	100 -			43	"	100 -
16	Oct	31	Michael Realty	5858 33	5000 -	858 33			
17	Nov	30	Michael Realty	5841 -	5000 -	841 -			
18	Dec	30	Michael Realty	5825 -	5000 -	825 -			
19	1948 Jan	31	Michael Realty	808 33		808 33			
20	Feb	5	Michael Realty (Paid by S.M.)	2500 -	2500 -				
21	Mar	5	Michael Realty (" ")	2500 -	2500 -				
22				[illegible]	[illegible]	[illegible]			[illegible]
23				52165 53	40000 -	8811 08			3354 45
24									
25				(1)	(11)	(12)			✓
26									
27									
28									
29									

DM 1.5 [redacted]

Cash Receipts April 1, 1948 to September 30, 1948

1948		P&B 42th Cash	P&B Bankhdg.	Rents	Interest	General		
Apr 2	Bill Miller's Riviera, Inc.	2000 00		2000 –				
May 3	Bill Miller's Riviera, Inc.	2000 00		2000 00				
May 15	Bill Miller's Riviera, Inc.	2000 00		2000 00				
23	" " "	2000 00		2000 00				
31	" " "	2000 00		2000 00				
June 8	" " "	2000 00		2000 00				
14	" " "	2000 00		2000 00				
22	" " "	2000 00		2000 00				
July 1	" " "	2000 00		2000 00				
6	" " "	2000 00		2000 00				
16	" " "	2000 00		2000 00				
24	" " "	2000 00		2000 00				
30	" " "	2000 00		2000 00				
Aug 13	" " "	2000 00		2000 00				
21	" " "	2000 00		2000 00				
Sept 7	" " "	2000 00		2000 00				
June 9	Insurance Refund	152 01				Inv.	152 01	
July 20	Exchange	2500 00				Cash	2500 00	
Sept 17	Exchange	10000 00				Cash	10000 00	
Sept 20	Bill Miller's Riviera		2000 00	2000 00				
30	Bill Miller's Riviera		2000 00	2000 00				
27	Public Nat'l Bank Loan 12/24/48		19848 33		151 67	Bank Loan	20000 00	
		44652 01	23848 33	36000 00	151 67		32652 01	
	S.M. cash off.	163 90				L.P.	163 90	
		44815 91	23848 33	36000 00	151 67		32815 91	
		44815 91	23848 33	36000 00	151 67		32815 91	

DM 1.5 [redacted]

Cash Receipts - November 1948 - 3/31/49

			Public N.B. Bldg	Interest	General Ledger Account	General Ledger Amount
Nov 5		12	300000			3000
	December					
6		12	3000			3000
24	Note discounted	11A	19850..	150		20000
	January 1949					
4		12	3000-			3000
25		12	2000			2000
	March 1949					
4		12	3000-			3000-
21	Insurance - Greenwald	40	11008			11008
24	Note discounted	11A	19846 67	153 33		20000-
			53806 75	303 33		54/1008
			(1A)	(42)		(✓)

31

[redacted] Cash Disbursements - April 1, 1948 to Sept 30, 1948

Check No.	1948		Net Cash	Interest	Premium	General Account	General Amount
1		April.					
2		Michael Realty Co. (Fee Lot)	808 33	808 33			
3		Michael Realty Co. (Mag. Lot)	791 67	791 67			
4		Michael Realty Co. Adv.	791 67	791 67			
5		Examined.	495 67			Ins. Fire (11)	495 67
6		Conklin	602 11			Ins. Fire (12)	602 11
7	May						
8		Michael Realty Co. Adv.	791 67	791 67			
9		Phileas Insurance	1000 00			Ins. Fire (13)	1000 00
10	June						
11		Michael Realty Co. June	791 67	791 67			
12		Phileas Insurance	1400 00			Ins. Fire (13)	1400 00
13		New Jersey State Tax Commission	116 12			St. Tax (14)	116 12
14	July						
15		Michael Realty Co. July	791 67	791 67			
16	Aug						
17		Michael Realty Co Aug	5791 67	791 67	5000 00		
18	Sept.						
19		Michael Realty Co. Sept.	5775 00	775 00	5000 00		
20		Boro of Fort Lee	59 30			Pr. Tax Ex. (9)	59 30
21		Boro of Fort Lee	5711 21			Pr. Tax Ex. (9)	5711 21
22		Boro of Fort Lee	772 66			Pr. Tax Ex. (9)	772 66
23		Bell Telephone Co. of N.J.	44 53				44 53
24		Exchange	2500 00			Exch. (7)	2500 00
25		Exchange	10000 00			Exch. (7)	10000 00
26		Interest - Sept.	9600	9600			
27		Jane Mayer - 1st Liquidation	5000 00			L.P. (15)	5000 00
28		Asset Products, Inc.	102556			L.P. (16)	102556

DM 1.5.

Cash Disbursements - October 1948

			Publisher N.B. B'klyn	Michael Realty Co Int on Mtge	Michael Realty Co Amortization	General Ledger Account	General Ledger Amount
1	Oct 1	Sam Marcus	✓ 300000			Amort.	3000 -
2							
3			3000 -				3000 -
4			✓				✓✓
5							
6							
7							
8							
9							
10							
11							
12							
13							
14							
15							
16							
17							
18							
19							
20							
21							
22							
23							
24							
25							
26							
27							
28							
29							

[redacted]

Cash Disbursement November 1948

		Public N.B. Ltd.	Michael Interest	S.M. Interest	General Ledger Account	Amount
1	Michael Realty Co	69167	69167			
2	Samuel Marcus	21233		62332	Amort. 11	1500 –
3		281449				
4	December 1948					
5						
6	1 Michael Realty Co	69167	69167			
7	1 Samuel Marcus	180166		30166	11	1500
8	Notes Payable	20000 –			11A	20000
9	January 1949					
10	3 Michael Realty Co	69167	69167			
11	4 Samuel Marcus	179666		29666	11	1500 –
12	31 Michael Realty	69167	69167			
13	31 Sam Marcus	179165		29165	11	1500
14						
15	March 1949					
16	1 Michael Realty	69167	69167			
17	Sam Marcus	178666		28666	11	1500 –
18	11 Insurance	88018			40	88018
19	Note paid	20000 –			11A	20000
20						
21		536384 8	345835	179995		483801 8
22						
23		(1A)	(42)	(42)		
24						
25						
26						
27						
28						

May

[redacted]

			18		
	425000	11	Land and Building		
			Mortgage Payable	11	300000
			Capital Stock Issued	20	125000
			To set up purchase of the Riviera with cash paid in adjusted to Capital Stock Issued to S. Marcus 12/31/46		
	40000	11	Bill Millers Riviera		
			Rent Income	31	40000
			To charge above account for Rent from May 1, 1946 to Dec 31, 1946 Eight months at $5,000 Jan 3, 1947		
	2500	11	Amortization		
	94419	42	Interest		
			L. Marcus	10	344419
			above paid to Michael Realty by S. Marcus Feb. 28, 1947		
	12500	11	Amortization		
	93333	42	Interest		
			L. Marcus	10	343333
			above paid to Michael Realty by S. Marcus		

		1675-	31	Depreciation Expense			
				Reserve for Depr.	7/6	1675-	
				2% reserved 10% on Fr. Fixt			
				equipment $10,000.00 and			
				3½% on buildings $6750			
		40000-	31	Profit			
		40560	31	Loss for the year			
				Insurance	40	57503	
				Taxes - Rates	41	13586	
				Water	41	10954	
				Interest on Mortgage	42	65952	
				Legal & Professional	43	8945	
				Depreciation Expense	44	16750	
		571560				571560	

1989a

Adjusting Entries - March 31, 1948 4

4121990				4121990
5000 -	10	Loans Payable - S Marcus		
		Loans Receivable - Mosaicks	3	5000 -
		To charge former with latter loan		
40000 -	31	Real Income		
112009	21	Loss for the Fiscal year 3/31/48		
		Insurance	40	6820 -
		Taxes	41	607321
		Interests	42	967818
		Legal & Auditing	43	1650 -
		Depreciation	44	16750 -
		General Expense	45	14870
8733999				8733999
8733999				8733999

Exhibit DM-16

MEMORANDUM OF AGREEMENT made in the Borough of Fort Lee, and State of New Jersey on this 23rd day of July, 1947, between MILMAR ESTATES, INC., with its principal office located at 18 East 42nd Street, Borough of Manhattan, City of New York (hereinafter called the Landlord), party of the first part, BILL MILLER'S RIVIERA, INC., with its principal office located at Fort Lee, New Jersey (hereinafter called the Tenant), party of the second part, and WILLIAM MILLER, residing at Fort Lee, New Jersey (hereinafter called Miller), party of the third part.

WITNESSETH:

WHEREAS, the Tenant has defaulted in the payment of its obligations under and pursuant to the Lease presently in existence between the Landlord and Tenant and has otherwise breached the said Lease, and

WHEREAS, Miller, who is the president of the Tenant and a stockholder in the said Corporation, has requested the Landlord to enter into a new Lease and to forego its rights and remedies existing under the Lease presently in effect, and

WHEREAS, the Landlord and Tenant and Miller desire to avoid any further controversies or disputes.

NOW THEREFORE, the consideration of One ($1.00) Dollar each to the other in hand paid, and for other good and valuable consideration, it is mutually agreed as follows:

1. Miller agrees to secure the cancellation of all of the outstanding stock of the Tenant and to secure the issuance by the Tenant of a similar amount of shares to Miller, which certificates shall represent fifty-one (51) per cent of the outstanding shares, and the other certificate shall represent forty-nine (49%) per cent of the outstanding shares. Marcus to cooperate in such cancellation.

Exhibit DM-16

2. Miller agrees that until the performance of all of the terms and conditions of this agreement, and the Lease between the Landlord and Tenant which shall be executed simultaneously herewith, that the Tenant will not issue any additional shares of any class, nor change or modify the class of stock or the capital structure of the Corporation without the written consent of the Landlord first had and secured.

3. Miller shall deliver to the Landlord duly endorsed in blank fifty-one (51%) per cent of the outstanding stock of the Tenant as security for the full and faithful performance of each and every term and condition of the Lease, which pertains to payment of rent, charges, insurance and including all sums due Marcowitz and Flobarlym, and note to Marcus, executed simultaneously herewith and also as security for the full and faithful performance of the terms of this agreement and any other agreement that may be entered into between the parties in connection with the property known as the RIVIERA located at Fort Lee, New Jersey. The Tenant agrees to deliver to the Landlord an exact copy of the Certificate of Incorporation and By-Laws, which Certificate of Incorporation and By-Laws shall be duly initialed on each page thereof by Miller as president of the Tenant.

4. The Tenant shall not adopt any By-Laws or amendment to the By-Laws of the Corporation without the written consent of the Landlord first had and secured, but such by-laws may be adopted if they do not conflict with this agreement.

5. The Tenant and Miller agree to secure the resignations of the directors and officers of the Corporation, representing 66⅔ of the stock, which resignations shall not be submitted to the Corporation, until such time as a default shall occur under the said Lease, as stated in Paragraph

Exhibit DM-16

3, or there shall be a breach of this agreement or any other agreement that may be entered into between the parties with respect to the RIVIERA located at Fort Lee, New Jersey.

6. The Landlord agrees to deliver the shares of stock received by the Landlord as security as aforesaid to ROBERT J. SCHWARTZ, as Escrow Agent, and also to deliver to said Escrow Agent the resignations of all of the officers and directors of the Tenant, limited to 66⅔, as stated above. Said Escrow Agent shall hold the said stock and resignations, in escrow, until such time as he shall be notified in writing that a default has occurred under the terms of escrow agreement, or under the terms of this agreement or any other agreement relating to the said property, and immediately upon receipt of such written notice, said Escrow Agent may without any further responsibility to either party deliver the stock and the resignations to the Landlord. Such stock may not be voted by Schwartz, until default occurs.

The stock which is placed in escrow may be substituted for other shares of like amount with the escrow agent, * * *

That the foregoing rights and remedies shall be in addition to any other rights and remedies which the Landlord may have by reason of any default which may occur under the Lease, this agreement or any other agreement with respect to the said property, and that Miller waives any right of notice under the Personal Property Law of the State of New Jersey, or under any laws thereto appertaining with respect to the said stock delivered as security as aforesaid, and the Landlord shall have the right to immediately transfer the said stock on the books of the Tenant in its own name, or in the name of its nominee.

Miller agrees that in the event of any default under the terms of the Lease, this agreement or any other agreement relating to the said property, and in order to induce

the Landlord to enter into the said Lease and this agreement, that he will not have or make any claim for any salary or other monies due from the Tenant, and that he will remove his person and possessions from the premises occupied by the Tenant within five days after receipt of a written notice from the Landlord of any default occurring under the Lease or this agreement or any other agreement relating to the said property.

IN WITNESS WHEREOF, the parties hereunto have affixed their signatures and the Landlord and Tenant have affixed their corporate seals as of the day and year first above written.

MILMAR ESTATE, INC.
[SEAL] by (sgd.) SAM MARCUS, Pres.
BILL MILLER'S RIVIERA, INC.
[SEAL] (sgd.) WILLIAM MILLER, Pres.
(sgd.) WILLIAM MILLER

Exhibit DM-18

July 27th, 1948

Mr. Bill Miller
c/o Bill Miller's Riviera
Ft. Lee, New Jersey

Dear Bill:

This is to substantiate our verbal understanding that you are hereby given a ten-day option in which to purchase my holdings of the Milmar Estates Inc., owners of the Riviera property for the sum of $125,000.00 payable $30,000.00 cash and the balance at $4,000.00 per month.

Exhibit DM-19

Inasmuch as I am dickering with other interested parties, I cannot make any more than a ten-day option at this price and this option expires midnight the 6th day of August, 1948.

Very truly yours

MILMAR ESTATES, INC.
SAM MARCUS

SM:m

Exhibit DM-19

August 26th, 1948

REGISTERED RETURN RECEIPT REQUESTED

Mr. Bill Miller
Bill Miller's Riviera
Fort Lee, New Jersey

Dear Bill:

As per your request for a statement of the amounts of money that you are in default, I am hereby listing same:

1. 13 payments of $500.00 each due as per agreement on your stock from June 1st..... $6,500.00

2. 3 Rental payments of $2,000.00 each..... 6,000.00
The lease calls for two weeks rental in advance and the rental to be paid each week. Under this arrangement, as of August 24th nineteen payments were to be made of which we have only received sixteen.

3. Unpaid Real Estate taxes as of date approximately $9,000.00 of which, according to our lease arrangements, you are to contribute 50%.. 4,500.00

Exhibit DM-19

4. Payment due to Flo Barlyn must be made immediately so that our stocks that they are holding as collateral can be released.

There are several additional payments to be made for which we will arrange a meeting of our accountants to settle on the amount due. In the meantime, I demand immediate payment of the above amounts on which there is no question.

Your prompt response to this demand is expected.

Very truly yours

MILMAR ESTATES, INC.
SAM MARCUS

SM:m

September 3rd, 1948

Mr. Bill Miller
Bill Miller's Riviera
Fort Lee, New Jersey

Dear Bill:

Regardless of pending negotiations, it is imperative that we do receive payments on account of rent.

This now makes four weeks in arrears and I must insist that we receive a check on account without further delay.

Very truly yours

MILMAR ESTATES, INC.
SAM MARCUS

SM:m

Exhibit DM-22

This exhibit is identical with Exhibit DME-5, which appears at page 138a herein where it is annexed to the opinion of the Court below, except for interlineation in Paragraphs 5 and 10, which appear in Exhibit DME-5 but not in Exhibit DM-22.

Exhibit DM-24*

(Photostat)

(Opposite) ☛

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*Appears in chronological sequence.

INDUSTRIAL
BANK OF COMMERCE
50 EAST 42nd STREET, NEW YORK

1-750
260

NEW YORK Oct 30 1946

PAY TO THE ORDER OF Milmar Estate Inc $3500.00

Thirty five Hundred 00/100 DOLLARS

COLLECTIBLE AT PAR THROUGH THE FEDERAL RESERVE BANK OF NEW YORK

NO. DM24 Sam Marcus

BANK OF COMMERCE
50 EAST 42nd STREET, NEW YORK

1-750
260

NEW YORK [illegible] 1946

PAY TO THE ORDER OF Milmar Estate Inc $2000.00

Two Thousand 00/100 DOLLARS

COLLECTIBLE AT PAR THROUGH THE FEDERAL RESERVE BANK OF NEW YORK

NO. DM24 Sam Marcus

INDUSTRIAL
BANK OF COMMERCE
50 EAST 42nd STREET, NEW YORK

H

1-750
260

NEW YORK Dec 27 1946

PAY TO THE ORDER OF Milmar Estate Inc $5100.00

Fifty one Hundred 00/100 DOLLARS

COLLECTIBLE AT PAR THROUGH THE FEDERAL RESERVE BANK OF NEW YORK

NO. DM24 Sam Marcus

INDUSTRIAL
BANK OF COMMERCE
50 EAST 42nd STREET, NEW YORK

H

1-750
260

NEW YORK [illegible] 1947

PAY TO THE ORDER OF Milmar Estate Inc $3500.00

Thirty five Hundred 00/100 DOLLARS

COLLECTIBLE AT PAR THROUGH THE FEDERAL RESERVE BANK OF NEW YORK

NO. DM24 Sam Marcus

DM 24

$3500.00/100 New York October 29 1946

On Demand after date, the promise to pay to the order of Sam Marcus Three Thousand Five Hundred and 00/100 Dollars payable at First National Bank Fort Lee N.J. value received

Due DM24 Milmar Estate Inc Sam Marcus

Milmar Estates Inc

PAY TO THE ORDER OF
BANK, BANKER
OR THROUGH
NEW YORK CLEARING HOUSE
OCT 31 1946
PRIOR ENDORSEMENTS
THE PUBLIC NATIONAL BANK
FORT LEE, N.J. 55-393
1-127

Milmar Estates Inc

FIRST NATIONAL BANK, FORT LEE, N.J.

BANK, BANKER, TRUST COMPANY
OR THROUGH THE
NEW YORK CLEARING HOUSE
DEC 5 48 1939
PRIOR ENDORSEMENTS GUARANTEED
THE PUBLIC NATIONAL BANK AND TRUST COMPANY
1-127

For Deposit
Milmar Estates Inc

OR THROUGH THE
NEW YORK CLEARING HOUSE
DEC 30 46 1393
GUARANTEED
THE PUBLIC NATIONAL BANK AND TRUST COMPANY
1-127

For Deposit Only
Milmar Estates Inc

OR THROUGH THE
NEW YORK CLEARING HOUSE
JAN 2 1947
ANY BANK
OR TRUST
PRIOR ENDORSEMENTS
THE PUBLIC NATIONAL BANK AND TRUST COMPANY
FORT LEE, N.J. 55-393
1-127

14

DEPOSITED TO THE ACCOUNT OF

Milman Estate Inc

WITH

The Public National Bank and Trust Company

OF NEW YORK

DATE 4/6 47 19

Subject to conditions on other side

	DOLLARS	CENTS
SPECIE		
BILLS	400	00
CHECKS	1200	00
	100	00
TOTAL	1700	00

LET US RENT YOU A SAFE DEPOSIT BOX

DM 24

DEPOSITED TO THE ACCOUNT OF

Milman Estate Inc

WITH

The Public National Bank and Trust Company

OF NEW YORK

DATE 4/24/47 19

Subject to conditions on other side

	DOLLARS	CENTS
SPECIE		
BILLS		
CHECKS	1 500	
	227	23
	172	23
		60
TOTAL	1787	33

LET US RENT YOU A SAFE DEPOSIT BOX

DM 24

DEPOSITED TO THE ACCOUNT OF

Milman

WITH

The Public National Bank and Trust Company

OF NEW YORK

DATE 3/5 1947

Subject to conditions on other side

	DOLLARS	CENTS
SPECIE		
BILLS	1100	
CHECKS		
TOTAL		

LET US RENT YOU A SAFE DEPOSIT BOX

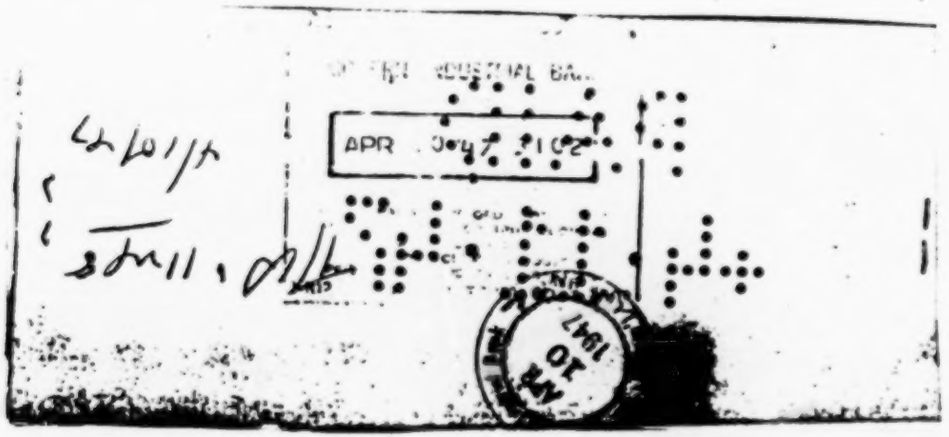
DM 24

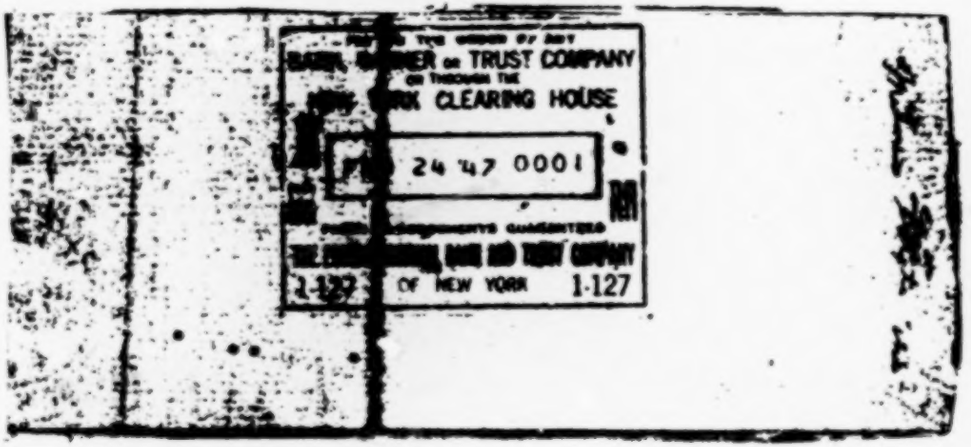
INDUSTRIAL BANK OF COMMERCE

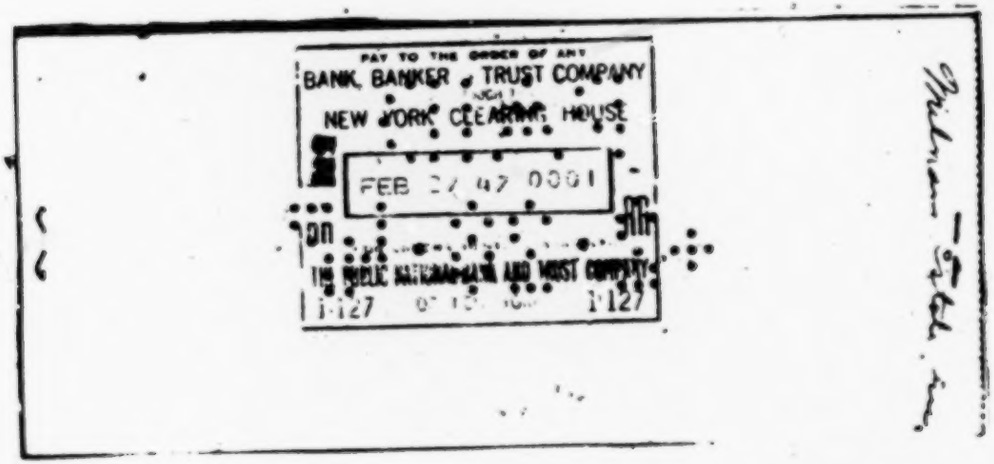
1-750 260

INDUSTRIAL BANK OF COMMERCE

1-750 260




TRUST COMPANY
CLEARING HOUSE
24 47 0001
1-127
OF NEW YORK
1-127


PAY TO THE ORDER OF ANY
BANK, BANKER & TRUST COMPANY
NEW YORK CLEARING HOUSE
FEB 24 47 0001
1-127
1-127

DEPOSITED TO THE ACCOUNT OF

Estate
Milman Realty Co

PRINT NAME

IN

The Public National Bank
and Trust Company
OF NEW YORK

DATE 9/2 19 47

Subject to conditions on other side

	DOLLARS	CENTS
SPECIE		
BILLS	1000	00
CHECKS	400	00
	200	00
	1	
	300	00
TOTAL		

DM 24

LET US RENT YOU A SAFE DEPOSIT BOX

---

c/c for Milman Estate

INDUSTRIAL BANK OF COMMERCE
59 EAST 42ND STREET, NEW YORK

NEW YORK 19 47

PAY TO THE ORDER OF Morgan Guaranty Trust Co. of N.Y. $ 1000.00

Thirty Thousand Two Hundred and 00/100 DOLLARS

1-750
260

NO. DM 24

Allen Marcus

DEPOSITED TO THE ACCOUNT OF

[redacted]

PRINT NAME

IN

[redacted] National Bank
[redacted] Trust Company
OF NEW YORK

DATE 9/2 19 47

Subject to conditions on other side

	DOLLARS	CENTS
SPECIE		
BILLS		
CHECKS	2 000	00
	1 000	00
TOTAL		

LET US RENT YOU A SAFE DEPOSIT BOX

INDUSTRIAL BANK OF COMMERCE
59 EAST 42ND STREET, NEW YORK

NEW YORK 19 47

PAY TO THE ORDER OF Milman Realty Co $ 1000.00

One Thousand and 00/100 DOLLARS

NO. DM 24

Allen Marcus

DM 24

COUNT OF

PRINT NAME

IN

The Public National Bank
and Trust Company
OF NEW YORK

DATE 9/20 19 47

Subject to conditions on other side

	DOLLARS	CENTS
SPECIE		
BILLS	Pen. 100	00
CHECKS	1 000	00
	100	
	2 000	
TOTAL		

DM 24

LET US RENT YOU A SAFE DEPOSIT BOX

DEPOSITED TO THE ACCOUNT OF

Milman Estate Co

WITH

The Public National Bank
and Trust Company
OF NEW YORK

DATE 19

Subject to conditions on other side

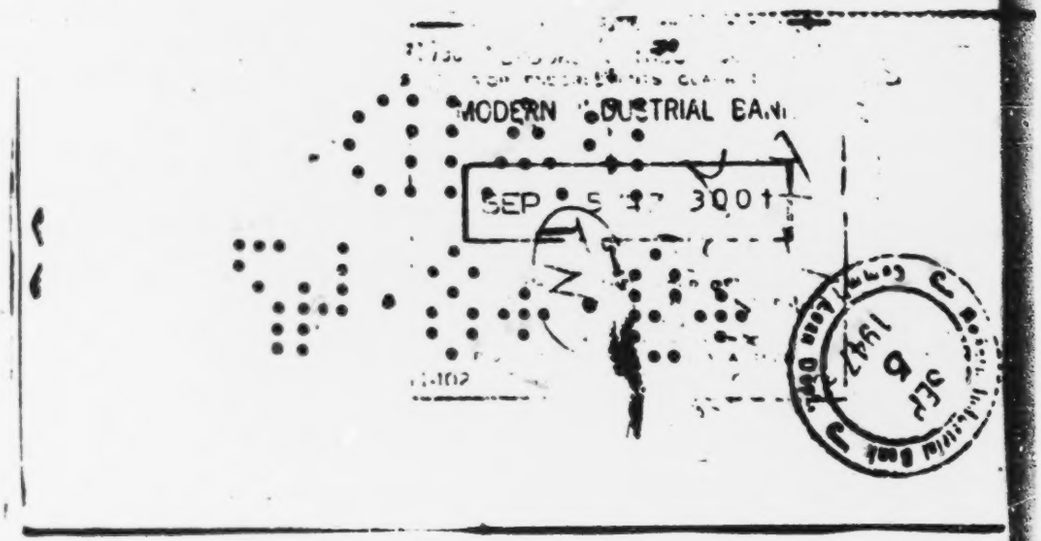
	DOLLARS	CENTS
SPECIE		
BILLS		
CHECKS	3 000	--
TOTAL	3,000	--

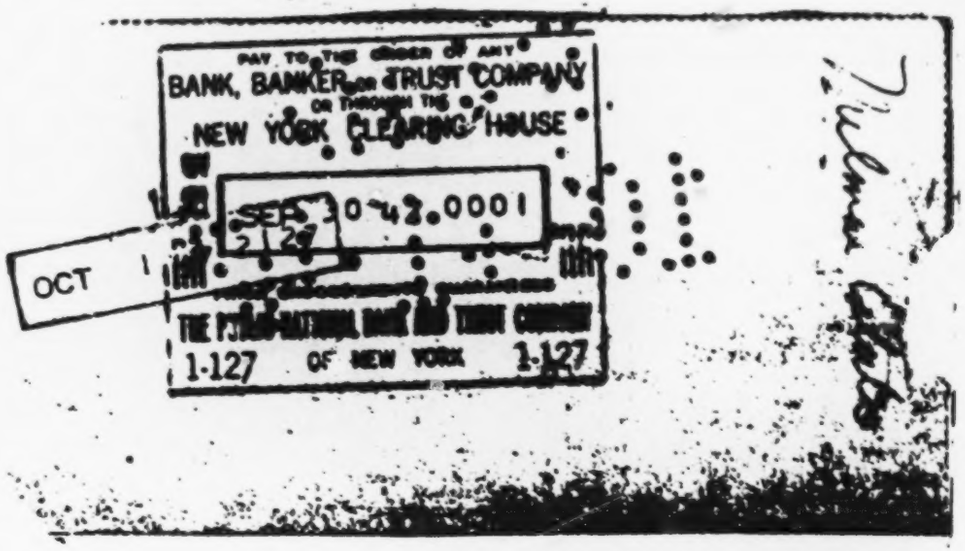
DM 24

Amount

Teller

LET US RENT YOU A SAFE DEPOSIT BOX





MODERN INDUSTRIAL BANK

SEP 5 '47 3001

SEP 6 1947

PAY TO THE ORDER OF ANY
BANK, BANKER OR TRUST COMPANY
OR THROUGH THE
NEW YORK CLEARING HOUSE

SEP 30 '42 0001
2127

OCT 1

THE PYRAMID NATIONAL BANK AND TRUST COMPANY
1-127 OF NEW YORK 1-127

Pulman Estate

NO RECEIPT REQUIRED
RETURN IF NOT CORRECT
THIS CHECK PAYS IN FULL THE FOLLOWING ITEMS

DATE	AMOUNT	CREDITS OR DISCOUNT	NET

TO
THE NATIONAL CITY BANK OF NEW YORK
41 TIMES SQUARE BRANCH
FORTY-FIRST STREET AT BROADWAY
NEW YORK, N. Y.

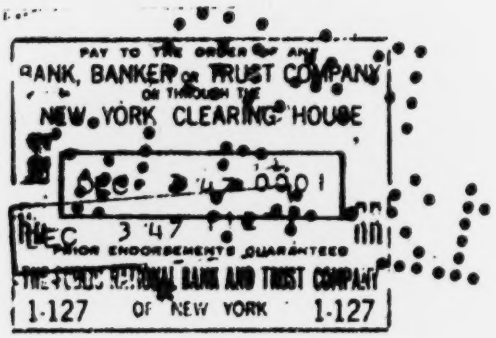
PAY TO THE ORDER OF Dorothy Thurber

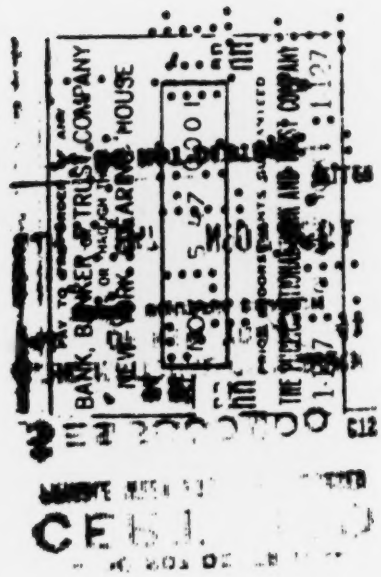
NEW YORK 12/2 No.

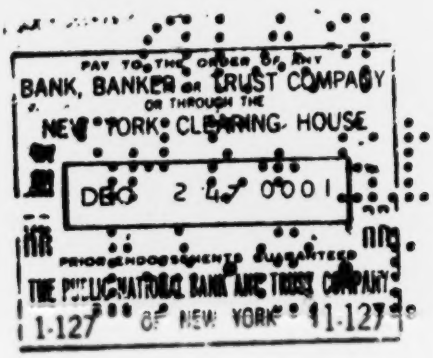
$3,500 00/100 DOLLARS

Dorothy Thurber

DM 24


PAY TO THE ORDER OF ANY
BANK, BANKER OR TRUST COMPANY
OR THROUGH THE
NEW YORK CLEARING HOUSE
DEC 2 4 0001
DEC 3 '47
PRIOR ENDORSEMENTS GUARANTEED
THE PUBLIC NATIONAL BANK AND TRUST COMPANY
1-127 OF NEW YORK 1-127


BANK, BANKER OR TRUST COMPANY
NEW YORK CLEARING HOUSE


PAY TO THE ORDER OF ANY
BANK, BANKER OR TRUST COMPANY
OR THROUGH THE
NEW YORK CLEARING HOUSE
DEC 2 4 0001
PRIOR ENDORSEMENTS GUARANTEED
THE PUBLIC NATIONAL BANK AND TRUST COMPANY
1-127 OF NEW YORK 1-127

DEPOSITED TO THE ACCOUNT OF

Mulm

PRINT NAME

IN

The Public National Bank and Trust Company

OF NEW YORK

DATE 12/26 1947

Subject to conditions on other side

	DOLLARS	CENTS
SPECIE		
BILLS	400	
CHECKS	1000	
	1400	
TOTAL		

LET US RENT YOU A SAFE DEPOSIT BOX

INDUSTRIAL BANK OF COMMERCE

50 EAST 42ND STREET NEW YORK

NEW YORK 1-750 260

PAY TO THE ORDER OF Eighth Hundred & Eighty Four DOLLARS

NO. DM24

INDUSTRIAL BANK OF COMMERCE

50 EAST 42ND STREET NEW YORK

NEW YORK 1-750 260

PAY TO THE ORDER OF Eighth Hundred & Eighty Four DOLLARS

NO. DM24

$2500.00 January 5th. 1948

ONE MONTH after date I promise to pay to the order of MICHAEL REALTY COMPANY

TWENTY-FIVE HUNDRED and 00/100 Dollars

at Industrial Bank of Commerce, 42nd St. Mad. Ave.

Value received

No. Due

DM 24

$2500.00 January 5th. 1948

TWO MONTHS after date I promise to pay to the order of MICHAEL REALTY COMPANY

TWENTY-FIVE HUNDRED and 00/100 Dollars

at Industrial Bank of Commerce, 42nd St. Mad. Ave.

Value received

No. Due

DM 24

Michael Realty Co
Michael Realty Co

NEW YORK CLEARING HOUSE
JAN 8 49 1101
THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK
57TH STREET BRANCH
13

Milman Estates Inc

NEW YORK CLEARING HOUSE
DEC 26 47 0005
THE PUBLIC NATIONAL BANK AND TRUST COMPANY
OF NEW YORK
1-127
DEC 17 47

DEPOSITED TO THE ACCOUNT OF
Milman Estates
PRINT NAME
IN
The Public National Bank
and Trust Company
OF NEW YORK
DATE 4/15 1948
Subject to conditions on other side

	DOLLARS	CENTS
SPECIE		
BILLS	50	
CHECKS		
1		
2		
3		
4		
5		
6		
7		
8		
9		
TOTAL	50	

DUPLICATE DEPOSIT SLIP
Amount 50
Teller
Duplicate
Avenue Office
OU A SAFE DEPOSIT BOX

Michael Realty Co
Michael Realty Co

13

FEB 5 1948
THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK
(NOTE TELLER)

MAR 5 1948
THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK
1-74

DEPOSITED TO THE ACCOUNT OF
Milman Estates
Inc.
PRINT NAME
IN
The Public National Bank
and Trust Company
OF NEW YORK
DATE July 20 1948
Subject to conditions on other side

	DOLLARS	CENTS
SPECIE		
BILLS		
CHECKS		
1 Leonard Geffner (Cashier's check)	2,800	00
2		
3		
4		
5		
6		
7		
8		
9		
TOTAL	2,800	00

PM 24

LET US RENT YOU A SAFE DEPOSIT BOX

Exhibit DM-32

October 1, 1948

Mr. Robert Schwartz
9 East 40th Street
New York City

Dear Mr. Schwartz:—

In connection with the mortgage on the Riviera, Fort Lee, New Jersey, which is in my name, this is to acknowledge that you are a participating owner in such mortgage in the sum of $7,700, and interest payable at the rate of $1,000 per month, commencing May 1, 1949, together with interest at 4%.

Sam Marcus

Exhibit DM-34

(Opposite) ☛

Note: The original of Exhibit DM-34 was unsuitable for photostating. There is substituted therefor the copy opposite.

DM-34

1/21/47	3,000.	to Riv -(Loan)
	3,500.	S M ret. Loans
1/30	3,444.19	Michael Realty
2/10	1,000.	Modern Bank a/c Loan
2/24	16.75	Int.
2/28	3,433.33	Michael Realty
3/8	1,000.	Modern Int
3/12	1,500.	S M Ret Loan
"	27.60	Lackawanna
4/8	16.75	"
5/12	76.57	Modern Int
6/4	3,408.33	Michael
6/19	16.75	Lackawanna
7/1	3,400.	Michael
7/18	2,220.27	Philvar Agency Ins
	85.75	N J State Franchise
7/24	3,000.	S M Ret Loan
7/25	500.	Jack Hoffman
8/1	5,891.67	Michael
	28.70	Lackawanna
	45.	Modern Int
8/12	3,500.	S M
	120.40	J H Time Clock
9/4	5,875.	Michaels
	300.	Simandel Legal
9/27	100.	" "
9/30	3,000.	42 St. Fotoshop Cash Exchange
10/2	5,858.33	Michaels
11/3	5,841.	"
12/1	5,825.	"
2/4/48	1,808.33	" Int
1/48		
4/5	791.67	Michaels Int
5	495.47	Greenwald) Ins.
5	602.11	Conklin)
~~5~~	~~775.~~	
	~~16.67~~	~~791.67 Michaels Int~~
5/12	1,000.	Philvar Ins.
6/2	791.67	Michaels Int
7/5	791.67	
	19,730.	39 @ 500 - 1 @ 230.76 (Markowitz notes)
6/17	1,400.	Philvar
7/2	116.12	Taxes
8/9	5,791.67	Michaels
9/3	5,775.	"
7/6	5,000.	S M Ret. Loan
7/12	1,696.	" " " "

Mar)
Apr) Michael?
May)

3/15	500.		
22	500.		
29	500.		
5/6	500.		
13	500.		
20	500.		
27	500.		
6/3	500.		
10	500.		
17	500.		
24	500.		
7/1	500.		
8	500.	8/5	500.
11	500.	12	500.
15	500.	19	500.
22	500.	26	500.
29	500.		500.
30	500.		500.
		(See Below)	500.
1/6	500		500.
1/13	230.76		500.
	7.52		

Markowitz

Markowitz Collection charges

5/10 775.)Int. on
16.67) Mortgage

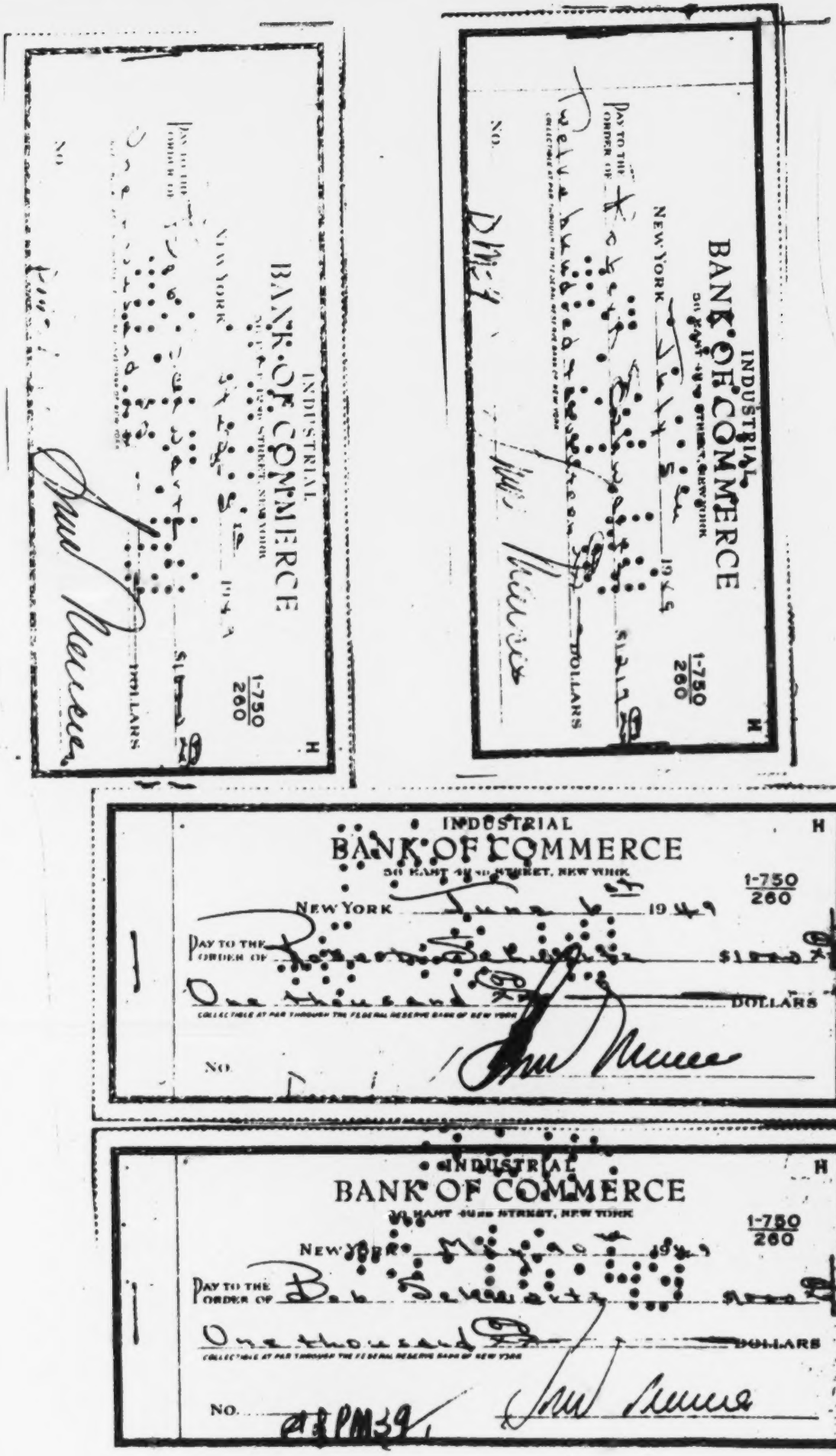
7/20 2,500 cash exchange
Geffner

DM 24

Exhibit DM-39

(Photostat)

(Opposite) ☛


INDUSTRIAL
BANK OF COMMERCE
NEW YORK
PAY TO THE ORDER OF
DOLLARS
NO.
1-750
260
INDUSTRIAL
BANK OF COMMERCE
NEW YORK
PAY TO THE ORDER OF
DOLLARS
NO.
1-750
260
INDUSTRIAL
BANK OF COMMERCE
NEW YORK
PAY TO THE ORDER OF
DOLLARS
NO.
1-750
260
INDUSTRIAL
BANK OF COMMERCE
NEW YORK
PAY TO THE ORDER OF
DOLLARS
NO.
DM 39

DM 39

For deposit only
Robt J Schwartz

JUL 21 49 50 5

72

For deposit only
Bob Schwartz

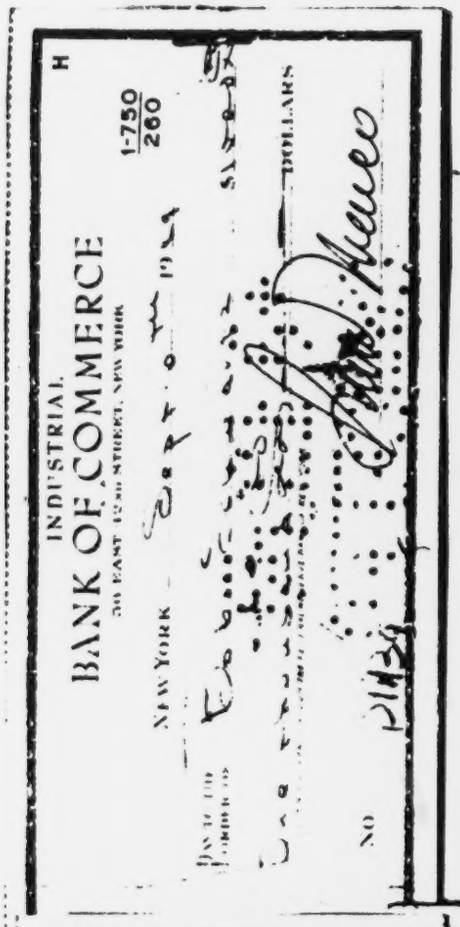
For deposit only
Robt J Schwartz

UN 8 49 2 45

72

For deposit only
Bob Schwartz

PAY TO THE ORDER OF
COLONIAL BRANCH
72
1-45



INDUSTRIAL
BANK OF COMMERCE
50 EAST 42ND STREET, NEW YORK

NEW YORK Sept 6th 1949

PAY TO THE ORDER OF Robert Schwartz $1000.00

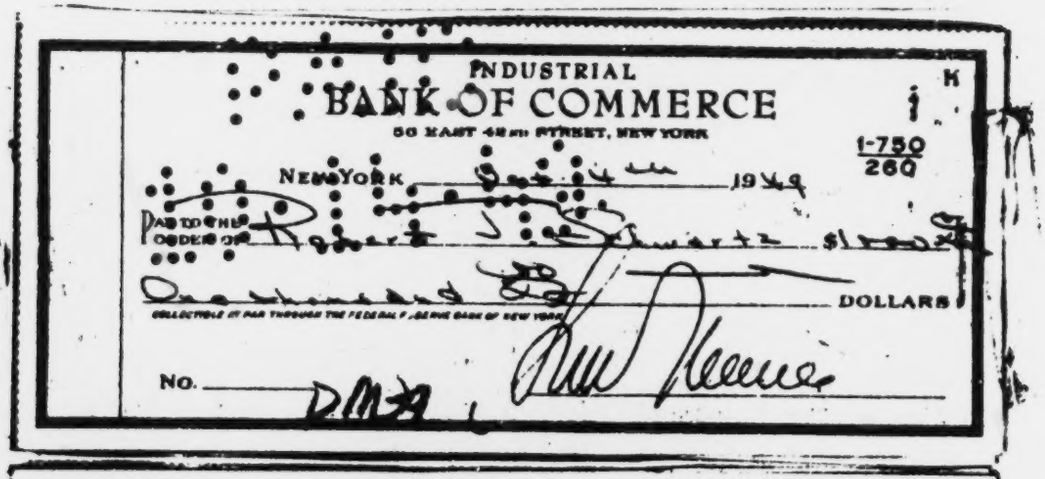
One thousand 00/100 DOLLARS

COLLECTIBLE AT PAR THROUGH THE FEDERAL RESERVE BANK OF NEW YORK

NO. DM39 Lew Marcus

H

1-750
260



INDUSTRIAL
BANK OF COMMERCE
50 EAST 42ND STREET, NEW YORK

NEW YORK Jan. 9th 1950

PAY TO THE ORDER OF Robt Schwartz $500.00

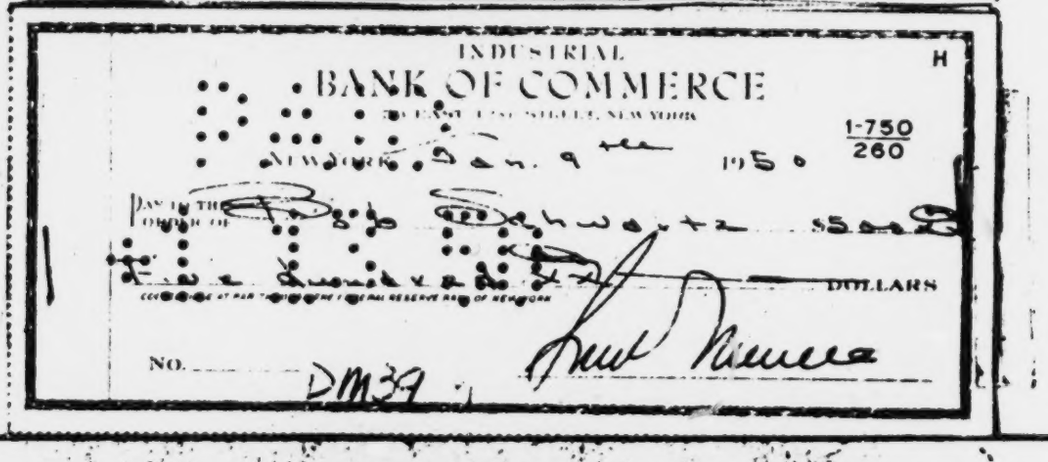
Five Hundred 00/100 DOLLARS

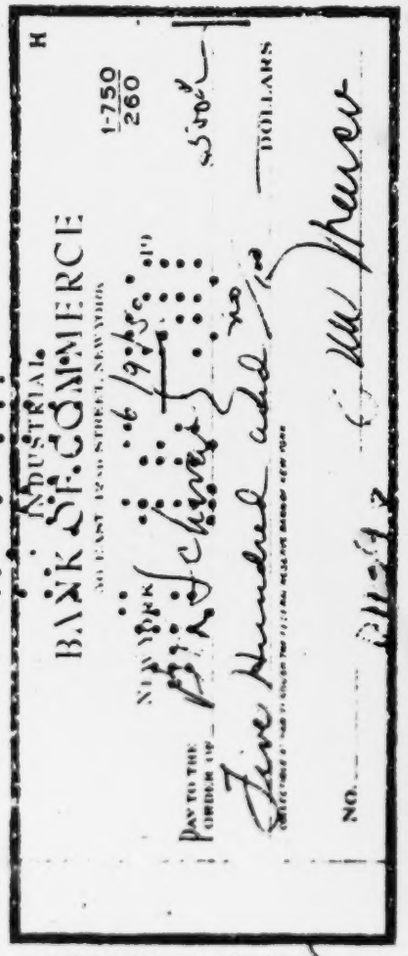
COLLECTIBLE AT PAR THROUGH THE FEDERAL RESERVE BANK OF NEW YORK

NO. DM39 Lew Marcus

H

1-750
260





INDUSTRIAL
BANK OF COMMERCE
50 EAST 42ND STREET, NEW YORK

NEW YORK 6/9/50 19

PAY TO THE ORDER OF Robt Schwartz $500.00

Five Hundred add no/100 DOLLARS

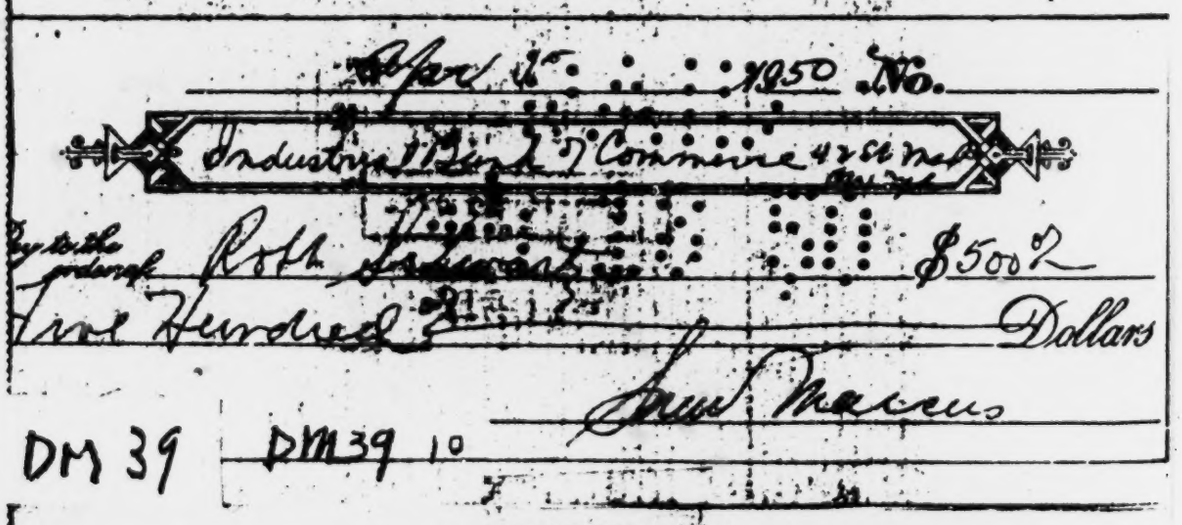
COLLECTIBLE AT PAR THROUGH THE FEDERAL RESERVE BANK OF NEW YORK

NO. DM39 Lew Marcus

H

1-750
260

Apr 1st 1950 No.



Industrial Bank of Commerce 42 St Mad

Pay to the order of Robt Schwartz $500.00

Five Hundred Dollars

Lew Marcus

DM 39 DM39 10

INDUSTRIAL
BANK OF COMMERCE
50 EAST 42ND STREET, NEW YORK

NEW YORK 7/13/50 19

PAY TO THE ORDER OF Robert Schwartz $500.00

Five Hundred and 00/100 DOLLARS

COLLECTIBLE AT PAR THROUGH THE FEDERAL RESERVE BANK OF NEW YORK

NO. DM39 Lew Marcus

H

1-750
260

PAY TO THE ORDER OF
MODERN INDUSTRIAL BANK
ENDORSEMENTS GUARANTEED

Bob Schwartz
Naomi N. Holtzman

JUN 16 50 1290

NATIONAL BANK RESERVE COMPANY
ORANGE, NEW JERSEY
E.B. SHUTT, Cashier
55-129

Bob Schwartz

PAY TO THE ORDER OF
NEW YORK CLEARING HOUSE
SEP 13 49 2245
SEP 13 49 900
CORR. EXCH. ... 1-45

Pay to the order of
Naomi Holtzman
Bob Schwartz
Naomi Holtzman

For deposit only
Bob Schwartz

For deposit only
Bob Schwartz

PAY TO THE ORDER OF
BANK, BANKER OR TRUST CO.
PRIOR ENDORSEMENTS GUARANTEED
JUL 21 50
55-100

Bob Schwartz
Naomi Holtzman

PAY TO THE ORDER OF
BANK, BANKER OR TRUST CO.
45 OCT 14 49 1-45
EXCHANGE BANK TRUST CO.

U.S. DISTRICT COURT
FOR NEW JERSEY
FEB 16 1955
EXHIBIT NO. D 11

39

Exhibit DM-43

(Photostat)

(Opposite) ☛

U. S. DISTRICT COURT
FOR NEW JERSEY

FEB 16 1955

EXHIBIT NO. DM43

		TOTAL	RECEIPTS RIVIERA	3 MARKS
1946	May	10000	10000	
	June			
	July	108666	98666 10000	10000
	August	500	500	
	September	3500	3500	
	October	7000		7000
	November			700
	December	12100		12100
1947	January	34419		34419
	February	34333		34333
	March			
	April	3500	2500	
	May	5100	3500 1600	
	June 1947	4000	4000	

Exhibit DM-44

(Photostat)

(Opposite) ☛

5

10/29/46 S Marcus 3500 —

(Note Issued)
Ret Premium Ins 393 46

Dec 1 1946 Short 266469

12/4 Sam Marcus 200 / 300 3500 00

135 38

12/4 S Marcus 5100 00

5935 31

1/4 S Marcus 3500 00

9435 31

9046 72

Balance 388 59

DM 44

DM 44

BALANCE FOR'D	DEPOSITS	CHECKS
No. 1016 Nov 22 1946 ORDER OF Winne Aug Banta FOR O/C DETAIL DEPOSIT		685 65
No. 1017 Nov 29 1946 ORDER OF Michael Realty Co FOR 2500 — 4% 289500 - 958.33 3458 33 DETAIL DEPOSIT		3458 33
No. 1018 Dec 13 1946 ORDER OF Louis Feldman FOR Attorney Fees		208 50
TOTAL DEPOSITS		
LESS TOTAL CHECKS DRAWN		
BALANCE CARR'D FOR'D		

BY ENDORSEMENT THIS CHECK IS IN FULL PAYMENT OF THE FOLL

DATE

TOTAL OF INVOICES
LESS ___ % DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

TO FIRST

BY ENDORSEMENT THIS CHECK IS IN FULL PAYMENT OF THE FOLL

DATE

TOTAL OF INVOICES
LESS ___ % DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

TO FIRST

BY ENDORSEMENT THIS CHECK IS IN FULL PAYMENT OF THE FOL

DATE

TOTAL OF INVOICES
LESS ___ % DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

TO FIRST

Exhibit DM-45

[Transcript pages 130 to 139]

By Mr. Winne:

Q. What is your business, Mr. Hoffman? A. I am a C P A.

Q. Where is your office? A. My offices are at 130 West 42nd Street, New York City and at 153 High Street, Closter, New Jersey.

Q. You have been identified with this enterprise, the Riviera, for a great many years, haven't you? A. Since the inception in 1946, with Mr. Miller.

Q. I want to ask you about the existing lease which is in evidence, the photostat which you furnished to Mr. Goldfarb when he came over to see you. A. That's right.

Q. That lease provides for a rent of $2,000 a week or a total of $104,000 a year when the property is occupied for fifty-two weeks a year. Is that right? A. That's right.

Q. It provides a minimum of $63,000 or $3,000 for twenty weeks under any circumstances. Is that right? A. That's right.

Q. And it provides for a sliding scale above twenty weeks if it is used more than twenty weeks. Is that right? A. If it is used more than twenty-six weeks, then it is at the rate of $2,000 a week, but no total can be more than $104,000.

Q. What is the maximum that has ever been paid for one year's rental under that lease? A. $81,540.

Q. The minimum has been how much? A. $40,000.

Q. What was paid last year? A. $50,000 for the past two years.

Q. It is a fact that Mr. Miller is both landlord and a substantial stockholder in the Milmar Estates and a tenant as practically the sole owner of Bill Miller's Riviera? A. That is true.

Exhibit DM-45

Q. So that there were various conversations in making the lease other than the most money that could be obtained by the land owner. Is that correct? A. That is true.

Q. About the operations of this company, just briefly how many shows do they have there per night? A. We had as high as four shows in one night, but on the average Friday, Saturday and Sunday we would have, I would say, just Saturday, we would have three shows. On Friday we would have two shows on the average.

Q. Through the rest of the week you would have two shows? A. Two shows is the least, the minimum.

Q. How many people can you seat? A. We have had as high has 1106 people at one sitting. It wasn't very comfortable.

Q. How many on an average? A. On an average, about 950.

Q. So you have about the same number of people for more than one show? A. Yes. We have had as high as 3200 people a night.

Q. Can you give us some idea about the volume of business done? A. Well, starting in 1947 for a physical period ending March 31 of each year we started for a thirty-nine week operation the first year. There was $753,000 worth of business. For the period ending March 31, 1948, for a forty-six week period, we tried going that whole year, and we did $1,098,500. That was for a forty-six week operation. In 1949, $1,023,384.38 for a twenty-six week operation. In 1951, $1,279,392.15 for a twenty-six week operation. March 3, 1951, $1,192,339 for a twenty-five week operation. For the year ending 1952, March 31, $1,277,910.43 for a twenty-five week operation. For last year, ending March 31, 1953, $1,394,467.45 for a twenty-five week operation.

Q. I don't think we ought to press you too closely about that. Does the Bill Miller Riviera make money? A. For the past three years it has made money.

Exhibit DM-45

Q. Can you give us a rough idea of how much? A. Well, I have a gross profit on sales for the entire period. I could just give you a run-down on this very fast. The gross profit for the first year, 1947, was $177,090. The gross profit for 1948 was $188,000. The gross profit for 1949 was $201,000. The gross profit for 1951 was $276,000. The gross profit for 1951 was $307,000. The gross profit for 1952 was $241,000. The gross profit for 1953 was $284,000.

Q. Out of that gross profit you have to charge depreciation. Is that right? A. We have expenses, depreciation, officer's salaries, repairs, et cetera.

Q. Let's talk about repairs. That is one thing we are all interested in. What do you spend annually for maintenance and repairs? I don't mean watchmen and salaries. I mean maintenance of the property. A. We started spending money in 1948. We only spent $2250 that year. In 1949, March, we spent no money during that year for repairs. In 1951, March 31, we spent $19,388.29. In 1951 we spent $47,095.47. In 1952 we spent no money. In 1953, that is, March 31, 1953, $2,044.29. That is a total of $100,737.98.

The Chairman: What do they cover, those repairs?

The Witness: They cover partly the windstorm we had during the end of 1950. We had roofing. The roofs had to be all redone. The entire roofing setup was all recovered. The inside, all the asbestos had to be redone.

The Chairman: This is the $47,000 item?

The Witness: Yes, sir, part of that $47,000. All the metal work all around the signs on the roof had to be repaired. The big signs are fourteen feet long. They were smashed by that wind and damaged and the plate glasses were also included in there. We received, I think, about $12,000 for the plate glass that was broken that year.

Exhibit DM-45

By Mr. Winne:

Q. Do these include the large plate windows? A. Yes, sir.

Q. Did you have insurance on those? A. We received a sum of about $12,000 or $13,000.

Q. How many were broke? A. Eight or nine.

Q. Since the building was purchased by Mr. Miller or, if you know, since it was built, were any substantial alterations or changes made which should be added to the cost of the building to illustrate what it is worth today, any big substantial changes? A. We keep the building in repair in accordance with the agreement with the Milmar Estates, Inc.

Q. I mean, such things as any air conditioning units added? A. We did install a big freezer in there.

Q. A deep freeze, is that new? A. One of the big deep freezers, yes. That came in about 1949 or 1950.

Q. You have a maintenance crew all the time and you pay salaries. Is that right? A. Yes.

Q. How many men do you have? A. Three men.

Q. They do the interior work? A. Other work which is not included in the maintenance account.

Q. I know that when you opened up in the spring for a number of days, you could see the place was all lit up and there were a lot of people working there. Is that repairs, getting it in shape? A. In March and April, when they start painting the place and any repairs that have to be done, we start working then. We have an income from concessions there too.

Q. You said there was income other than the operating income. What is that? A. We received on an average of $36,000 a year from Eli Quain for the past five or six years. The first year we received $39,000 or the rate of $1,000 a week for the weeks that we were opened, but after that we received on an average of about thirty-six a year.

Exhibit DM-45

We have advertising costs during this period of seven years, of $364,000.

Q. The big thing is when you are through with all those expenses you still made substantial profit. Is that correct? A. Oh, yes.

Mr. Winne: Thank you, Mr. Hoffman, that is all.

Cross examination by Mr. Lloyd:

Q. The storm damage in 1951 that you mentioned that you had to repair, you were covered by insurance for that, were you not? A. Yes, sir.

Q. Is this the net after the items—is the net included in this statement of repair items after allowance for insurance? A. I think we received $42,000 which was applied against that. It was applied against that. I think our expenses were about $65,000 that particular year, but it went into 1952, when we were still repairing that. Our net on that was $42,000.

Q. That is, after insurance? A. Yes, sir.

Q. That is what you took after tax deductions? A. Yes, sir.

Q. Did you say this other income from Quain reflected in your gross profit for these years? A. Yes, sir.

Q. That is in there? A. Yes, sir.

Q. After you get rid of your officers' salaries and expenses which are chargeable against gross profit, what was your net for 1953?

The Chairman: You mean absolute profit?

The Witness: Absolute net. We have a net which has not been audited this year.

Q. That would be 1952? A. This is for 1953. There is one more thing I want to explain to you. This was filed on March 31, of each year. We close our business on October 25 of the previous year and before we reopen again on

Exhibit DM-45

April 25 six months have elapsed, at which time over $50,000 is spent in maintenance, in maintaining this place. We have three policemen on duty there twenty-four hours a day. The bookkeeping staff works there. We have maintenance there besides, during the entire period while we are closed. After that—after we got finished there we have left $15,000. This is not audited by the tax department.

Q. That is for 1953? A. The end of 1953.

The Chairman: Is that the amount that would be subject to income tax?

The Witness: Yes, sir, right now.

Q. Now, 1952, how much was it? A. For 1952 it has been audited and we have the figure of $35,000 net, and there has been some of this money on Bill Miller's Riviera, some of the expenses and repairs. We have had a tax auditor there. They have been working on that for a couple of months and the auditor there has tired to apply some of these expenses to the Milmar.

Q. We are only talking about the operating company. A. That is Bill Miller's Riviera. The average was about $35,000.

The Chairman: For each year about the same?

The Witness: Yes, about the same.

Q. What about 1950? A. 1950—

The Chairman: As I recall, earlier he stated 1950, 1951 and 1952 were the profitable years.

The Witness: Well, in those particular years the salaries increased thirty per cent or forty per cent among the officers there.

Mr. Winne: How many men draw salaries?

The Witness: Officers' salaries, just two.

Mr. Winne: They drew substantial salaries?

The Witness: About $40,000.

Exhibit DM-45

By Mr. Lloyd:

Q. What was your 1950 figure? A. We have a profit of $10,765.94, which has been adjusted to about $30,000 because of a carry-back loss which we deducted. They wouldn't let us do it.

Q. What was it for 1949? A. 1949 we show a loss of $4800.

Mr. Lloyd: That is all.

Redirect examination by Mr. Winne:

Q. There has been some kind of inventory offered in evidence dated back in 1946. Without going into detail, do you keep that inventory up to date from year to year? A. Yes, sir, we do.

Q. Are the same substantial things there today that were there in 1946? A. Substantially the same, because if anything was taken out from the originals, from the ones we bought with Mr. Marden, we replaced all the glasses, et cetera.

Q. I mean anything that is substantial equipment or the building itself. Everything that was there in 1946 is there today? A. Everything is there that was originally there in 1946.

Exhibit DM-46

(Photostat)

(Opposite) ☛

THE PUBLIC NATIONAL BANK AND TRUST COMPANY
OF NEW YORK

MILMAR ESTATE INC.
152 W. 42nd STREET
NEW YORK, N. Y.

Dm 46

TRANSCRIPT

DEBITS	DEPOSITS	DATE	BALANCE
BALANCE FORWARD	7,868.33	JAN 18 +/	7,868.33
3,000.00 B M Riven Loan		JAN 23 EX	4,868.33
	3,000.00	JAN 27 +/	7,868.33
3,500.00 Sm Ret. Loan	(B M Ret	JAN 28 EX	4,368.33
3,444.19 Michael Really		JAN 31 EX	924.14
	700.00	FEB 6 +/	1,624.14
1,000.00 Modern Ind Bank		FEB 11 EX	624.14
	1,727.23	FEB 24 +/	2,351.37
16.75 Interest on Loan		FEB 27 EX	2,334.62
	3,000.00	FEB 27 +/	5,334.62
3,433.33 Michal Really		MAR 4 EX	1,901.29
	1,100.00	MAR 5 +/	3,001.29
1,000.00 Modern Ind.		MAR 11 +/	2,001.29
1,500.00 Sm Ret. Loan		MAR 11 +/	501.29
27.60 Lackawan Warehouse		MAR 14 EX	473.69
	1,500.00	APR 11 +/	1,973.69
500.00 } Markowitz Notes	(Sm 100)	APR 15 EX	1,473.69
500.00 }		APR 22 EX	973.69
500.00 }		APR 29 EX	473.69
	500.00	APR 29 +/	973.69
16.75 Lackawan	(BM)	MAY 1 EX	956.94
500.00 Markowitz		MAY 6 EX	456.94
	500.00	MAY 8 +/	956.94
76.67 — 500.00 Markowitz		MAY 13 EX	380.27
Modern Ind.	500.00	MAY 15 +/	880.27
~~882.27~~	~~882.27~~ EC		
500.00 — Markowitz		MAY 20 EX	380.27
	500.00	MAY 26 +/	880.27
2.00 MIS Bank Chgs		MAY 27 +/	878.27
	2,000.00	MAY 27 +/	2,878.27
500.00 Markowitz		MAY 29 +/	2,378.27

LAST AMOUNT IN THIS COLUMN IS YOUR BALANCE

CoSC - SERVICE CHARGE
EX - EXCHANGES
EC - ERROR CORRECTED
RT - RETURN ITEM
LST - LIST
CC - CERTIFIED CHECK
DM - DEBIT MEMO
CM - CREDIT MEMO
MIS - DEBIT OR CREDIT MEMO

(IF YOUR ADDRESS AS RECORDED IS INCORRECT, PLEASE ADVISE)

All items and this account are subject to conditions on reverse side

THE PUBLIC NATIONAL BANK AND TRUST COMPANY
OF NEW YORK

MILMAR ESTATE INC.
152 W. 42nd STREET
NEW YORK, N. Y.

DM 46

DEBITS	DEPOSITS	DATE	BALANCE
BALANCE FORWARD ☞			
500.00- Markowitz		AUG 18 EX	4,782.31
2.00 MIS		AUG 18 ✓	4,780.31
120.40- Jack Hoffner		AUG 18 ✓	4,659.91
~~3,500.00-~~		AUG 20 EX	1,159.91
3,500.00- Sm Rel Loan	2,500.00	AUG 22 ✓	159.91
	~~3,500.00 EC~~	AUG 22 ✓	3,659.91
500.00- Markowitz		SEP 2 ✓	3,159.91
500.00- Markowitz		AUG 26 EX	2,659.91
	✓ 3,500.00	SEP 2 ✓	6,159.91
5,875.00- Michael Realty		SEP 5 EX	284.91
300.00- Simandl Legal		SEP 8 EX	15.09
	✓ 2,600.00	SEP 8 ✓	2,584.91
2.00 MIS Bad Chgs -		SEP 9 ✓	2,582.91
500.00 RT Markowitz	✓ 2,542.23	SEP 12 ✓	4,625.14
500.00- "		SEP 16 EX	4,125.14
500.00- "		SEP 23 EX	3,625.14
	✓ 2,500.00	SEP 23 ✓	6,125.14
3,000.00- Sm Rel Loan		SEP 24 EX	3,125.14
100.00- Simandl Legal		SEP 29 EX	3,025.14
500.00- Markowitz		SEP 30 EX	2,525.14
	✓ 4,000.00	SEP 30 ✓	6,525.14
5,858.33- Michael Realty		OCT 6 EX	666.81
500.00- Markowitz		OCT 7 EX	166.81
	✓ 2,500.00	OCT 7 ✓	2,666.81
500.00- "		OCT 14 EX	2,166.81
	✓ 2,500.00	OCT 16 ✓	4,666.81
500.00- "		OCT 21 EX	4,166.81
502.77 RT	2,002.77 RT	OCT 22 ✓	1,661.27
	Mg check & Renaly		
500.00- Markowitz		OCT 28 EX	1,161.27

LAST AMOUNT IN THIS COLUMN IS YOUR BALANCE

SC - SERVICE CHARGE
EX - EXCHANGES
EC - ERROR CORRECTED
RT - RETURN ITEM
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THE PUBLIC NATIONAL BANK
AND TRUST COMPANY
OF NEW YORK

MILMAR ESTATE INC.
152 W. 42nd STREET
NEW YORK, N. Y.

Dkt 46

NSCRIPT

DEBITS		DEPOSITS	DATE	BALANCE
BALANCE FORWARD ☞				
500.00-	Markowitz		JUN 3 EX	1,878.27
		✓ 2,500.00	JUN 3 +/	4,378.27
3,408.33-	Michael Realty		JUN 4 EX	969.94
500.00-	Markowitz		JUN 10 EX	469.94
		✓ 2,500.00	JUN 11 +/	2,969.94
500.00-	Markowitz		JUN 17 EX	2,469.94
		✓ 2,500.00	JUN 18 +/	4,969.94
500.00-	Markowitz		JUN 24 EX	4,469.94
16.75-	Lackawanna		JUN 26 EX	4,453.19
500.00-	Markowitz		JUL 1 +/	3,953.19
3,400.00-	Michael -		JUL 7 EX	553.19
		3,000.00	JUL 7 +/	3,553.19
500.00-	Markowitz		JUL 8 EX	3,053.19
500.00RT	Markowitz	✓ 500.00NIS	JUL 9 +/	3,053.19
2,220.27-	Phelan Agency Inc		JUL 10 EX	832.92
500.00RT	Markowitz	✓ 6,000.00	JUL 11 +/	6,332.92
		✓ 500.00	JUL 14 +/	6,832.92
500.00-	Markowitz		JUL 15 EX	6,332.92
500.00-	Markowitz		JUL 22 EX	5,832.92
		✓ 2,000.00	JUL 22 +/	7,832.92
85.75-	NJ Transfer		JUL 23 EX	7,747.17
		✓ 2,000.00	JUL 25 +/	9,747.17
3,000.00-	Sm Rel Loan		JUL 28 EX	6,747.17
500.00-	Markowitz		JUL 29 EX	6,247.17
500.00-	Markowitz		JUL 30 EX	5,747.17
		2,000.00	JUL 31 +/	7,747.17
5,891.16-	Michael Realty		AUG 1 +/	1,856.01
50.00-	Markowitz		AUG 5 EX	1,356.01
		2,000.00	AUG 8 EX	3,356.01
500.00-	Markowitz		AUG 12 EX	2,856.01
28.70-	Lackawanna		AUG 13 EX	2,827.31
45.00-	Modern Elev.		AUG 14 EX	2,782.31
		2,500.00	AUG 15	5,282.31

LAST AMOUNT IN THIS COLUMN IS YOUR BALANCE

SC - SERVICE CHARGE
EX - EXCHANGES
EC - ERROR CORRECTED
RT - RETURN ITEM
LST - LIST
CC - CERTIFIED CHECK
DM - DEBIT MEMO
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THE PUBLIC NATIONAL BANK
AND TRUST COMPANY
OF NEW YORK

MILMAR ESTATE INC.
152 W.42nd STREET
NEW YORK, N. Y.

Dm 16

TRANSCRIPT

DEBITS		DEPOSITS	DATE	BALANCE
BALANCE FORWARD ☞			NOV 1 ✓	1,161.27*
500.00-	Markowitz		NOV 5 ✓	661.27*
5,841.67-	Michael Realty	✓ 8,320.00	NOV 6 ✓	3,139.60*
500.00-	Markowitz		NOV 12 EX	2,639.60*
		✓ 251.91	NOV 12 ✓	2,891.51*
500.00-	Markowitz		NOV 18 EX	2,391.51*
500.00-	"		NOV 25 EX	1,891.51*
500.00-	Markowitz		DEC 2 EX	1,391.51*
		✓ 6,000.00	DEC 2 ✓	7,391.51*
5,825.00-	Michael Realty		DEC 9 EX	1,566.51*
500.00-			DEC 16 EX	1,066.51*
500.00-			DEC 16 ✓	566.51*
	Markowitz	✓ 1,500.00	DEC 16 ✓	2,066.51*
500.00-			DEC 23 EX	1,566.51*
500.00-			DEC 30 EX	1,066.51*
500.00-	Markowitz		JAN 6 EX	566.51*
7.52 MIS			JAN 7 ✓	558.99*
230.76-	Markowitz Last Coll. exp.		JAN 13 EX	328.23*
		✓ 600.00	FEB 3 ✓	928.23*
808.33-	Michael Realty Int.		FEB 6 EX	119.90*
2.00 SC	Bank Chgs		MAR 23 ✓	117.90*
		2,000.00	APR 5 ✓	2,117.90*
495.47-	Greenvalet Invs.		APR 7 EX	1,622.43*
602.11-	Cooklin Invs.		APR 8 EX	1,020.32*
791.67-	Michael Realty		APR 9 EX	228.65*
2.00 MIS	- Chgs		APR 22 ✓	226.65-
		2,000.00	MAY 24 ✓	2,226.65
775.00-	16.67- Michael Realty		MAY 10 EX	1,434.98
1,000.00-	Phibro Invs.		MAY 12 EX	434.98
		2,000.00	MAY 17 ✓	2,434.98*
2.00 MIS	Chgs -		MAY 25 ✓	2,432.98-

LAST AMOUNT IN THIS COLUMN IS YOUR BAL AND

SC - SERVICE CHARGE
EX - EXCHANGES
EC - ERROR CORRECTED
RT - RETURN ITEM
CC - CERTIFIED CHECK
DM - DEBIT MEMO
CM - CREDIT MEMO
MIS - DEBIT OR CREDIT MEMO

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LAST LINE

THE PUBLIC NATIONAL BANK
AND TRUST COMPANY
OF NEW YORK

MILMAR ESTATE INC.
152 W. 42nd STREET
NEW YORK, N. Y.

DM 46

TRANSCRIPT

DEBITS		DEPOSITS	DATE	BALANCE
BALANCE FORWARD				
		2,000.00	MAY 27	4,432.98
		2,000.00	JUN 2	6,432.98
		2,152.01	JUN 9	8,584.99
791.67-	Michael Realty		JUN 14 EX	7,793.32
		2,340.40	JUN 17	10,133.72
		2,000.00	JUN 23	12,133.72
1,400.00-	Pluhar Bros.		JUN 30 EX	10,733.72
		2,000.00	JUL 2	12,733.72
791.67-	Michael Realty		JUL 8 EX	11,942.05
		2,000.00	JUL 9	13,942.05
116.12-	Texaco		JUL 13 EX	13,825.93
1,696.00-	Rel Loan Sm		JUL 19 EX	12,129.93
		2,000.00	JUL 19	14,129.93
2,500.00-	Cash Exch. Geffner	2,500.00	JUL 20	14,129.93
5,000.00-	Rel Loan Sm		JUL 21 EX	9,129.93
		2,000.00	JUL 26	11,129.93
		2,000.00	AUG 4	13,129.93
5,791.67-	Michael Realty		AUG 9 EX	7,338.26
		2,000.00	AUG 17	9,338.26
		2,000.00	AUG 24	11,338.26
		2,000.00	SEP 8	13,338.26
5,775.00-			9 EX	5,563.26
772.66-	59.30-		SEP 9 EX	1,020.09
5,711.21-				
1,025.56 CC		50.00	SEP 15	44.53
		10,000.00	SEP 17	10,044.53
10,000.00-			SEP 20	44.53
44.53-			OCT 14 EX	.00

LAST AMOUNT IN THIS COLUMN IS YOUR BALANCE

SC-SERVICE CHARGE
EX-EXCHANGES
EC-ERROR CORRECTED
RT-RETURN ITEM
LST-LIST
CC CERTIFIED CHECK
DM DEBIT MEMO
CM CREDIT MEMO
MIS DEBIT OR CREDIT MEMO

IF YOUR ADDRESS AS RECORDED IS INCORRECT PLEASE ADVISE

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Exhibit DM-47

MODERN INDUSTRIAL BANK
Chartered 1924
116 FIFTH AVENUE
Corner Seventeenth Street
NEW YORK 11, N. Y.

March 3, 1952

Mr. Samuel Marcus
c/o Cineque Colorfilm Laboratories
424 East 89th Street
New York 28, New York

Dear Mr. Marcus:

This will acknowledge receipt of your inquiry of February 18, 1952.

Our records indicate that on January 1947 the following loans were issued to Milmar Estates and the notes endorsed by Samuel Marcus:

TLS	11246	$1,000.00
"	11247	1,000.00
"	11248	1,000.00
"	11249	5,000.00

We trust this info mation will be of assistance to you.

Very truly yours,

/s/ GARRY A. STOLZBERG
Garry A. Stolzberg
Assistant Vice President

eg:ms

Exhibit DM-51

#81092

Our Order No. 82194

WHITNEY DUPLICATING CHECK Co.
406 West 31st Street
New York 1, New York
Telephones: LAckawanna 4-6277-8-9

May 23, 1946

Sold to RIVERA RESTAURANT
Sold to HUDSON TERRACE
Sold to FORT LEE, N. J.
Terms: Net cash fob factory

Shipped via Express & called

Quantity	Item	Price	Amount
100M	Special RESTAURANT checks 4¼x9½" prtd. on 90# stock in blue & white with stub at bottom #1 to 50M & repeat.	2.50M	250.00
100M	Special BAR checks 4¼x9" prtd, on 90# stock in yellow & red, perf. down center with words "PAY TOTALED ADDITION" at bottom. No'd 1 to 100M	4.00M	400.00
	Special plates for both checks	35.00ea	70.00
			720.00

DUPLICATE INVOICE

Exhibit DM-52

#10695

Our Order No. 96209

WHITNEY DUPLICATING CHECK CO.
406 West 31st Street
New York 1, New York

Telephones: LAckawanna 4-6277-8-9

July 26, 1950

Sold to BILL MILLER'S RIVIERA REST.
Hudson Terrace
Fort Lee, N. J.

Terms: COD FOB FACTORY

Shipped via Truck

Quantity	Item	Price	Amount
100M	Cardboard restaurant checks prtd on 99# stock on 2 sides, front side of check prtd in gray & blue, no'd in red, words at bottom in red, size of check 4¼"x10", body plate to have 22 lines; reverse side of check prtd in gray, wording in red, no'd 1 to 100M incl.	3.85M	385.00
	Delivery charge		12.00
			397.00

Duplicate Invoice

Exhibit DM-52 (Continued)

#85047

Our Order No. 85953

WHITNEY DUPLICATING CHECK CO.
406 West 31st Street
New York 1, New York

Telephones: LAckawanna 4-6277-8-9

June 10, 1947

Sold to BILL MILLER'S RIVIERA REST.
Hudson Terrace
Fort Lee, N. J.

TERMS: PAID

Shipped via Peoples Express

Quantity	Item	Price	Amount
100M	Special cardboard checks, prtd 2 sides as follows; front side prtd in blue & gray, words at bottom of check in red, no'd in red reverse side prtd in red & gray, wording in red; no'd 50,001 up to 100M & repeat 50,001 to 100,000	3.63M	363.00
	Charge for new plate for above checks		40.00
			403.00
	Charge for three cases		3.00
	DUPLICATE INVOICE		406.00

Exhibit DM-52 (Continued)

#3877

Our Order No. 89867

WHITNEY DUPLICATING CHECK CO.
406 West 31st Street
New York 1, New York

Telephones: LAckawanna 4-6277-8-9

August 10, 1948

Sold to BILL MILLER'S RIVIERA REST.
Hudson Terrace
Fort Lee, N. J.

Terms: COD FOB FACTORY

Shipped via Call & People's Express

Quantity	Item	Price	Amount
100,000	Cardboard restaurant checks printed on 90# stock on two sides, front side printed in gray & blue with no's in red and words at bottom in red. Size of check 4¼" wide x 9¾ long with length of body plate to have 22 lines reverse side of check printed in gray with wording in red, reverse plate to be centered. No'd 1 to 50,000 & repeat	3.85M	385.00
	Charge for making new plates		12.00
			397.00
	Paid on account by check		200.00
	Balance Due		197.00

5,000 checks picked up by messenger 8/6/48.

Duplicate Invoice

Exhibit DM-52 (Concluded)

#13942

Our Order No. 99235

WHITNEY DUPLICATING CHECK CO.
408 West 31st Street
New York 1, New York

Telephones: LAckawanna 4-6277-8-9

May 31, 1951

Sold to BILL MILLER'S RIVIERA
Hudson Terrace
Fort Lee, N. J.

Terms: COD FOB FACTORY

Shipped via Haselan's Express

Quantity	Item	Price	Amount
100M	Special BAR checks size 4¼"x9" prtd on 90# white stock in light blue dark blue, red & yellow, no'd in red, perf. down center with words PAY TOTALED ADDITION at bottom in red, no'd 1 to 100M incl.		
5M	Special OFFICER'S checks prtd on 90# pink stock in blue, no'd in red, no'd 1 to 5M		
105M		4.72M	495.60

Duplicate Invoice

Exhibit DM-63

(Photostat)

(Opposite) ☛

Schedule D (Filed with Form 1040)

TREASURY DEPARTMENT
Internal Revenue Service

1948

SCHEDULE OF GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY

For Calendar Year 1948 or fiscal year beginning ....., 1948, and ending ....., 1949

NAME AND ADDRESS SAMUEL MARCUS, 685 West End Avenue, New York, N. Y.

(1) CAPITAL ASSETS

1. Kind of property (If necessary, attach statement of description. Give full details as to assets held by decedent.)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	6. Cost or other basis (If not purchased, attach explanation)	7. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 6 MONTHS						
			$	$	$	$
1 Totals			$	$	$	$
2 Net short-term gain or loss other than from partnerships and common trust funds (column 4 plus column 5 minus the sum of columns 6 and 7, of line 1)						$
3 Enter your share of the net short-term gain or loss from partnerships and common trust funds						
4 Enter here the sum of gains or losses, or difference between gain and loss, shown on lines 2 and 3						$
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTH						
Stock-136 E. 32 Corp.	1945	2/29/48	$3520 79		3000 00	$
Stock-Millmar Estates, Inc.	1946	10-48	125000 00	$	101200 00	
Stock-Duane Products, Inc.	1947	8/1048	-0-		25609 08	
Stock-E.57 St.Amusement Corp.	1947	12/31/48	8000 00		17000 00	
			176520 79	$	146809 08	$
5 Totals						
6 Net long-term gain or loss other than from partnerships and common trust funds (column 4 plus column 5 minus the sum of columns 6 and 7, of line 5)						$ 27,711 71
7 Enter the full amount of your share of the net long-term gain or loss from partnerships and common trust funds						27,711 71
8 Enter here the sum of gains or losses, or difference between gain and loss, shown on lines 6 and 7						$ 13,855 85
9 Enter 50 percent of the excess (if any) of amount in line 8 to be taken into account in Summary below						13,855 85
10 Summary of Capital Gains (use only if gains exceed losses in lines 4 and 9)						$
a Net gain (or loss) as shown by the net gain or difference between gains and losses on lines 4 and 9						13,855 85
b Capital loss carry-over from 1947 (if any)						$
c Balance (enter here and on line 1, Schedule D, page 2, Form 1040)						$
d If line 8 exceeds line 9, enter here the excess of net long-term capital gain over net short-term capital loss						$
e Enter here and on line 1, Schedule D, page 2, Form 1040, the smaller of the following: (1) the amount on line (d), (2) net income adjusted as provided by law (if return is examined without regard to capital gains or losses), or (3) $1,000						$
f Enter here the amount of line (d) which is to be offset against line (a) or on line (e)						$

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTHS

Stock-136 W. 32 Corp.	1945	2/29/48	43520 79	5000 00	$
Stock-Millmar Estates, Inc.	1946	10-48	125000 00	101200 00	
Stock-Duane Products, Inc.	1947	8/1048	-0-	25609 08	
Stock-E.57 St. Amusement Corp.	1947	12/31/48	8000 00	17000 00	
5 Totals			176520 79	148809 08	$

6. Net long-term gain or loss (other than from partnerships and common trust funds (column 4 plus column 5 minus the sum of columns 6 and 7, of line 5 — $ 27,711 71
7. Enter the full amount of your share of the net long-term gain or loss from partnerships and common trust funds — 27,711 71
8. Enter here the sum of gains or losses, or difference between gain and loss, shown in lines 6 and 7 — $ 13,855 85
9. Enter 50 percent of line 8. This is the amount to be taken into account in summary below — $ 13,855 85

10. Summary of Capital Gains (use only if gains exceed losses in lines 4 and 9):
(a) Net gain for 1948 (either the sum of gains or difference between gains and losses in lines 4 and 9) — $
(b) Capital loss carry-over, 1943-1947 inclusive — 13,855 85
(c) If line (a) exceeds line (b) enter the excess here and on line 1, Schedule D, page 2, Form 1040 — $ 13,855 85
(d) If line (b) exceeds line (a) enter the excess here and use same to determine allowable loss — $
(e) Enter here and on line 1, Schedule D, page 2, Form 1040, the smallest of the following: (1) the amount on line (d), (2) net income (adjusted gross income if tax table is used) computed without regard to capital gains or losses, or (3) $1,000 — $
(f) Enter here the amount on line (e) plus any capital losses carried over from 1948 which were not used against line (a) or on line (e) — $
(g) Subtract line (f) from line (c) and enter the remainder here. This is your capital loss carry-over to 1949 — $

11. Summary of Capital Losses (use only if losses exceed gains in lines 4 and 9):
(a) Net loss for 1948 (either the sum of losses or difference between losses and gains in lines 4 and 9) — $
(b) Capital loss carry-over, 1943-1947 inclusive
(c) Total of lines (a) and (b) — $
(d) Enter here and on line 1, Schedule D, page 2, Form 1040, the smallest of the following: (1) the amount on line (c), (2) net income (adjusted gross income if tax table is used) computed without regard to capital gains or losses; or (3) $1,000 — $
(e) Enter here the amount on line (d) plus the amount of any 1943 capital loss carry-over not used in line (d) — $
(f) Subtract line (e) from line (c) and enter the remainder here. This is your capital loss carry-over to 1949 — $

(2) PROPERTY OTHER THAN CAPITAL ASSETS

1. Kind of property	2. Date acquired	3. Gross sales price (net sales price)	4. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	5. Cost or other basis (if not purchased, attach explanation)	6. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913
		$	$	$	$
DM 63					
1. Totals		$	$	$	$

2. Total net gain or loss (columns 3 plus 4 minus the sum of columns 5 and 6). Enter on line 2, Schedule D, page 2, Form 1040 — $

See other side for Instructions and Computation of Alternative Tax PART OF DM-63

Final Judgment

(Filed—October 19, 1956)

This cause coming before the court at a hearing on motion for entry of final judgment, to dismiss part of cross claim of Milmar Estate, Inc., against Samuel Marcus, and application for counsel fees; and the court having heard the evidence, and having considered the motions of the parties, and the legal arguments, and having read and considered the briefs of the parties, and the court having stated the issues, the findings of fact and conclusions of law in its opinion filed March 12, 1956, which findings and conclusions are incorporated herein;

IT IS on this 19th day of October, 1956, ORDERED, ADJUDGED, DECREED, FOUND, AND DECLARED THAT:

1. The court has jurisdiction over all the parties and claims; the plaintiffs' complaint was filed in good faith and for good cause and the plaintiffs, Al Bierman and William Miller, are discharged from any and all liability to Milmar Estate, Inc., and Samuel Marcus in the making of any payments on account of the purchase price or on account of any balance arising out of or with respect to a transaction which culminated in the contract entered into on the 14th day of September, 1948, among the parties to this action relating to the sale of stock of Milmar Estate, Inc.

2. Judgment is entered in favor of Al Bierman, William Miller, Milmar Estate, Inc., and Al Kevelson against Samuel Marcus on each and every claim asserted by the respective parties against Samuel Marcus, except as otherwise provided in paragraphs 10, 11, and 13 herein.

3. Each and every claim of Samuel Marcus asserted by way of or in any answer, cross claim, counterclaim, or third party claim, is in all things denied, and as to each of such

claims of Samuel Marcus judgment is entered in favor of Al Bierman, William Miller, Milmar Estate, Inc., and Al Kevelson, except as otherwise provided in paragraphs 10, 11, and 13 herein.

4. All stock or stock certificates in or of Milmar Estate, Inc., in the possession, custody, or control of Samuel Marcus, and all stock of Milmar Estate, Inc., bearing date prior to September 14, 1948, be and hereby are declared cancelled, null, and void; Samuel Marcus has no right, title, or interest in or to any stock or stock certificates of Milmar Estate, Inc., all stock certificates of Milmar Estate, Inc., in the possession, custody, or control of Samuel Marcus shall be forthwith delivered to Milmar Estate, Inc., to be physically cancelled.

5. The transaction entered into among the parties on September 14, 1948, was a purchase of all of the stock of Milmar Estate, Inc., consisting of 1250 shares by the plaintiffs, Al Bierman and William Miller. Milmar Estate, Inc., is not in any manner or on any claim or for any reason indebted to Samuel Marcus for any alleged loans or advances.

6. The balance of the proceeds of the condemnation award made in favor of Milmar Estate, Inc., by the commissioners in condemnation in the matter of the petition of the State Highway Commissioners of the lands of Milmar Estate, Inc., which money was ordered deposited in the Peoples Trust Company of Bergen County in the account designated "Walter G. Winne, Master United States District Court," which balance now totals $569,674.70 was and always has been the sole property of the defendant, Milmar Estate, Inc., and that balance now on deposit shall be delivered and paid within ten (10) days after this date to Milmar Estate, Inc., through Maurice C. Brigadier, its

attorney, and the said account of Walter G. Winne, Master United States District Court, be closed. Walter G. Winne, Master, shall receive a fee of $3,500.00 for his services as the Master of this court, to be paid him herewith from the monies in his hands.

7. The agreement of September 14, 1948, is a valid agreement.

8. Samuel Marcus is not an officer nor a director of Milmar Estate, Inc.

9. The note bearing date of June 1, 1947, in the amount of $50,000.00 executed by William Miller to Samuel Marcus is cancelled.

10. Al Bierman, William Miller, and Milmar Estate, Inc., are each and all released from all liability to Samuel Marcus, except as to the liability of William Miller on the balance of a $15,000.00 note executed to Samuel Marcus as provided in paragraph 11.

11. Judgment is entered in favor of Samuel Marcus and against William Miller in the sum of $5,800.00 and interest at 4% running to the date of payment on the unpaid balance of $15,000.00.

12. Samuel Marcus is not entitled to the return of any stock, papers, agreements, or documents deposited with Abraham Lieberman, Esq., as escrowee; each and all of which shall be forthwith delivered to Al Bierman and William Miller.

13. It is ORDERED that there be awarded $500.00 as counsel fees to Chazin & Chazin, attorneys for plaintiffs, which amount the Clerk of the Court is directed to pay forthwith to them out of the interpleaded fund deposited in this

court. On his claim to the interpleaded fund, judgment is entered in favor of Samuel Marcus in the amount of $35,600.00, which is the total interpleaded fund less the award of counsel fees to Chazin & Chazin, and the Clerk of the Court is ordered to pay forthwith that amount to Samuel Marcus out of the interpleaded fund deposited in this court. All other applications for counsel fees are disallowed.

14. It is ORDERED that costs be awarded against Samuel Marcus in favor of the plaintiffs, Al Bierman and William Miller, the defendant, Milmar Estate, Inc., and the added third-party defendant, Al Kevelson, in the sum of $659.52, which are their expenses paid to the court reporter to obtain for this court a transcript of the trial of this action. The court hereby finds good cause for the granting of the aforementioned costs against Samuel Marcus all in compliance with the applicable rules, statutes, and practice of the court. The Clerk of this Court is directed to enter the within judgment and to tax all costs as are provided by law.

15. Further proceedings, decision, and judgment are reserved on the claims asserted against Samuel Marcus on the 4th, 5th, 6th and 7th counts of the cross claim of defendant, Milmar Estate, Inc., which counts allege causes of action against Samuel Marcus for the filing of a lis pendens as a malicious use of process and malicious abuse of process, slander of title and a malicious interference with a prospective economic advantage. The court expressly determines that there is no just reason for a delay in the entry of a final judgment as to all matters except said 4th, 5th, 6th, and 7th counts of the cross claim of defendant, Milmar Estate, Inc.

s/ ALFRED E. MODARELLI
Alfred E. Modarelli
United States District Judge

Notice of Appeal

(Filed—October 24, 1956)

Notice is hereby given that Samuel Marcus, defendant in the above-captioned matter, hereby appeals to the United States Court of Appeals for the Third Circuit from the Final Judgment entered in this action on October 19, 1956.

MAURICE SCHAPIRA,
Attorney for Appellant,
Samuel Marcus,
17 Academy Street,
Newark 2, New Jersey.

Amended Notice of Appeal

(Filed—November 7, 1956)

To: United States District Court for the District of New Jersey
Federal Building
Newark, New Jersey

Maurice C. Brigadier, Esq.
40 Journal Square
Jersey City, New Jersey

Chazin & Chazin, Esqs.,
30 Journal Square
Jersey City, New Jersey

George Kesselhaut, Esq.
786 Broad Street
Newark 2, New Jersey

SIRS:

PLEASE TAKE NOTICE that defendant, Samuel Marcus, hereby appeals from the Final Judgment in this case made October 19, 1956 and filed October 22, 1956, and from each and every provision of said final-judgment, except for so much of Paragraph 6 thereof as provides that Walter G. Winne, Master, shall receive a fee of $3,500.00 for his services as the Master of the court, to be paid to him from the monies his hands; and except for Paragraph 15 of said Final Judgment.

DATED: November 2, 1956.

MAURICE SCHAPIRA,
Attorney for Defendant-Appellant,
Samuel Marcus.

No. 839

Office - Supreme Court, U.S.
FILED
MAR 6 1958
JOHN T. FEY, Clerk

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12073

AL BIERMAN and WILLIAM MILLER,
Plaintiffs-Appellees,

vs.

SAMUEL MARCUS,
Defendant-Appellant and Cross Claimant-Appellant,

and

MILMAR ESTATE, INC., a corporation organized under the laws of the State of New Jersey,
Defendant-Appellee.

AL KEVELSON,
Defendant on Cross Claim-Appellee.

Civil Action (No. 1626-56)

On Appeal from Final Judgment of the United States District Court for the District of New Jersey

Sat Below: Modarelli, U.S.D.J.

APPELLANT'S SUPPLEMENTAL APPENDIX

MAURICE SCHAPIRA,
Attorney for and of Counsel with Defendant-Appellant, Samuel Marcus,
17 Academy Street,
Newark 2, New Jersey.

SAMUEL M. KOENIGSBERG,
WILLIAM ROSSMOORE,
60 Park Place,
Newark 2, New Jersey.

MAX LEICHTMAN,
60 East 42nd Street,
New York 17, New York,
Of Counsel.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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SUPPLEMENTAL APPENDIX

Complaint

(Filed—August 3, 1956)

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION—ESSEX COUNTY

DOCKET NO.

ABRAHAM LIEBERMAN,

Plaintiff,

vs.

MILMAR ESTATE, INC., a corporation of New Jersey, BILL MILLER'S RIVIERA, INC., a corporation of New Jersey and WILLIAM MILLER,

Defendants.

CIVIL ACTION

Plaintiff, Abraham Lieberman, who maintains a law office at 851 Boulevard East, Weehawken, Hudson County, New Jersey, says:

1. At all times herein mentioned he was and is a practicing lawyer and a member of the Bar of the State of New Jersey.

2. In 1948 the defendant, Milmar Estate, Inc., and the defendant Bill Miller's Riviera, Inc., by their respective agent, servant and employee engaged his professional services on an annual retainer basis, whereby he agreed to render professional services as a lawyer to the said corporate defendants, in consideration of their agreeing to pay him the sum of $5,000.00 annually.

3. Thereupon, he rendered professional services to the said corporate defendants during the years 1948, 1949, 1950, 1951, 1952 and 1953 and he performed such professional services as the said corporate defendants, from time to time during the said years, requested that he render.

4. Simultaneously therewith and at the time when the corporate defendants engaged the professional services of plaintiff in the manner aforesaid, defendant William Miller requested that plaintiff extend credit to the said corporate defendants and in consideration of plaintiff extending such credit, the defendant, William Miller, agreed to pay the aforesaid sum of $5,000.00 which would become due and payable to him annually under the aforementioned retainer agreement.

5. Thereupon and in accordance with the agreement with the defendant, William Miller, plaintiff extended credit to the said corporate defendants and plaintiff rendered professional services to the said corporate defendants during the years 1948, 1949, 1950, 1951, 1952 and 1953.

6. By reason of such performance and rendition of professional services by plaintiff during the years aforementioned, there became due and owing to plaintiff from the said corporate defendants and the said defendant, William Miller, the sum of $30,000.00 on account of which some of money plaintiff has received the payment of $800.00 in 1955 leaving a balance of $29,200.00 due and owing to him.

7. Plaintiff has demanded payment of the aforementioned sum of money but the said defendants have refused and failed to make payment thereof.

8. On April 26, 1956 plaintiff commenced a Civil Action in attachment in the Superior Court of New Jersey, Law Division, Docket Number L-7099-55 against all the defendants named herein alleging in the said Civil Action the

foregoing facts and seeking a judgment for the balance of the fees aforementioned. Such proceedings were had in the aforementioned Civil Action pending in the Superior Court of New Jersey, Law Division, so that on April 26, 1956 an Order was made directing the issuance of a Writ of Attachment against the rights and credits, money and effects, goods and chattels, and real estate belonging to all defendants and located in the State of New Jersey. Thereupon a Writ of Attachment was issued by the Clerk of the said Court, and the Sheriff of Bergen County levied upon certain funds due and owing to the said corporate defendant, Milmar Estate, Inc., then in the hands of one Walter G. Winne, Master, United States District Court and in the hands of Peoples Trust Company of Bergen County. Notice of the Writ of Attachment and the foregoing Levy was given to all the said defendants in accordance with the rules of Court. Thereafter the said defendants made application to the aforementioned Court for an Order to quash the said Writ of Attachment and the Levy made thereunder, and although on July 11, 1956 the said Court did enter an Order quashing and vacating the Writ of Attachment issued against the corporate defendants and the said Levy made thereunder, the Court denied the application of the said defendant, William Miller.

9. The defendant, William Miller, is not now a resident of the State of New Jersey. He resides and maintains a permanent residence at 812 Bracken Street, Las Vegas, Nevada. The defendant, William Miller, is a non-resident of the State of New Jersey and process cannot be served upon him within the State of New Jersey.

10. The records of the Office of the Department of State, Bureau of Corporations of the State of New Jersey disclose that the principal office of the defendant, Milmar Estate, Inc., and of the defendant, Bill Miller's Riviera,

Inc., both corporations of New Jersey, is located at the same address, Hudson Terrace, Fort Lee, New Jersey and that the corporate agent for said corporations is the defendant, William Miller. The foregoing principal office is no longer in existence and the said corporate agent does not reside in the State of New Jersey. According to the records of the said Department of State, these said corporations did not change the location of their principal office or name another corporate agent. The records of the Clerk of the Superior Court of New Jersey, Law Division, in the aforementioned attachment proceedings disclose that the Secretary of State of New Jersey was served with a copy of the Complaint and Notice of Attachment and Levy on behalf of the said corporate defendants in compliance with the Statutes of New Jersey R.S. 2A:15-26.

11. The defendant, Milmar Estate, Inc., has issued 1250 shares of its capital stock, this being the total amount of issued and outstanding stock. These shares of stock have been issued to one Samuel Marcus and endorsed in blank by him. 500 shares of the foregoing shares of stock so issued to Samuel Marcus and endorsed by him in blank, are, in fact, the property of the defendant, William Miller. The foregoing 500 shares of stock so belonging to the defendant, William Miller, are his only assets which presently can be found in the state of New Jersey.

12. In a certain Civil Action now pending in the United States District Court, for the District of New Jersey wherein the corporate defendant herein, Milmar Estate, Inc., and the individual defendant, William Miller, and others are parties, plaintiff appeared as a witness at the trial of the said Civil Action pending in the Federal Court and testified before the Hon. ALFRED E. MODARELLI. During the said trial and while he so testified therein, plaintiff produced and brought into Court certain papers and in-

struments including the certificates of stock covering the shares of stock belonging to the said defendant, William Miller, as aforesaid. These papers, instruments and certificates of stock are exhibits in evidence in the said Federal Court proceedings and are all now being held by the Clerk of the said Federal Court in the Office thereof located in the City of Newark, Essex County, New Jersey and although plaintiff produced such papers, instruments and certificates of stock, he is not able to recapture possession thereof.

13. On April 26, 1956 in the aforementioned attachment proceedings pending in the Superior Court of New Jersey, Law Division, an Order was entered directing the issuance of a Writ of Attachment against the rights and credits, money and effects, goods and chattels and real estate of the defendant, William Miller, located in this State. Plaintiff has been unable to locate any assets or property belonging to the defendant, William Miller, excepting however, the aforementioned shares of stock issued by the defendant, Milmar Estate Inc. A valid attachment or levy cannot be made against the said shares of stock so owned by the defendant, William Miller, in the manner provided under the provisions of New Jersey Statutes R.S. 14:8-39 because the said certificate of stock cannot be actually seized by the officers making the attachment or levy and the said shares of stock cannot readily be attached or levied upon by ordinary legal process as required under the laws and statutes of our state.

14. Plaintiff seeks the aid of this Court by injunction to enjoin the said defendants from surrendering and redeeming the aforementioned shares of stock owned by the defendant, William Miller, until final disposition and judicial determination of the attachment proceedings pending in the Superior Court of New Jersey, Law Division as aforementioned in accordance with such remedy pro-

vided under the laws of the State of New Jersey, R.S. 14:8-39 and R.S. 14:8-40.

15. Plaintiff is without an adequate remedy in the Superior Court of New Jersey, Law Division.

Therefore, plaintiff claims judgment as follows:

That the said defendants, Milmar Estate, Inc., Bill Miller's Riviera, Inc., and William Miller and their agents and servants may be enjoined from surrendering and redeeming the shares of stock being the property of the said defendant, William Miller and that the said defendant, William Miller, be further enjoined and restrained from negotiating, transferring, assigning his said shares of stock so held by him and that the said defendant, William Miller, may be further enjoined and restrained from, in any manner disposing of, selling, transferring, assigning his interest or any part thereof in the said shares of stock so owned by him.

SAMUEL H. BERLIN
Samuel H. Berlin
Attorney for Plaintiff

STATE OF NEW JERSEY }
COUNTY OF ESSEX } ss.:

ABRAHAM LIEBERMAN, being duly sworn according to law upon his oath, deposes and says:

1. I am the plaintiff herein and I am personally familiar with all the matters set forth in the Complaint to which this Affidavit is annexed.

2. All the facts stated in the said Complaint are true to the best of my knowledge and belief.

ABRAHAM LIEBERMAN
Abraham Lieberman

Sworn and subscribed to before
me this 30th day of July, 1956.

MARY HUFNAGEL
A Notary Public of N. J.

Order to Show Cause

(Filed—August 3, 1956)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—ESSEX COUNTY
DOCKET NO.

ABRAHAM LIEBERMAN,

Plaintiff,

vs.

MILMAR ESTATE, INC., a corporation of New Jersey, *et als.*,

Defendants.

CIVIL ACTION

This matter being opened to the Court by Samuel H. Berlin, Attorney for the plaintiff, and the Court having considered the verified Complaint filed herein, from all of which it appears that plaintiff commenced a Civil Action in Attachment in the Superior Court of New Jersey, Law Division against the defendants named herein and that in said attachment proceedings an Order was made directing the issuance of a writ of Attachment against the rights and credits, money and effects, goods and chattels and real estate belonging to the defendant, William Miller, and that certain shares of stock issued by defendant, Milmar Estate, Inc., and belonging to the defendant, William Miller, are now being held by the Clerk of the United States District Court for the District of New Jersey in the office of said Clerk in the City of Newark, and that said shares of stock cannot validly and readily be attached or levied upon by ordinary legal process as re-

quired under the laws and statutes of our State and that defendant, William Miller, is a non-resident of the State of New Jersey and process cannot be served upon him within this state and good cause further appearing for the granting of this Order to Show Cause without notice;

It is on this 3rd day of August, 1956, ORDERED that the defendants show cause before this Court at the Hall of Record in Newark, N. J. New Jersey on Monday, the 13th day of August, 1956, at 10:00 o'clock in the forenoon or as soon thereafter as this matter can be heard why they and each of them should not be enjoined and restrained pending final hearing herein and the trial and final judgment herein, from surrendering, redeeming, negotiating, transferring, assigning and in any manner disposing of, selling, transferring and assigning all and any part of and interest in the shares of stock heretofore issued by the defendant, Milmar Estate, Inc., and belonging to the defendant William Miller, and it is further, which restraint shall expire within 10 days of the date hereof unless within such time the restraint order is extended by the Court,

ORDERED, that the defendants be and they are hereby restrained as aforesaid pending the argument and hearing on this Order to Show Cause, and it is further,

ORDERED, that the said defendants may apply to this Court for an Order to dissolve or modify the said restraint upon two days' notice to the plaintiff or his Attorney, and it is further,

ORDERED, that a copy of this Order to Show Cause and the verified Complaint filed herein, be mailed within one day from the date of this Order, by registered mail with postage prepaid, directed to the defendants, Milmar Estate, Inc., and Bill Miller's Riviera, Inc., in care of the Secretary of State of New Jersey, Trenton, New Jersey, and it is further,

Order to Show Cause

ORDERED, that a copy of this Order to Show Cause and the verified Complaint filed herein, be mailed within one day from the date of this Order, by registered mail with postage prepaid, directed to the defendant, William Miller, at his post-office address at 812 Bracken Street, Las Vegas, Nevada; and it is further,

ORDERED, that a copy of this Order to Show Cause and the verified Complaint filed herein be served upon the Clerk of the United States District Court, District of New Jersey at his office in Newark, New Jersey within one day from the date of this Order.

JOHN B. McGEEHAN,
J. S. C.

Excerpts from Court Testimony

ABRAHAM LIEBERMAN, called and sworn for the defendant Milmar Estate, testified as follows:

• • •

Cross examination by Mr. Grosman:

• • •

(commencing at 161-12)

The Witness: No, your Honor is entitled to it. I am not raising that question one bit. Your Honor should take more vacation than you probably take.

The Court: I'm not taking any vacation. My son is in the hospital and has been since January 4th.

The Witness: I'm sorry to hear it. Now, I am in this position. As I say, I came up specially as a witness in this case. I am not interested one way or the other. I thought I'd go back today or tomorrow. Of course, as it is now—

• • •

(commencing at 162-3)

The Witness: Oh, I will be gone until March.

Mr. Kesselhaut: It seems to me that the wishes of this witness so far as his pleasure visits, whether they be to Florida or the coast, should be unimportant to the Court, and they are certainly unimportant to us. And I think this witness should be amenable to the purposes of this Court, if necessary.

The Court: Particularly since he happens to be one of the key witnesses in this suit. I don't see how—

Mr. Grosman: Well, Judge, I don't want to embarrass the judge any more than I have to, although my relationship with him has not been very pleasant—

• • •

William Miller—Plaintiff—Cross

(commencing at 162-19)

The Court: I think Judge Lieberman, you are a responsible member of the bar, and you have been a member of the bench, and you realize how vital your testimony is in this case. It may be more vital than anybody else's. It is very unreasonable to ask anybody to excuse you just to go back to Florida. I am sure they will finish with you on the first day we resume. (163) And it's very unfortunate that this situation had to develop.

• • •

(commencing at 168-4)

The Witness: Does your Honor therefore say I should come back Wednesday morning?

The Court: I think you better, Judge, unless you make some other arrangements with the party that brought you here to suit your convenience. But, as I said before, you must realize that you are probably the most important witness in this case, or certainly one of them, and one of the key witnesses whose testimony may determine the issues in this case. And if it keeps you from Florida for a couple of days—much as I'd like to be there myself—you'll have to forego that pleasure. The rest is up to you and whoever brought you here.

• • •

WILLIAM MILLER, a plaintiff herein, called as a witness on his own behalf, having been duly sworn, testified as follows:

Cross examination by Mr. Grosman:

• • •

(commencing at 381-15)

The Court: Why don't you tell us that? How do we know that, taking over the management first and then an actual taking over of the club later? We don't know that, unless you tell us.

Let's start with '46 and see what he is driving at.

The Witness: May I add to that, your Honor?

The Court: Let's see, when did he take over management, according to you? April blank, 1946. It's a letter addressed to William Miller—

The Witness: The same letter as he did before.

The Court: —signed by William Miller, accepted by (382) Samuel Marcus. Let's get this straight. Who wrote this letter?

The Witness: Mr. Marcus.

The Court: I thought so. Go ahead. You are a great signer and he is a great letter writer.

Mr. Grosman: He gives you anything but money.

The Court: Is this his idea?

The Witness: This is the same identical typewriter—

The Court: I see that

• • •

(commencing at 382-17)

Q. Now Mr. Miller, you say that Marcus took over management in some form in April of '46? A. That's correct, as agent for his dummies. As agent.

Q. But he took over? A. He told me that he has no interest in this club when he took over, he is just helping these poor unfortunate people.

Q. Including yourself? A. Oh, yes. I wasn't there at the time.

Q. You were not there in April of 1946? (383) A. No. I went over to the Riviera. I took care of the Riviera.

William Miller—Plaintiff—Cross

Q. Please. After April, 1946, Marcus took over management, and you were not out, you were taking care of the Riviera? A. Of the Riviera.

Q. You are sure of that? A. I am positive.

• • •

(commencing at 387-15)

Q. Were you the president of the Mocambo Club on Monday, September 23, 1946? A. I may have been on record, but I had nothing to do with the club or its policies.

The Court: The answer is you really don't know, do you?

The Witness: I don't know, no.

• • •

(commencing at 390-1)

Q. Let me ask you this. Did you close the Riviera for a time in 1946 and go over to manage the Embassy Club? A. I don't remember.

Q. You don't. But you are sure that as of April, '46, you were out and Marcus was in charge? A. That's correct.

Q. I show you a letter on the stationery of the Embassy Club dated December 15, 1946. Read it, please, and tell me whether you wrote that letter, and that's your signature on it? Letter to Samuel Marcus. (Document handed to the witness.) A. Yes.

Q. You still say that subsequent to April of '46 you had nothing to do with the management of the Mocambo Club? A. I still say I had nothing to do with the management of the Embassy Club after April, 1946.

Q. Did you have any interest in it? A. None whatsoever.

Q. What is the meaning of that letter? A. It is another one of his letters that I voided on September 14, 1948. I wanted all these papers forgotten and given away.

• • •

By Mr. Grosman:

(392) Q. Now, Mr. Miller, as I recall you stated very emphatically that you didn't know a man named Black and don't know who he is? A. I said right now I don't remember a man named Black. I can't remember who he is.

Q. Do you remember what you said about Black in the testimony which you gave under oath before the Liquor Commission in New York? A. No, I do not.

Q. Wait a minute. On September 29, 1947, or October 3, 1947? A. I don't remember.

Q. All right. Let me read the question that was put to you and the answer that you gave then.

"Question: There is a charge here that you permitted a person named Philip Black to avail himself of the license. How long have you known Philip Black? And tell us the extent to which he was connected."

Do you remember that question? A. No, I do not.

Q. You gave this answer, "Because of the delay in building of the place, and my sickness, I needed some additional capital, so I applied—asked Philip Black—he was a very dear friend of mine—to loan me some money."

Do you still say you don't know—

• • •

(commencing at 393-4)

A. Yes. Now I know who Philip Black is. Ten years ago—I haven't seen the man. I had virus pneumonia, in the hospital, and this fellow was at the New Yorker Hotel, where I lived, and I used him to do everything, because I was in the hospital at the time. Now I know who Philip Black is. You refreshed my memory.

Q. Why did you tell us a little while ago that you never heard of that name. A. Because I just didn't remember Philip Black. The name meant nothing. I know more people than any man that you have ever met and I can't remember names to this day.

Q. But you testified in 1947, in September or October of '47, that he was a very dear friend of yours. A. He was, probably, in 1947 but I have had so many people that I meet, and I have so many friends, that I just didn't recall at this time.

Q. You were asked, "What business is Black in?" And you answered, "He is in the sportswear business, Treo Sportswear." A. Now I know. Anything you want to ask me about Philip Black, I will be glad to tell you.

The Court: Now you are well-refreshed about (394) Philip Black.

• • •

(commencing at 394-5)

Mr. Grosman: Now, if your Honor please, I think your Honor ought to take note of the fact that this man is deliberately committing perjury.

Mr. Brigadier: I object.

Mr. Grosman: Please. Let me finish and then you may say whatever you like.

It's all right for this man to get up here and say that he suffers lapses of memory, or his memory goes blank, but unless I confront him with something in documentary form, he will say anything he likes. Now, it is impossible that in 1947 this man could have testified under oath before the New York Liquor Authority that this man had loaned him money, and was a very dear friend of his, and testify here that he never heard of the name.

Mr. Brigadier: If your Honor please—

The Court: Just a minute, please. You know, I would be inclined to agree with you, but I have had a lot to do with people in the nightclub profession and the theatrical profession. They are very extravagant in their terms. A man can be a very dear friend whom they have met twice. You and I wouldn't talk that

way, because any dear friend of mine (395) I will remember till the day I close my eyes. But these lads do that. And you should hear how they talk about their women friends after they meet them at first time. You would think they knew them for a lifetime. Then when they get in trouble, the opinion changes completely of that girl.

But you should be very careful, sir, because there is a lot to what Judge Grosman says. It shouldn't be necessary for him—when you make a sworn statement before a hearing authority in New York that so and so "is a dear friend of mine" and eight years later you have got to be refreshed, and a lot of time has got to pass, and then you have got to be shown things, and then he comes back to you.

• • •

(commencing at 395-20)

The Court: I don't see what purpose he would have in not recalling him, because Mr. Black won't have much to do with the outcome of this case, I am sure.

• • •

(commencing at 396-12)

Mr. Grosman: I didn't ask you to adjudicate the case, I asked you to take note of the fact that this man, according to ordinary legal standards, as I understand them, deliberately committed perjury when he said that he never heard the name Black, he knows nothing about it, when, under oath, seven years later he says that he was a very dear friend of his and had loaned him money.

By Mr. Grosman:

Q. Now, how much money did he loan you? A. I don't remember.

Q. You don't remember. Did you pay him back or did you give him a note? A. I paid him back in full.

(397) Q. In cash? A. I don't know, cash or check, but I paid him back in full.

Q. Do you know where this man is now? A. I haven't seen Philip Black in three or four years.

Q. Now, this man, Philip Black, was he the kind of a person that you would meet as the Judge described? A. That's correct. I met him at the New Yorker Hotel.

Q. Just a casual acquaintance and he passed out of your memory? A. That's correct.

Q. May I ask you this. You were questioned before the Liquor Commission in New York and this question was put to you, "What business is Black in?

"Answer: He is in the sportswear business, Treo Sportswear.

"Question: Businessman?

Q. Answer: Businessman. And I asked him—he is a very personal friend of mine, knew him for years, and when I was building the place, he always felt that the place had a good chance to make good, and he always felt like coming in, and, of course, I kept him out."

Do you remember giving that testimony? A. If it is in the testimony, I said it.

Q. "I didn't need any money, but after this sickness, (398) and the long delay, I thought I needed some additional capital. Again, as a layman, I asked Philip to make me a loan, and for the loan, besides paying back the loan, which I fully intended to do, I felt I would give him a piece of the profit, but not to make him an officer, or in any way involved with the ABC Board, and we had made arrangements to do so. In fact, I had some kind of an agreement drawn up, which was never entered into, never signed, never entered into, because in the meantime *I had met Dave Parris.*"

* * *

William Miller—Plaintiff—Cross

(commencing at 398-20)

Q. You still say that Black was a casual acquaintance? A. I say that I met–

Q. (continuing) —the memory of his friendship has completely passed out of your memory until I read this to you? A. That's correct. And I take an oath on it.

(commencing at 399-18)

Mr. Grossman: My attention has been called to one question about the Embassy.

Q. I think you said that you turned that over, the stock of the Mocambo, to Marcus— A. I said—

Q. —lock, stock and barrel? A. I said Marcus, but again I was mistaken. I always talk of Marcus as my partner. But evidently I turned it over (400) to a couple of people he had interested or something.

• • •

(commencing at 400-13)

Q. Did any of these dummies that you speak of give you any money? A. Oh, yes, they did.

Q. Directly? A. Oh, sure.

Q. I see. Well, now, you say that you eventually turned over this club, the Embassy Club, which was at the time a paying, going concern, to Marcus, or his dummies; is that what you said? A. I didn't make that answer at all.

The Court: Strike out the "paying, going concern." The rest of the answer is true?

The Witness: Is correct, yes.

(401) Q. You turned over the Mocambo and the Embassy Club to Marcus? A. To him or his nominee.

Q. Well, now, was the Embassy Club on a paying basis at the time that you turned over— A. I don't know anything about the Embassy Club at that time. Mr. Marcus—

Excerpts from Court Hearing of August 11-12, 1954

The Court: No, at the time you turned it over.

The Witness: At the time I turned it over, I didn't know anything about it, because I had been away, your Honor, I had been at the Riviera.

• • •

(commencing at 401-16)

The Court: I know. How about when you turned over the management to him, in April of that year, was it paying then, do you know?

The Witness: Yes, it had a real good future, it looked like it was a hot club, what we call a hot club. People were coming and the crowds were coming.

By Mr. Grosman:

Q. And was it on a paying basis then? A. Yes, it was.

Q. And you say that you turned what over to Marcus (402) in April of '46; what did you turn over to him? A. The management.

Q. The management? A. Right.

Q. Did you retain the ownership, control, or the ownership of the Embassy Club? A. Yes, I did.

Q. Until when? A. Until this paper was signed. (Indicating.)

Mr. Brigadier: What is the date?

The Witness: I am sorry.

A. Till February 8, 1947.

• • •

(commencing at 404-22)

Q. Isn't it a fact that in December of '46 you again became active in the Embassy Club? A. I don't remember, Judge.

Q. You don't. Would you say that you did not become (405) active again in December of '46? A. I don't remember.

• • •

Excerpts from Hearing January 25, 1954

Page 5:

Mr. Brigadier: As I say, here we had the one affidavit of Mr. Marcus alone. That affidavit, incidentally, and a reply affidavit that Mr. Marcus has since filed, charged all of these people not only with conspiracy to defraud, but charge them, as I see it, in very clear language with having committed perjury, forgery and a number of other crimes.

This includes, incidentally, the member of the bar of the State of New Jersey.

Page 29:

Mr. Grosman: Now, if your Honor please, the thing that amazes me about Mr. Brigadier's argument is this: I can't understand how he stands up here and tries to make a point of the fact that this litigation has been going on since 1950. We are the ones who have been yelling, "Murder," so to speak, about how this litigation has dragged.

Now, he started this thing as a simple suit for interpleader wherein he said, "We don't know to whom we pay the money; we are in doubt; under the contract existing between our clients we are in doubt."

Now, they started in to take depositions, the deposition of Marcus. We served notice on them that we wanted to take the deposition of Miller. And, of course, we were stymied because we could not take the deposition of Miller until they got through with the deposition of Marcus.

Page 30:

After four hundred pages of testimony on deposition had been taken it became a weariness to the soul the way they were dragging this thing out, so I came in here on a motion, as you will remember, and I asked your Honor under the Rules to terminate this litigation. That was way back—

I don't know, a year ago or so. And, your Honor, they objected very vigorously—why, they hadn't even started. So your Honor said, "Well, I guess they have a right to go on and take these depositions to a conclusion."

Page 31:

Mr. Grosman: So that is the way the time has gone.

And so now he comes in and says, "Why, this litigation has been going on since December of 1950. Let's terminate it."

Excerpts from Court Hearing of August 11-12, 1954

Pages 38-39:

Mr. Grosman: • • • Now, they tell you about all these four or five years that have elapsed since the inception of this case. If you will look at the record of the case, Judge, it is they who have be in control of this thing ever since. Under the rules of the Federal Court whoever serves notice of the taking of depositions first has priority. They served notice a few days before we did and they have had a picnic with this thing ever since.

They examined Marcus. Up to this time we haven't even been up at bat. They have been up at bat since December 19, 1951, the first day when they examined Marcus. Now, they went on and examined him on December 19, 1951; December 26, '51. They then jump to February 13, '52 February 25, '52; February 26; March 18, '52; March 26, '52. And then the case drops dead.

Now, your Honor will remember that we tried to shorten this thing. We came in here on a motion, which is on file, and we asked you, we plead with your Honor to shorten this thing. And they fought us tooth and nail. No, they didn't want to have it shortened then. It suited their purpose. Now they are all through. The money has been paid on this condemnation proceeding, and they are greedy for this money, they would like to get hold of this money, which is quite understandable.

Excerpts from Court Hearing of December 13th, 1954

Pages 32, 33:

The Court: The one of the claimants wants to know, "Why can't I get justice in your Court; why can't I get my case tried; what do I have to do it to get it tried?" and not without good cause. What does a man have to do to get his case tried in the face of tactics such as have been used on both sides. And I frankly told this gentleman that his lawyer was just as much responsible for the delay as the defendant's lawyers are.

And I don't blame that man at all. How long does a person have to wait to get his case tried, with all these obstructionist tactics? You never agree on anything, except what day you are in here, then you will agree. Nobody has been the least bit cooperative in this case, to try it on its merits, whatever they might be, I might as well tell you, and I am sick and tired of obstructionist tactics. And I shall not tolerate them any longer. I am going to set it down for trial. That's exactly what I intend to do. I will give you sufficient time. But that man is right. His case is going to be tried. He says, "If I haven't got a case, I will lose it, and that's the end of it. If I have got a case, I want my money." And I don't think there is anything unreasonable about that gentleman's position at all. This is a typical example of what you can do with discovery proceedings to obstruct and delay justice as long as possible, to wear your adversary out.

• • •

Page 35:

Now, if you are not going to vacate the order, let us, at least, see the books, see what they did with the money.

Page 36:

Mr. Grosman: Of course, we claim that they paid that

money with the corporation's funds. And if Marcus owns all the stock of the corporation, except $20,000 worth, you have been, in effect, paying these debts with Marcus' own money.

Now, all we want is to have our accountants look at their books, and see what happened to the money they borrowed, the $60,000 they borrowed from the bank. I think that is a perfectly reasonable request and should be granted.

Page 37:

Mr. Grosman: Now, your Honor, it is a very significant fact in this maze of talk back and forth that should stand out and appeal to your Honor. Every time we ask these people for discovery, they throw every possible obstacle in our way.

Now, the heart of the new rules is to give us discovery in advance of the trial. What could we do with these people if we got them on the stand? We ask them a question and we can't check any of their answers. We can only do that if we have their answers in advance of the trial, just as they went after Marcus. Week after week, month after month, it was they who held up this case. I didn't hold it up. Check the records.

The Court: I didn't say you held it up. I told this man, who was on the other side, that his lawyer had as much to do with the delay as anybody else did. And you know I am a very frank man.

Page 38:

The Court: And I wanted him to know it, too. And I wanted him to know it wasn't my fault.

Mr. Grosman: All I want is to look at their books in advance of trial, see what they did with this $60,000. Now, we are entitled to that, under the rules. It is the heart of the new rules. If you don't give us that relief you are handicapping us and depriving us of the benefit of the rules.

Excerpts from Court Hearing of April 23, 24, 1956

Page 39:

Mr. Grosman: We wanted to try the case, but we want to go into this case properly prepared.

The Court: Well, my dear friend, if you are not properly prepared after four years, you never will be, any of you.

Mr. Grosman: I don't know why we should be placed in a position where, after these people have taken more than three years to prepare their case, suddenly we are obstructing. We are not obstructing anything.

The Court: Well, if you are not obstructing, you certainly haven't pushed it along. That goes for both sides.

Mr. Grosman: We haven't had an opportunity to prepare our case for trial, your Honor.

The Court: Well, I am setting it down for trial, which I have a right to do under the rules. I don't think anybody would criticize me, after waiting four years.

Excerpts from Court Hearing of April 23, 24, 1956

• • •

(commencing at 33-9)

Mr. Lieberman: If the Court please, may I say, first of all, sir, that I am not a party to this suit. Your Honor may remember originally counsel for the defendant included me as a party defendant and I appeared before your Honor, and your Honor dismissed the case as far as I was concerned, because I was an escrowee. So I am not a party to this suit.

I merely want to call to your Honor's attention something that is academic and I hope your Honor will agree with me. I appeared in this court as a witness. Counsel in this case—Mr. Chazin, Mr. Bridagier—had nothing.

They didn't know anything about this case, and didn't have a paper. It was the result of my efforts, sir, that they were able to get into this case and prepare their case properly, because they had nothing.

I came into this court, whether under subpoena or otherwise--I may have come into the trial voluntarily. (34) I think your Honor at that time stated that I was to come up from Florida. Your Honor remembers that.

Mr. Brigadier asked me for various papers, and I produced them, to use as evidence.

And as counsel in this case, the one who has the papers, and the one who produced them, I feel, your Honor, when the case is finished the papers should be returned to me. They belong rightfully to me.

If there is any question as between clients and myself, they have a remedy to get the papers from me. But I voluntarily produced them here, came in here into court as evidence, and I therefore feel, sir, that this is an improper provision. I am not a party to this suit, and I don't see how counsel expect your Honor to make an order of this kind, ordering the papers that I turned into this court as evidence, merely to be used as evidence to help the Court decide, and now say those papers should be turned over to the defendant.

The logical procedure—and your Honor, I can cite numerous cases stating that when papers are turned over by a witness, after disposition of the case they rightfully go back to the person who introduced those papers in evidence. If your Honor wants to hear those cases I will be glad to quote them. But I think it is purely academic. Your Honor knows that, having been a (35) member of the bar and sat on the bench all these years.

Mr. Schapira: Well, as far as I am concerned, your Honor, I would just like to supplement the Judge's remarks by merely stating that again your opinion merely

Excerpts from Court Hearing of April 23, 24, 1956

talks about certain papers that have been given to the Judge as escrow agent and certainly they wouldn't be entitled to any papers that were not immediately important to the issue—to the escrow—that was actually what Judge Lieberman's offices were used for, as an escrow agent.

Now, if there were other papers, other than the escrow, then I think those papers ought to be specifically set forth in detail, that they should be turned over. But not again an omnibus provision that all papers, all documents, be turned over. And I don't think they are entitled to anything that they don't have a right to.

Mr. Brigadier: If your Honor please, the whole action was brought to determine, as between Samuel Marcus on the one hand and Milmar and the others on the other, what the rights were with respect to this transaction. And part of the transaction was the escrow agreement.

It is true that Samuel Marcus tried to make Judge Lieberman a party to the action, that he violently opposed it—I took no position, you recall, at the time at all—and that he was not made a party to the action.

(36) But this simply adjudges, as it is elementary with respect to any judgment—you can only adjudge things as between parties to the proceedings.

So when this says that we are entitled to the papers in Lieberman's possession, Lieberman is required to turn it over to us, it is elementary that, of course, the judgment doesn't make him turn over the papers at all, he is not a party to the proceeding. But that is no reason why the judgment shouldn't still make the recital.

Mr. Brigadier: Now, I suggest, because I know what the basis of Mr. Lieberman's difficulty is right now, that he is going to claim that there is some money due to him for legal services. Why not let's talk about it frankly, Judge? And I would suggest that all we put in this clause, which would be all that he is entitled to, subject to any lien, if any, which he is entitled to with respect to such documents.

Excerpts from Court Hearing of April 23, 24, 1956

Mr. Lieberman: I will go a step further, if the Court please. If your Honor will agree with me—and as long as Mr. Brigadier brought it up, and I wasn't going to bring it up, and was certainly not going to question before this Court the question of my fees—I have asserted, if the Court please, there are fees due me of $29,200. And I have asserted a lien on these papers, and I feel rightfully so. And I think your Honor will do me a personal favor, as (37) a member of the bar and officer of this court, in view of my statement, to assert in this order of judgment that the sum of $29,200 be set aside until this is litigated for fees due me.

Under those circumstances, I would be satisfied. The papers don't interest me, as long as I know that that sum is set aside to be litigated. Because, your Honor, may I just say this, my opinion is that after this order of judgment is entered, and if no appeal is filed—I am just assuming, knowing the parties involved, and knowing that Mr. Miller is a non-resident of this state—that this corporation will be immediately dissolved and the moneys will be distributed, and I, who happen to be a rather important witness, and did an awful lot of work in this case, will be left hanging in the air, sir.

I merely want to call this to your Honor's attention. Your Honor will possibly wonder why I haven't spoken up prior to this. I knew the trial was pending, sir, and I didn't want them to place me in the position—and your Honor has seen the type of individuals involved here, saying that I am trying to shake them down before I testify. And I did nothing, relying upon a promise that I would receive my fees. I have made my demand, and now it has been refused, sir. And that is why I object to this and why I ask the Court to protect me, * * *

Excerpts from Deposition of William Miller on Oral Examination

Mr. Schapira: There is one thing I would like to observe, if your Honor please, not knowing too much about this case, and that is this.

Here are two stockholders in a corporation, admittedly at this point they are the holders of all the stock of the corporation. They bring a suit and they make their own corporation the defendant, and make Marcus a defendant.

Now, we had to come in and defend that suit and because we had to file compulsory counter-claims at that point.

As I unduerstand it, and they come in and admit that the corporation had no claim to the fund. Why should we bear the expenses of that?

(Talking about Marcus.)

After all, if we were entitled to it why did they bring the suit in the first place?

The Court: That's a good question, Mr. Schapira. I often thought of that myself during this trial.

Excerpts from Deposition of William Miller on Oral Examination

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(commencing at 2-24)

Q. Now, did you ever live at the Hudson Terrace at Fort Lee, New Jersey? A. Yes, I did. That's the Riviera.

(3) Q. That's the Riviera? A. That's the Riviera, yes.

Q. When did you leave there? A. I can't tell you offhand. It must have been about—

Q. About. A. I imagine it must have been somewhere about '50, 1950, maybe '49. I don't know.

Q. Now, did you live on the premises? A. Yes, I lived at the Riviera.

Excerpts from Deposition of William Miller on Oral Examination

Q. And you stopped living there in 1950? A. I believe it was '50. I am not sure. I would have to look.

• • •

(commencing at 37-8)

A. • • • He resigned as an officer of the corporation, which he testified under oath that he did not, and we have a letter here proving that he resigned as an officer. And from that day on I had nothing to do with Sam Marcus, I had finally gotten him out of my hair. I was in a position to operate, either make a success or break the club. And that is the way I operated.

• • •

(commencing at 71-7)

Q. How? A. A number of times if I needed some money, or anything like that, he would go to the Public National Bank, and on his name, by signing his signature, they would give us some money, and he would put it into Milmar, and then loan it to me, if I needed it, to hold me over for a couple of weeks.

Q. Milmar loaned money to you—? A. Yes.

Q. —or to Bill Miller's Riviera? A. Bill Miller's—to me and then I'd put it in the Riviera.

Q. I see. Did you put up any security for that? A. No.

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(commencing at 73-9)

Q. When is the last time you saw the books of Milmar Estates, Inc.? A. I never saw the books.

Q. At no time? A. At no time.

Q. Who had charge of the books of Milmar Estates, Inc.? A. Jacob Hoffman and my secretary.

• • •

Excerpts from Deposition of William Miller on Oral Examination

(commencing at 100-11)

Q. Well, was it more than a hundred shares? A. I don't know.

Q. Was it a thousand shares? A. I don't know.

Q. Now, on September 14, 1948, in view of the fact that you, as you say, left everything to your attorney, Judge Lieberman, you didn't read any of the documents prepared that day? A. No.

Q. You didn't participate in any of the discussions, except with Sam Marcus? A. I didn't say anything of the kind.

Q. Well, now, what did you say about participating in discussions? A. I said we participated in all the discussions, but all the paper work was left to Marcus—to Marcus, and his attorney, and Mr. Lieberman.

Q. And you reached certain agreements with Mr. Marcus, (101) told them to your attorney, he, or somebody, reduced them to writing, on September 14, '48. You didn't bother reading those writings, because you relied upon your attorney, is that correct? A. That's correct.

• • •

(commencing at 129-10)

Q. So that as soon as you, Mr. Bierman and Mr. Kevelson felt that you were in control, you immediately superseded, or replaced the lease of September 14, '48, DM-10, by a new lease. A. That was an agreement between ourselves—

Q. Yes. A. —that this new lease would go in effect only when Mr. Marcus is paid off in full, we would hold it as an agreement. But not till this lease was paid off, and all the obligations were paid off, would we use any part of the new lease.

• • •

Excerpts from Deposition of Robert J. Schwartz on Oral Examination

(Hearing of May 11, 1954)

(commencing at 23-7)

A. Mr. Marcus called me on the phone approximately the first week in September, 1948, and he said, "I have got a chance to sell," —strike that. He called me and he said, "What would you say if I told you that there is a buyer for the Riviera?"

And I said, "It all depends on the price or what you can get out of it."

• • •

(commencing at 40-10)

Q. And on the original you are sure the date is 1948 also? A. Well, if it's on a carbon, it must have been on the original.

Q. When did you first notice that it said 1948 on Exhibit DM-229? A. Oh, I guess about a year ago or so.

• • •

(commencing at 43-15)

Q. To whom did you actually deliver the file? A. I'm not absolutely sure, but, well, I'm pretty sure it was Mr. Marcus.

Q. And about how long ago? A. Oh, several years ago; at least three or four.

Q. Did you deliver all the papers that were in the file to him at that time? A. Actually the entire file. He took the complete file.

• • •

(commencing at 92-17)

Q. Well, you are sure that you turned over these certificates for 125 shares of stock to Mr. Marcus; what occasion was there for you to search for them among

Excerpts from Deposition of Robert J. Schwartz on Oral Examination

your possessions? A. He insisted he didn't have it so therefore I went back and went through my file, and still couldn't find it.

Q. When you turned over the stock to Mr. Marcus did you turn them over to him personally? A. I may have given it to his secretary, he may not have been there.

• • •

(commencing at 93-6)

A. Well when I was served with a subpoena duces tecum sometime last winter I went through my file to see if I could locate any papers at all, and I found nothing except what I have told you about.

• • •

(commencing at 146-1)

"Q. Now you are getting fresh, that is why I am shouting at you. A. I am not getting fresh. You don't understand plain English. I answered your question. I didn't say anything about the stock. If you ask the stenographer to read the answer you will save yourself a lot of high blood pressure.

"Mr. Topper: This is off the record. I think you better go up to see Judge Modarelli.

"Mr. Grosman: Wait a minute.

"Q. Now, I want to warn the witness— A. Don't warn me about anything, you just ask your questions and refrain from warning me about anything. In your position I think you would be pretty embarrassed to warn anybody about anything.

"Mr. Grosman: I want the record to show I am warning the witness that he is being fresh and refusing to answer, and if he persists—

• • •

Excerpts from Deposition of Robert J. Schwartz on Oral Examination

(commencing at 149-13)

Mr. Grosman: I didn't interrupt him, your Honor. So I told him if he persisted we would have to come in here and consult your Honor. With that he flared up, got off the stand, grabbed his coat, and said, "Let's go in and see the Judge now."

Now, obviously we can't continue this. He is a witness, that's all he is.

The Witness: As long as you shout at me, Mr. Grosman I will not continue. You will behave yourself and act as a gentleman.

Mr. Tepper: That is how it is.

The Witness: That's right. You have no right to shout at me.

• • •

(commencing at 156-5)

Mr. Grosman: If your Honor please, I don't see why there should be any exception in this case, why the ordinary rules of procedure should not be followed. As far as I am concerned, this man is a hostile witness hostile to Mr. Marcus, he has been playing with the other side quite obviously, he knows all about their exhibits, he calls for exhibits, and they hand them to him. As far as we are concerned he might just as well sit at counsel table with them. Now, the rules provide that this examination be conducted in this manner, and I don't know why your vacation should be broken up—

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(commencing at 160-17)

Now, it is true this thing has been going on for almost four years but they are the ones who have been having a field day with this thing. You remember I

Excerpts from Deposition of Robert J. Schwartz on Oral Examination

came in here, I think it was a year ago, and I asked your Honor, "Stop the examination of Mr. Marcus." And they objected very strenuously. And your Honor then said, "Why, you only took 400 pages of testimony, you come in here after 4,000 pages have been taken." Now, we haven't had a chance to examine a witness.

The Court: What is that, implied criticism of me, (161) now?

Mr. Grosman: No, no, I am not criticizing you.

The Court: I thought everybody was out of step but you.

Mr. Grosman: I am not criticizing your Honor but I am telling what happened at that point. Now all of a sudden they are in an awful rush because this thing has been reduced to cash.

• • •

(commencing at 162-9)

Mr. Grosman: Now, if your Honor please, we had this all set down to be worked out consecutively and they stopped it. I don't remember now why they stopped it, but they stopped it. Now, I am perfectly satisfied to go on with this case consecutively, but I don't think that we ought to go on during the heat of the summer, and I don't think I ought to be required to drop everything else because it suits their convenience now. I have been ready for four years with this case.

Now, may I suggest that the matter be set down for 30 days consecutively in September. I don't care how many days it takes.

When they say that we are stalling, we didn't bring this action, they brought this action. They are the ones who tied up the fund.

The Court: They tied up the fund, but I will tell you right now, I bet the plaintiff regrets he ever filed an (163) interpleader.

Excerpts from Deposition of Robert J. Schwartz on Oral Examination

Mr. Grosman: That is something else. Don't let them say we tied this thing up when they came in here pleading for your Honor to protect—

• • •

(commencing at 163-18)

Mr. Schwartz certainly has to be considered. Here is a man who has no interest in the outcome of this litigation at all; he is a member of the bar and he has to make his living as a lawyer. Do you expect this man just to come jackassing from New York constantly because he unfortunately represented Mr. Marcus at one time? And I use the word "unfortunately" advisedly. I think that he has a perfect right to ask that you get through with him as soon as possible.

• • •

(commencing at 166-19)

Mr. Grosman: No, I don't suppose he does.

The Court: He certainly doesn't. I bet he regrets the day he ever represented Mr. Marcus; he wouldn't be here now.

The Witness: That's right.

Mr. Grosman: Well, it hasn't been at any loss, I don't imagine.

The Court: Well, I hope it won't be to yourself. (167) if you ever get through with it. If you do. Are you ready tomorrow?

• • •

(commencing at 167-20)

Mr. Tepper: But we have to read the transcripts which are coming in now dealing with direct examination. This is an important matter. They are the ones who conducted lengthy direct examinations, not we; they are the ones who instituted the interpleader suit,

Excerpts from Deposition of Robert J. Schwartz on Oral Examination

not we. They are the ones who had dealings with Mr. Schwartz, and partially as a (168) principal—he was a principal. He isn't only in this matter due to circumstances; the circumstances, having represented Mr. Marcus; he was a principal, he owned stock in this corporation, he had a stake in it. He has a stake in it now. It isn't exactly as it appears on the record.

The Witness: That is not true.

Mr. Tepper: So I say to your Honor we merely want an opportunity to carefully examine the record.

I agree that this pretrial has gotten out of hand, but not due to cross-examination because we haven't cross-examined anybody yet.

The Court: You haven't started?

Mr. Tepper: We haven't started. So why should we be charged with all of this delay?

Now, if your Honor wants to fix Thursday morning to examine this witness, and continue with him until we have completed his cross-examination, I think that would be fair and reasonable and just. Thereafter to fix some future dates so that we may have an opportunity to examine the entire transcript before cross-examination.

The Court: You will need it before you start.

* * *

(commencing at 189-22)

Q. Now, Mr. Schwartz, would you please try to fix the date of this conference between you and Mr. Miller at his hotel, the Saint Regis Hotel—the Saint Moritz, rather? I am sorry. A. Some time around December (190) or right about New Years' of the period preceding the purchase of the Riviera.

* * *

(commencing at 380-7)

Q. Did you say to Mr. Marcus on that same occasion,

Excerpts from Deposition of Robert J. Schwartz on Oral Examination

"Roth has no standing in the case. Your lawyers are over in Jersey." A. Possibly. I don't know. I think was my point of doubt, whether Roth was authorized to get the papers here. He had exhibited nothing to me, nor said that he had any authority to get them.

Q. Did you ask him for any such authorization? A. I think I said to Roth, "Is there any reason why the attorneys in Jersey don't request the papers. They are the ones in the litigation."

Q. Did Sam Marcus then say to you, "I am telling you Mr. Roth is my attorney here in New York?" A. Could be.

* * *

(commencing at 381-1)

Q. You then said to him, "Roth has no standing in this case." A. I don't know whether I repeated it. My point was, I wanted to hand them over to somebody in litigation if possible.

Q. You wanted to hand over what to somebody in litigation? A. Whatever papers they thought I had.

Q. Well, did you have some papers? A. I didn't think that those two receipts for dealings between Mr. Marcus and myself were part of the case at all.

Q. You are now referring to Exhibits DM-229 and Exhibit DM-228? A. That is right.

* * *

(commencing at 382-4)

Q. Now, you recall whether or not, Mr. Schwartz, you showed Exhibit DM-229 to Mr. Brigadier on any one of several times when he came over to see you? A. You will have to be more specific. I did show it to him subsequently when the examination started.

Q. Not before? A. Not before.

* * *

Excerpts from Deposition of Al Kevelson on Oral Examination

Page 8:

Q. Did you make up your mind then and there as to whether you would buy it or not? A. I left with the accountants and I told Mr. Miller that I will call him later, which I did, and I told him that I am ready to do business.

Q. Now, how much later did you call him? A. I don't remember. Maybe that same evening, or the next morning. I don't remember exactly.

Page 11:

Q. So you personally had no dealings with him whatsoever, except as you came in contact with him at these night clubs? A. You mean business dealings?

Q. Yes. A. No, no business dealings.

Page 39:

Q. You knew he was a living human being who had an interest in this Milmar Estates; you knew that? A. Yes.

Page 63:

Q. Did you have any interest in the corporation known as Bill Miller's Riviera? A. No, sir.

Pages 9-10:

Q. And do you have a lawyer representing you generally in your business? A. Most of the times.

Q. And who is he? A. We have Harvey Simon in New York City, and Chazin and Chazin in Jersey City.

Q. Now, did you talk to either one of these firms— A. About what?

Q. —with respect to your proposed purchase of one half interest in Milmar Estates? A. No, sir.

Excerpts from Deposition of Al Kevelson on Oral Examination

Page 79:

A. Well, I didn't think I needed a lawyer. I had confidence in William Miller.

Page 68:

Q. Well, were you fully informed of exactly what was going on with the affairs of Milmar Estates, Inc.? A. That's right.

Q. From the time that you took over, as you described here? A. That's correct.

Q. You at all times have been fully informed of the affairs of Milmar Estates, *Inc.*? A. That's correct.

Page 43:

Q. How much money did Bill Miller put up in connection with the purchase of this stock, Marcus' stock, on September 14, 1948 any? A. Mr. Miller didn't put any money up.

Q. Only you and Mr. Bierman. A. That's correct.

Page 44:

Q. In reference to the $15,000, did he put up any money? A. He was paying—I imagine he was paying. It was his duty to pay it.

Q. You didn't advance him any money on account of the $15,000? A. No, sir.

Page 45:

Q. Didn't the $15,000 additional come from the treasury of the Milmar Estates, Inc., after you and Mr. Miller and Mr. Bierman took over? A. I don't know where it came from. And if it did, it would be charged to Mr. Miller's account.

Excerpts from Deposition of Samuel Marcus on Oral Examination

Page 71:

Q. Incidently, why weren't you a party to that contract? It was your money that was being spent to buy Marcus' interest. A. No particular reason. I just didn't want to be named in it. I didn't want anybody—I told them to act as my agent and they went.

Page 75:

Q. Well, did Bierman put any of his own money or was it your money that he put up? A. You mean with the deposit?

Q. *Yes.* A. *I don't* remember exactly whether it was his or whether it was mine.

Q. Well, an item like $10,000, you wouldn't remember whether it was your money or his money that was put up? A. Well, I gave Bill Miller the money. Whether he gave it to Bierman, or what he did with it, I don't know what he did, but most likely he must have given it to Bierman.

Excerpts from Deposition of Samuel Marcus on Oral Examination

(commencing at 57-8)

Q. Did you protest to the lawyers that this agreement did not carry out your intent? A. Frankly, I don't recall ever see the agreement after I left my lawyer's office. I had no copy myself.

• • •

(commencing at 80-7)

Q. Well, what do you say was the transaction which this agreement was intended to cover? A. I personally was to sell my holdings of 625 shares of stock to a gentle-

Excerpts from Deposition of Samuel Marcus on Oral Examination

man by the name of Mr. Al Kevelson, or his nominees, whoever might appear for him.

Q. For what price? A. For $125,000, plus an additional amount which was later added.

• • •

(commencing at 84-5)

Q. What were those papers? A. I don't know what they were. I just gave my attorney the sheaf of papers that I had gotten from Mr. Schwartz's office, and I didn't know what was in it.

Q. Did those papers include a copy of Exhibit P-4? A. I really don't know. I didn't go through the file. I simply turned the file over completely as I got it from Mr. Schwartz's office.

• • •

(commencing at 89-8)

A. I have never seen a copy of this agreement since the time it was signed in Mr. Schwartz's office.

Q. Did Mr. Schwartz give you a copy of this agreement? A. He did not.

Q. Did he give you a copy of this agreement among the papers that you turned over to Judge Grosman? A. I wouldn't know.

• • •

(commencing at 94-8)

Q. Now, your wife, Sarah Marcus, never signed that deed, did she? A. I don't think she did.

Q. You know that a suit was brought by Milmar Estates, Inc., against your wife with reference to an alleged dower interest in that property? A. That's correct.

Q. And you know that that suit was settled by the payment of money to your wife? A. So I understand.

• • •

Excerpts from Deposition of Samuel Marcus on Oral Examination

(commencing at 133-5)

Q. What additional sources are there where you might have papers? A. Well, we have a warehouse down on Duane Street which is quite loaded up there, and it took us days to move things around to locate those things, and I have been waiting for my secretary to get well, that is my ex-secretary to get well, so that she can come into town and help me to possibly locate something in my files.

• • •

(commencing at 149-13)

Q. Now, what conversation took place between you and Al Kevelson at that time? A. I said to Mr. Kevelson that I understand—"I have heard rumors that you are no longer connected with the Riviera. Is that correct?"

And he said, "Why, no, that is not correct at all. I am still actively engaged there. Those rumors are entirely incorrect."

• • •

(commencing at 155-8)

Q. Will you tell us what the conversations were. A. Well, one conversation particularly, Mr. Miller wanted me to release his note for $50,000, he wanted me to give him back his note for $50,000, and I did not want to give him back his note for $50,000.

He says, "well, Mr. Kevelson, Al, won't go through with this deal unless you return this note to me. He knows about this note that you hold of mine and he does not want anybody in any position to press me for money, and unless I can get a release of this note it may dump the applecart."

He said, "What difference does it make to you? You have the stock. You own the stock. What difference does it make to you if you give me the note back and destroy the note?"

• • •

Excerpts from Deposition of Samuel Marcus on Oral Examination

(commencing at 156-21)

And I told him that, frankly, I do not like the looks of it, that I feel I was being taken for a ride, that I was not getting for my shares of stock what I was entitled to. And he called Bill Miller over. He said, "Well, put Bill Miller back again." Bill Miller went back on the phone, and (157) when he came back he said to me, "Well, I will tell you, Sam, here is what we agreed to do. I will give you an extra $15,000 to sweeten up the deal." And with the extra $15,000 I agreed to sell my stock for the amount of $140,000.

• • •

(commencing at 162-22)

A. Well, the deal was, he said, "Bill can get you $125,000 for your stock. Now, why don't you take it," he said; "Maybe we can do a little bit better, but at least take this deposit now so that I can go back to (163) this guy and tell him we got a deal finished."

Mr. Grosman: Would you ask him who the "guy" is.

• • •

(commencing at 164-2)

Q. Now, that contemplated the selling of your stock in Milmar Estates, Inc.? A. That contemplated selling 625 shares of stock that was issued in my name.

Q. How about the rest of the stock? A. The rest of the stock was being held for a $50,000 note.

• • •

(commencing at 188-2)

Q. Did you ever knowingly sign a resignation as officer and director of Milmar Estates, Inc.? A. I don't recall ever knowingly signing such resignation.

• • •

Excerpts from Deposition of Samuel Marcus on Oral Examination

(commencing at 218-14)

The Witness: It is from its inception I believe. I see the first date May 7, 1946. I never had this checkbook in my possession. I mean I never handled this book at all. It was merely left in the office by Mr. Hoffman.

Mr. Grosman: What is the last date?

The Witness: May 16, 1947.

* * *

(commencing at 227-11)

Do you know that Milmar Estates, Inc. paid your wife, Sara Marcus, $7500? A. I heard about it.

Q. Did you know about an action that was pending by Milmar Estates, Inc. against your wife prior to the time that that money was paid? A. I had heard about it.

Q. Did you prior to the time the money was paid know anything about the negotiations pending in settling that suit? A. I did not.

Q. Did you know that an offer or offers had been made by Milmar Estates, Inc. to pay money to your wife? A. I did not.

Q. You knew nothing about such an offer or offers until after the money was paid? A. That's correct.

* * *

(commencing at 303-7)

Q. By the way, have you set up any account in any of your books showing a balance unpaid on sale of stock of Milmar Estates by you, showing payments as they are received and showing balances unpaid? A. No, I did not.

Q. Do you have any amount set up at all in your books for the balance of the purchase price of the stock sold by you on September 14, 1948? A. I handled this transaction as a personal matter.

* * *

Excerpts from Deposition of Samuel Marcus on Oral Examination

(commencing at 305-10)

Q. What instructions had you given her as to how these checks should be entered in your checkbook? A. I don't recall ever giving her any instructions. It is something that she had always done on her own to be able to supply me with whatever information I wanted when required.

• • •

(commencing at 309-5)

The Witness: I am not prepared to make a definite statement as to the exact purpose of this money received from Miller. I do know there was arrangements made where I was to be repaid some loans that I had advanced to the Riviera, and unless I can see the books of the Riviera and Milmar I cannot make an intelligent answer to your question.

• • •

(commencing at 342-24)

A. • • • and I also gave him at that time as additional collateral some stock I owned in another (343) company called the Weimet Co. • • •

• • •

(commencing at 403-2)

Q. Do you know that in the dower case your wife in answer to an interrogatory said that she was displeased with your connection with night clubs? A. I don't know what she said at all.

• • •

(commencing at 403-9)

Q. Was your interest in it merely as a real estate proposition? A. That's right.

• • •

Excerpts from Deposition of Samuel Marcus on Oral Examination

(commencing at 403-17)

Q. And not with the purpose of operating any club? A. That's right.

• • •

Exhibit DME-57

[Check Stubs]

(Opposite) ☛

DME57

No. 7/10 19 ORDER OF

	2563	79
Sam Mercer Rel Loan Ben Marden Notes of Feb 2000 Mar 2000	5000	—

No. 8/3 19 ORDER OF

Michaels Realty Corp 5000 Principal 791 Int.	5791	67

No. 9/7 19 ORDER OF

Michaels Realty Corp	5775	00
	23070	46

DME59

No. 9/7 19 ORDER OF

	23070	46
Boro of Ft Lee Milton Tax - Personal	59	30

No. 9/7 19 ORDER OF

Boro of Ft Lee Block 153 Lot 36 1947 Tax + int.	5711	21

No. 9/7 19 ORDER OF

Boro Ft Lee Block 186 Lot 11 Tax	772	66
	9613	63

No. 339

Office - Supreme Court, U.S.
FILED
MAR 6 1958
JOHN T. FEY, Clerk

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12073

AL BIERMAN and WILLIAM MILLER,
Plaintiffs-Appellees,

vs.

SAMUEL MARCUS,
Defendant-Appellant and Cross Claimant-Appellant,

and

MILMAR ESTATE, INC., a corporation organized under the laws of the State of New Jersey,
Defendant-Appellee.

AL KEVELSON,
Defendant on Cross Claim-Appellee.

Civil Action (No. 1026-50)

On Appeal from Final Judgment of the United States District Court for the District of New Jersey

Sat Below: Modarelli, U.S.D.J.

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APPENDIX

Additional Relevant Docket Entries

* * *

1-15-51 Consent order adjourning hearing on application to discharge plaintiffs from liability to 1-22-51, filed (Fake)

1-22-51 Consent order adjourning hearing on application to discharge plaintiffs from liability to 1-29-51, filed (Fake) Notice mailed.

1-29-51 Ordered hearing on application to discharge plaintiffs from liability adjourned. Consent order to be signed (Fake)

1-29-51 Consent order adjourning hearing on application to discharge plaintiffs from liability to 2-19-51, filed (Fake) Notice mailed.

* * *

2-20-51 Consent order adjourning hearing on application to discharge plaintiffs from liability to 3-26-51; and extending time to answer to 4-.. 51, filed. (Modarelli)

* * *

3-26-51 Consent order adjourning hearing on application to discharge plaintiffs from liability to 4-23-51; and extending time to answer to 4-23-51, filed (Modarelli) Notice mailed.

* * *

4-23-51 Consent order adjourning hearing on application to discharge plaintiffs from liability to 5-14-51; and extending time to answer to 5-14-51, filed 4-20-51 (Modarelli) Notice mailed.

* * *

Additional Relevant Docket Entries

5-14-51 Consent order adjourning hearing on application to discharge plaintiffs from liability to 6-25-51; and extending time to answer to 6-25-51, filed 5-11-51 (Modarelli) Notice mailed.

* * *

6-20-51 Consent order extending date for hearing on application to discharge plaintiffs from liability to Oct. 22, 1951 and extending time to answer to Nov. 2, 1951 filed 6-19-51. (Modarelli) Notice mailed.

* * *

10-19-51 Consent order adjourning hearing on application to discharge plaintiffs from liability; and extending time to answer to 11-26-51, filed 10-18-51 (Modarelli) Notice mailed.

* * *

11-20-51 Consent order adjourning hearing on application to discharge plaintiffs from liability to 1-14-52; and extending time to answer to 1-14-52, filed 11-19-51 (Modarelli) Notice mailed.

* * *

12-14-51 Notice of motion for extension of time for Samuel Marcus to answer, etc., and affidavit of service, filed (ret. 1-14-52)

* * *

1- 2-52 Order adjourning hearing on order to show cause, and extending time to answer until after depositions, filed (Modarelli) Notice mailed.

* * *

4- 8-52 Notice of motion to terminate or limit examinations of defendants, and acknowledgments of service, filed (ret. 4-28-52) (4-7-52)

* * *

Additional Relevant Docket Entries

7-14-52	Copy of letter-opinion denying motion to limit examination; granting motion to inspect books; and denying objections to interrogatories, filed 7-11-52
	• • •
3-26-53	Order denying motion to limit examination of Samuel Marcus; permitting inspection of documents, etc., denying motion to strike interrogatories, filed 3-25-53 (Modarelli) Notice mailed.
	• • •
5-27-54	Hearing on application to require witness to answer questions on deposition. Decision reserved. (Modarelli) (5-26-54)
	• • •
8- 6-54	Notice of motion to establish a time for the completion of the taking of all depositions and other pre-trial discovery proceedings; to direct Master to withdraw certain monies from bank for investment, etc., filed 8-5-54 (ret. 8-11-54) No brief submitted.
	• • •
8-13-54	Hearing on motion to establish a time for the completion of the taking of all depositions and other pre-trial discovery proceedings, etc. Ordered hearing continued to 8-12-54. (Modarelli) (8-11-54)
8-13-54	Affidavit of J. B. Hoffman, filed 8-12-54.
8-13-54	Continued hearing on motion to establish a time for the completion of all depositions and other pre-trial discovery proceedings, etc.
	• • •
8-23-54	Order authorizing payments from fund on deposit filed. (Modarelli) Notice mailed.

Additional Relevant Docket Entries

9-17-54	Notice of motion to vacate order of August 21, 1954, and acknowledgment of service, filed 9-16-54 (ret. Oct. 4, 1954)
9-17-54	Notice of motion to modify order of February 18, 1954, and acknowledgment of service, filed 9-16-54 (ret. Oct. 4, 1954)
10- 7-54	Notice of motion to modify order of February 18th, 1954 filed (ret. 10-25-54) (No Brief)
	• • •
7-24-56	Transcript of hearing on motions, 4-23-56, filed.
	• • •
9-24-56	Notice of motion of Samuel Marcus for summary judgment on certain counts of cross-claims of Milmar Estates, Inc., filed (ret. 10-8-56) (Brief submitted)
	• • •
10-25-56	Hearing on application for a stay of judgment and to fix amount of Supersedeas Bond. Decision Reserved. (Modarelli) (10-24-56)
	• • •
10-26-56	Memorandum filed. (Modarelli)
10-26-56	Transcript of hearing on motion for supersedeas bond filed.
	• • •
11-27-56	Consent order directing Master to pay certain monies to the Internal Revenue, filed (Modarelli) Notice mailed.
11-27-56	Consent order allowing fee to Master, filed (Modarelli) Notice mailed.
11-29-56	Order denying Summary Judgment filed 11-28-56. (Modarelli) Notice mailed.
	• • •

Additional Relevant Docket Entries

2-18-57	Transcript of hearing on application for a stay of judgment and to fix amount of Supersedeas bond, filed
2-18-57	Supplement to memorandum of Milmar Estate, Inc., filed
2-18-57	Second Deposition supplement to memorandum of Milmar Estate, Inc., filed
2-18-57	Fourth Supplemental Record on Appeal forwarded to Clerk, USCA.

• • •

Excerpt from Complaint*

(Filed—December 28, 1950)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Docket No. 1026—50

Civil Action

AL BIERMAN and WILLIAM MILLER,

Plaintiffs,

—v.—

SAMUEL MARCUS and MILMAR ESTATE, INC., a corporation organized under the laws of the State of New Jersey,

Defendants.

• • •

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* To correct misquotation at 12a.

Excerpt from Complaint

WHEREFORE, plaintiffs pray:

* * *

3. That the plaintiffs, upon payment into the Registry of this Court of the sum of Fifteen Hundred ($1,500.00) Dollars and interest thereon, may be adjudged to be discharged from all liabilities to said defendants, or any of them, as regards the said installment payment of $1,500.00 and interest thereon; and that as to each installment payment and interest thereon which shall be paid by the plaintiffs into the Registry of this Court, they may be adjudged to be discharged from all liability to the defendants, or any of them, upon such payment or payments being made into the Registry of this Court.

* * *

/s/ CHAZIN & CHAZIN
CHAZIN & CHAZIN
Attorneys for Plaintiffs,
30 Journal Square,
Jersey City, N. J.

By: /s/ ABRAHAM CHAZIN
ABRAHAM CHAZIN
A Member of the Firm.

Order

(Filed—December 28, 1950)

The plaintiffs having filed their Complaint in Interpleader under Title 28, U. S. Code, Section 1335, and the plaintiffs having deposited with the Registry of this Court, the sum of $1700.00, being the amount of the $1500.00 installment which will become due on January 1st, 1951, as set forth in

the Complaint, and sufficient monies to pay the interest thereon, and it appearing that the defendant, Samuel Marcus, is a citizen and resident of the State of New York, and that the defendant, Milmar Estate, Inc., is a citizen and resident of the State of New Jersey, and of the District of New Jersey, and that the value of the obligation involved in this case exceeds $500.00, and that the defendants, of diverse citizenship as defined under Title 28, U. S. Code, Section 1332, are claiming or may claim to be entitled to the money or to the benefit or benefits arising by virtue of the obligations of the plaintiffs to pay the said installment of $1500.00 with interest thereon, and the subsequent installments as they become due, totalling the principal sum of $35,000.00, besides interest, and good cause appearing,

THEREFORE, it is on this 28th day of December, 1950, on motion of Chazin & Chazin, attorneys for the plaintiffs, by Abraham Chazin, ORDERED that:

1. The defendants, Samuel Marcus and Milmar Estate, Inc., and their respective officers, agents, servants, employees and attorneys, be and they hereby are pending this suit and until further order of this Court, enjoined and restrained from instituting or prosecuting any proceeding in any State or United States Court affecting the obligation involved in this interpleader action, to wit: The obligation of the plaintiffs to pay $1500.00 on January 1st, 1951 and interest thereon, and the obligations of the plaintiffs to make additional payments, all totaling $35,000.00 with interest thereon, as set forth in the complaint, said sum of $35,000.00 being the balance of the purchase price on the purchase of the stock of Milmar Estate, Inc.

2. That the process of this Court be issued for all the defendants to appear in this case.

Order

3. That the defendants interplead and determine their rights to collect the obligation described in the complaint and the installments thereof.

4. That the defendants and each of them and their respective officers, agents, servants, employees and attorneys be and they hereby are restrained until further order of this Court from declaring an acceleration default of the balance of the said purchase price and from demanding the return by Abraham Lieberman, Esq., Escrow Agent, to the Seller of the stock deposited with him, and that the restraint against calling an acceleration default and against demanding of said Escrow Agent the return of the said stock as aforesaid continue so long as the plaintiffs deposit with the Registry of this Court on or before the time or times that the same shall become due, the various installments of principal of the said obligation, together with interest thereon.

5. That the said defendants show cause before this Court in the Federal Building in the City of Newark on the 15th day of January, 1951 why the plaintiffs should not be discharged from further liability as to the installment with interest deposited by the plaintiffs with the Registry of the Court, and as to any further installments that the plaintiffs shall deposit with the Registry of the Court, and why the Court should not grant such other relief as may be appropriate, including a judgment requiring the defendants to interplead, and why the injunction and restraint contained in this Order should not be made permanent.

6. That a true copy of this Order be served upon each of the respective defendants, or their attorneys, within six days from the date hereof.

/s/ THOMAS F. MEANEY
Judge U.S.D.C.

Order

(Filed—January 15, 1951)

It appearing that an Order was entered on the 28th day of December, 1950, ordering that:

1. The defendants, Samuel Marcus and Milmar Estate, Inc., and their respective officers, agents, servants, employees and attorneys, be and they hereby are pending this suit and until further order of this Court, enjoined and restrained from instituting or prosecuting any proceeding in any State or United States Court affecting the obligation involved in this interpleader action, to wit: The obligation of the plaintiffs to pay $1500.00 on January 1st, 1951 and interest thereon, and the obligations of the plaintiffs to make additional payments, all totalling $35,000.00 with interest thereon, as set forth in the complaint, said sum of $35,000.00 being the balance of the purchase price on the purchase of the stock of Milmar Estate, Inc.

2. That the defendants interplead and determine their rights to collect the obligation described in the complaint and the installments thereof.

3. That the defendants and each of them and their respective officers, agents, servants, employees and attorneys be and they hereby are restrained until further order of this Court from declaring an acceleration default of the balance of the said purchase price and from demanding the return by Abraham Lieberman, Esq., Escrow Agent, to the Seller of the stock deposited with him, and that the restraint against calling an acceleration default and against demanding of said Escrow Agent the return of the said stock as aforesaid continue so long as the plaintiffs deposit with the Registry of this Court on or before the time or times that the same shall become due, the various installments of principal of the said obligation, together with interest thereon.

Order

And it further appearing that the defendants were ordered to show cause before this Court in the Federal Building in the City of Newark on the 15th day of January, 1951 why the plaintiffs should not be discharged from further liability as to the installment with interest deposited by the plaintiffs with the Registry of the Court, and as to any further installments that the plaintiffs shall deposit with the Registry of the Court, and why the Court should not grant such other relief as may be appropriate, including a judgment requiring the defendants to interplead, and why the injunction and restraint contained in this Order should not be made permanent,

And defendant, Samuel Marcus, by his Attorneys, Hannoch & Lasser, by Aaron Lasser, Esq. having applied for an adjournment of the hearing on the order to show cause, and all the parties having consented to this order,

It is on this 15th day of January, 1951, on motion of Chazin & Chazin, Attorneys for plaintiffs, by Abraham Chazin, Esq.,

ORDERED that the date for the hearing on said order to show cause be and hereby is extended to the 22nd day of January, 1951, at 10:00 o'clock in the forenoon or as soon thereafter as the Court may attend to the matter, and that the Order of the 28th day of December, 1950, be and hereby is continued in all other respects and that the defendants and each of them and their respective officers, agents, servants, employees and attorneys be and they hereby are restrained and enjoined in accordance with the aforesaid Order until further order of this Court.

/s/ GUY L. FAKE
Judge U.S.D.C.

Order

We hereby consent to the entry of the within Order.

/s/ HANNOCH & LASSER
Hannoch & Lasser

By: /s/ AARON LASSER
Aaron Lasser
Attorney for defendant,
Samuel Marcus

/s/ CHAZIN & CHAZIN
Chazin & Chazin

By: /s/ ABRAHAM CHAZIN
Abraham Chazin
Attorney for plaintiffs,
Al Bierman and
William Miller

/s/ MAURICE C. BRIGADIER
Maurice C. Brigadier
Attorney for defendant,
Milmar Estate, Inc.

Order

(Filed—January 2, 1952)

This matter being opened to the Court by Robert D. Grosman, Esq., attorney for the defendant, Samuel Marcus, and consent to the entry of the following order being hereunder noted by Chazin & Chazin, attorneys for plaintiffs, and Maurice C. Brigadier, attorney for Milmar Estate, Inc.; and it being represented that the defendant, Samuel Marcus is unable to file an answer to the complaint exhibited against him herein without the taking of depositions; and

Order

it being represented that the defendant, Samuel Marcus, cannot answer the order to show cause made herein on the 28th day of December, 1950, which has from time to time been continued; and the Court being satisfied with the sufficiency of this application:

It is, on the 2nd day of January, 1952

ORDERED:

1. That the time for the hearing of the order to show cause made herein on the 28th day of December, 1950, which has been continued from time to time, be and is hereby extended and continued the first motion day (of which notice shall be given) following thirty days after the termination of the taking of the aforementioned depositions by the defendants, Samuel Marcus and Milmar Estate, Inc., and by the plaintiffs, Al Bierman and William Miller; and that the order of the 28th day of December, 1950 be and is hereby continued in all respects and that the defendants and each of them and their respective officers, agents, servants, employees and attorneys be and they are hereby restrained and enjoined in accordance with the aforesaid order until the further order of this Court.

2. That the time within which the defendants, Samuel Marcus and Milmar Estate, Inc., shall answer or otherwise move with regard to the complaint is likewise extended and continued until 30 days after the termination of the taking of depositions by the defendants, Samuel Marcus and Milmar Estate, Inc. and by the plaintiffs, Al Bierman and William Miller.

/s/ ALFRED E. MODARELLI
Judge, U.S.D.C.

Order

We hereby consent to the entry of the above order.

CHAZIN & CHAZIN
Attorneys for Plaintiffs

By /s/ ABRAHAM CHAZIN
Abraham Chazin
A Member of the Firm

/s/ ROBERT D. GROSMAN
Robert D. Grosman
Attorney for Defendant, Samuel Marcus

/s/ MAURICE C. BRIGADIER
Maurice C. Brigadier
Attorney for Defendant, Milmar Estate, Inc.

Excerpts from Notice of Application to Terminate or Limit Examinations

(Filed—April 8, 1952)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Docket No. 1026-50

Civil Action

AL BIERMAN and WILLIAM MILLER,
Plaintiffs,

—v.—

SAMUEL MARCUS and MILMAR ESTATES, INCORPORATED, a Corporation organized under the rules of the State of New Jersey,
Defendants.

Excerpts from Notice of Application to Terminate or Limit Examinations

To: MESSRS. CHAZIN & CHAZIN,
Attorneys for Plaintiffs,
Al Bierman and William Miller,
30 Journal Square,
Jersey City 6, New Jersey.

And: MAURICE C. BRIGADIER, Esq.,
Attorney for the defendant,
Milmar Estates, Inc.,
26 Journal Square,
Jersey City 6, New Jersey.

GENTLEMEN:

PLEASE TAKE NOTICE that on Monday, the 28th day of April, 1952, at the hour of 10:00 o'clock in the forenoon, (E. S. T.), at the Federal Building in the City of Newark, I shall apply to the United States District Court for the District of New Jersey, for the following relief in this case:

1. That the examination of the defendant, Samuel Marcus on deposition, be terminated or limited for reason of the fact that the plaintiffs herein, and the defendant, Milmar Estates, Inc., a New Jersey Corporation, have conducted said examination in bad faith and in such manner as unreasonably to annoy, embarrass or oppress the said deponent.

2. Said application will be based upon the transcript of the testimony heretofore given in this case by the said defendant, Samuel Marcus, and upon his affidavit, hereto annexed.

AND TAKE FURTHER NOTICE, that at the same time and place, the defendant, Samuel Marcus, will apply to the Court for an order requiring the co-defendant, Milmar Estates, Inc., a New Jersey Corporation, to produce and permit the inspection, copying or photographing of all and

Excerpts from Notice of Application to Terminate or Limit Examinations

singular the said defendant's corporate records, books of account, papers, documents, and records of every nature or description, pertaining to the corporate affairs of the said Milmar Estates, Inc., defendant, or its business.

This notice is in substitution of notice served March 28, 1952, said notice being a nullity under the amended rules of this Court.

ROBERT D. GROSMAN
Attorney for Defendant, Samuel Marcus

Dated: April 3-52

Excerpts from Affidavit of Samuel Marcus, Annexed to Foregoing Notice to Terminate or Limit Examinations

STATE OF NEW JERSEY,
COUNTY OF ESSEX, *ss.*:

SAMUEL MARCUS, being duly sworn according to law, upon his oath deposes and says:

* * *

7. As I have previously stated, the plaintiffs' attorneys have examined me with an almost intolerable degree of minuteness. Every bit of information that could be possibly elicited from me, has been obtained.

* * *

/s/ SAMUEL MARCUS
Samuel Marcus

Sworn and Subscribed to
Before me this 1st day of
April, 1952.

/s/ DOROTHY THOMPSON
Notary Public of New Jersey
My Commission Expires April 6, 1953

Excerpts from Hearing of April 28, 1952

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* * *

The Court: Well, doesn't Mr. Marcus have any records of his own of this transaction, at all?

Mr. Grossman: He has produced his record, your Honor, to the extent that he was able to find them. This thing goes back over a period of six years.

* * *

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* * *

The Court: Well, we don't need a case to tell us that. If a man hasn't got the knowledge, we can't expect him to answer, and I do admit that in a transaction that took so long to culminate that it would be almost impossible to expect a man to remember all of the details of everything he did; but what puzzles me in this case, Judge, is that here is a man handing out thousands and thousands of dollars who kept no record himself, even in his check margins, or anything.

Mr. Grossman: He did keep some records. Those records he had he produced.

* * *

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* * *

Mr. Brigadier: Just one last thing and I think it should be discussed with you. He still hasn't brought in all of his records. Why shouldn't he, since he is the first one to be examined—let's assume your Honor comes to the conclusion that he might look at the books. Shouldn't he bring in all his books, since he is the first one to be examined, and they haven't concluded their direct examination? Let us serve a subpoena upon him, because I can't compel him without the process of subpoena and notice is not sufficient.

Excerpts from Hearing of April 28, 1952

Let somebody serve him with a subpoena, either myself or Mr. Chazin. He is the first party being examined. Certainly he ought to produce his records before he is allowed to look at ours.

Mr. Tepper: That isn't necessary. The record will show, your Honor, that they did furnish him with a list of the documents that they wanted, the records that they wanted, but he came in from time to time, having found some, and produced them, and his last statement under oath was, "I have looked in every place that I can think of where these records are, in the warehouses, in the storerooms and so

forth; I have consulted with my former secretary, and I have been unable to find any additional documents."

The Court: Let me ask you, Mr. Tepper, did you ever permit your secretary to take your diary out of your office and keep it?

Mr. Tepper: Certainly not. But I don't recall what the testimony was, but I believe it was that Mr. Marcus said that "my former secretary apparently kept a personal diary of some sort and took it with her so that she could refresh her recollection about matters if she were questioned at some time in the future."

Mr. Brigadier: A personal diary of every check received from us?

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Excerpts from Letter Opinion of Hon. Alfred E. Modarelli

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

chambers of
ALFRED E. MODARELLI
Judge

Newark 1, N. J.
July 7, 1952

• • •

Gentlemen:

The disposition of motions previously argued before this court follows:

• • •

Rule 33 states, "Any party may serve upon any adverse party written interrogatories • • •." Defendants are "adverse claimants" of a fund deposited into the registry of this court under Title 28, Section 1335. It is true that defendants are not denominated as adverse parties, but that they are adverse parties in fact, with sharply contested claims one against the other, is evident from a reading of the entire transcript of the depositions of Samuel Marcus and the hearing of the motions. Defendant, Milmar Estate, Inc., is a party proceeding in an adverse manner against defendant Marcus. The latter may serve the former with the interrogatories so long as they are not privileged and are relative to the subject matter of the litigation. This motion is denied.

An order will be submitted by the attorney for the prevailing party in accordance with the above findings.

Very truly yours,

/s/ ALFRED E. MODARELLI
Alfred E. Modarelli

• • •

Petition for Temporary Restraining Order and the Appointment of a Receiver*

(Filed—October 22, 1953)

Petitioner, Samuel Marcus is one of the defendants in the foregoing suit.

1. The Milmar Estates, Inc., a New Jersey corporation, is co-defendant, and one of the respondents herein.

2. This court has jurisdiction over all of the parties to the foregoing action named in the caption hereof.

3. The defendant, Milmar Estates, Inc., is a New Jersey corporation, and has issued and outstanding a total of 1250 shares of common stock.

4. On the 14th day of September, 1948, petitioner was, and claims to be the owner of approximately 1230 shares of the common stock of said defendant, Milmar Estates, Inc., of the aforementioned 1250 shares of common stock of said corporation issued and outstanding.

5. On the said 14th day of September, 1948, by trickery, deceit, and false representations made to him and specifically hereinafter set forth, by the plaintiff, William Miller, petitioner was fraudulently induced to agree to the sale of 625 shares of the capital stock of said corporation, for the sum of $125,000.00, payable in various installments.

6. The plaintiff, Al Bierman, is the owner of 20 shares of the common capital stock of Milmar Estates, Inc.

7. The plaintiff, William Miller, never acquired any of the shares of the stock of Milmar Estates, Inc.

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* "Exhibit A", annexed to this Petition is omitted. This Exhibit is the same as Exhibit DM-22 printed in Appellant's Appendix at page 1996a, et seq.

Petition for Temporary Restraining Order and the Appointment of a Re .iver

8. In pursuance of said alleged agreement of September 14, 1948, petitioner, though not a party to said agreement, except in his capacity as president of Milmar Estates, Inc., deposited with one Abe Lieberman, of Union City, 625 shares of the capital stock of said Milmar Estates, Inc., owned by him individually, upon condition that the said Abe Lieberman was to hold the same in escrow, pending the full and complete performance of each and every covenant of said alleged contract, executed the 14th day of September, 1948, between the said Milmar Estates, Inc., and Al Bierman and William Miller.

9. Said agreement, dated the 14th day of September, 1948, between Milmar Estates, Inc., a New Jersey corporation, therein referred to as the "seller," party of the first part, and Al Bierman and William Miller, therein referred to as the "buyer," party of the second part, is so vague, indefinite, unintelligible, as to be null, void, and of no legal effect.

10. The contract of September 14, 1948 referred to herein was never and cannot be performed. Consequently, said 625 shares of stock of the Milmar Estates, Inc., deposited by petitioner with the said Abe Lieberman, in escrow, are, or should still be in his possession; and petitioner is entitled to the immediate and unconditional return of said 625 shares of the common stock of said Milmar Estates, Inc.

11. On said 14th day of September, 1948, when petitioner was induced to deposit said 625 shares of Milmar Estates, Inc., common capital stock with the said Abe Lieberman in escrow, as aforesaid, petitioner was the president and a director of the said Milmar Estates, Inc. Petitioner is still

the lawful president and a director of said Milmar Estates, Inc.

12. Said understanding between the plaintiffs and your petitioner was never reduced to writing, but in place thereof, a vague, indefinite and wholly ineffective agreement dated the 14th day of September, 1948, was prepared between Milmar Estates, Inc., a New Jersey Corporation, as seller, party of the first part, and Al Bierman and William Miller, buyers, parties of the second part, which is hereto annexed and marked Exhibit "A."

13. Said agreement of September 14, 1948, is wholly void, null and of no effect, because it not only failed to carry out the intent and agreement of the parties, but also because it was a product of trickery, deceit, fraud and misrepresentation practiced upon the petitioner by the plaintiff, William Miller and Al Bierman.

14. The trickery, deceit, fraud and misrepresentation, which petitioner alleges the plaintiffs, William Miller and Al Bierman practiced upon him, in order to induce him to enter into said abortive agreement of September 14, 1948, whereby he allegedly undertook to sell 625 shares of the capital stock of Milmar Estates, Inc., is inter alia, as follows:

(a) At all the times herein mentioned, the lands and premises of the defendant, Milmar Estates, Inc., a New Jersey corporation, were encumbered by a mortgage in the sum of originally $300,000, originally held by the Michael Realty Co. a New Jersey corporation, and assigned by it to Tessie Schlesinger and Julia Steinberger, payable in monthly installments of $5,000 each, together with interest at 4% on the unpaid balance to the date of payment.

Petition for Temporary Restraining Order and the Appointment of a Receiver

(b) Said lands and premises were occupied by Bill Miller's Riviera, a New Jersey corporation, as tenant.

(c) The affairs of said tenant corporation were, and still are controlled by the plaintiff, William Miller. The monthly payments of $5,000 each required to be made on account of said $300,000 mortgage, given to the Michael Realty Co., a New Jersey corporation, was to be paid from the rents payable by Bill Miller's Riviera, Inc., to Milmar Estates, Inc.

(d) William Miller represented to the petitioner that the business of Bill Miller's Riviera, Inc., was continuously falling off, and it could not continue to make its monthly rental payments to Milmar Estates, Inc. Because of these representations, your petitioner obtained permission from said mortgagees to pay $2500, instead $5,000 per month on account of the principal of said mortgage.

(e) William Miller continued to represent to your petitioner, not only that the business of Bill Miller's Riviera, Inc., a New Jersey corporation, tenant of said premises, was so poor that it would have to default on the payment of its rent entirely, but that Ben Marden insisted on the restoration of the original installments of $5,000 per month, in which event, the Milmar Estates, Inc., would be unable to pay even the reduced monthly installments on account of the mortgage default entirely thereon, in consequence whereof said mortgage would be foreclosed, and said Milmar Estates, Inc. would suffer a total and complete loss of its assets by reason of said foreclosure, and your petitioner would suffer a total loss of his investment.

(f) Plaintiff, William Miller, further represented to your petitioner, that he had interested one Al Kevelson in purchasing 625 shares of the capital stock of Milmar Estates, Inc., owned by petitioner, for the sum of $125,000.

Petition for Temporary Restraining Order and the Appointment of a Receiver

15. The statements and representations made to your petitioner by William Miller with respect to the inability of the tenant Bill Miller's Riviera, Inc. to pay its rent to Milmar Estates, Inc., and that the mortgagor demanded a restoration of the monthly payments of $5,000. were false, in fact, to the knowledge of the said William Miller; and made solely for the purpose of inducing your petitioner to agree to sell the aforementioned 625 shares of stock for a fraction of the value of said stock.

16. Petitioner relied upon the aforementioned representations made by William Miller to him, and agreed to sell the aforementioned 625 shares of stock, which he would not otherwise have agreed to do.

17. William Miller has never invested a dollar of his own money in the Milmar Estates, Inc., although upon the organization of said corporation, he agreed to equal the investment of your petitioner by contributing $100,000, which he failed to do, and later by agreeing to contribute $50,000, which likewise he failed to do.

18. Thereafter, on or about the 28th day of December, 1950, William Miller and Al Bierman, filed a complaint of interpleader against your petitioner and Milmar Estates, Inc., a New Jersey corporation, and obtained from this Honorable Court, a restraint against your petitioner, and the defendant, Milmar Estates, Inc., a New Jersey corporation from instituting or prosecuting any proceedings in any State or United States Court affecting the obligation involved in this interpleader action.

19. Subsequent to said 14th day of September, 1948, when said alleged agreement was entered into between the defendant, Milmar Estates, Inc., and the plaintiffs, and

your petitioner deposited in escrow with the said Abe Lieberman, his said 625 shares of common capital stock of Milmar Estates, Inc., the plaintiffs, William Miller and Al Bierman, wrongfully and unjustly, and without legal warrant or authority whatsoever, undertook to act, and are still acting as officers and directors of the said Milmar Estates, Inc., a New Jersey corporation.

20. Your petitioner charges that the said plaintiffs, William Miller and Al Bierman, were without power and authority to act as officers and directors of said defendant, Milmar Estates, Inc., a New Jersey corporation, and still are without such power and authority.

21. Notwithstanding their lack of authority so to do, the said plaintiffs, William Miller and Al Bierman, have proceeded to illegally manage the affairs of said corporation, Milmar Estates, Inc., to make contracts, and to do all and singular the several acts and things and perform the duties appertaining to the office of officers and directors of the said Milmar Estates, Inc., a New Jersey corporation.

22. At all the times herein mentioned, and at present, the defendant, Milmar Estates, Inc., a corporation of New Jersey was and still is the owner of certain lands and premises lying and being in the Borough of Fort Lee, in the County of Bergen and State of New Jersey, known as Lot #36 in Block 153, on the Tax Map of the Borough of Fort Lee.

23. On or about the 29th day of June, 1953, condemnation proceedings were instituted by the State Highway Commission of the State of New Jersey, against all the lands and premises owned by the defendant, Milmar Estates, Inc., a New Jersey corporation. Previous to the institution of

said condemnation proceedings, and since, the plaintiff, William Miller, and perhaps the plaintiff, Al Bierman, have undertaken to carry on negotiations with the State Highway Commissioner of the State of New Jersey, for the sale of the lands and premises owned by the defendant, Milmar Estates, Inc., a New Jersey corporation.

24. The said plaintiffs, William Miller and Al Bierman, are wholly without authority to carry on such negotiations, or to enter into any contract with the State Highway Commissioner of the State of New Jersey, or with anyone else, for the sale of the lands and premises owned by the defendant, Milmar Estates, Inc., a New Jersey corporation.

25. Petitioner is informed, and verily believes it to be true, that the State Highway Commissioner of the State of New Jersey, has offered to the said William Miller and Al Bierman, the sum of $700,000 for the lands and premises owned by the defendant, Milmar Estates, Inc.

26. The said offer has been refused by the said William Miller and Al Bierman, who have demanded according to your petitioner's information and belief, upwards of $1,000,000, for said lands and premises.

27. Condemnation commissioners have been appointed and have designated October 26, 1953, at the Courthouse in Bergen County, New Jersey, before the Hon. J. Wallace Leyden, Judge of the Superior Court of New Jersey, for the taking of testimony on the application for the State Highway Commissioner of the State of New Jersey for the condemnation of the lands of the defendant, Milmar Estates, Inc., a corporation of New Jersey.

28. The State Highway Commissioner of the State of New Jersey, has continued to negotiate with the said Wil-

liam Miller and Al Bierman, for the acquisition of the lands and premises owned by the Milmar Estates, Inc., a New Jersey corporation, although your petitioner has notified him that the said William Miller and Al Bierman, have no authority whatsoever to conduct such negotiations.

29. Your petitioner is fearful that notwithstanding his protests, the said State Highway Commissioner of the State of New Jersey, may conclude an agreement with the said William Miller and Al Bierman, wrongfully acting as officers and directors of the defendant, Milmar Estates, Inc., a New Jersey corporation, and pay over to the said William Miller and Al Bierman, as officers and directors of Milmar Estate, Inc., a New Jersey corporation, in which event your petitioner, as the owner of 1230 shares of the common capital stock of the defendant, Milmar Estate, Inc., a New Jersey corporation, of the total of 1250 shares of common capital stock of said corporation issued and outstanding, will suffer great, immediate and irreparable damage.

30. Your petitioner is informed, and verily believes it to be true and therefore charges, that the plaintiffs, William Miller and Al Bierman, and Milmar Estates, Inc., who are the respondents herein, are financially irresponsible, and if they are permitted to take into their possession as officers and directors of the defendant, Milmar Estates, Inc., a New Jersey corporation, the aforementioned sum of $700,000 or more, which may be paid to them by the State Highway Commissioner of the State of New Jersey, your petitioner will sustain great, immediate and irreparable injury, and will find himself without redress if said funds should be dissipated.

31. Petitioner is informed, believes it to be true, and therefore charges the fact to be, that William Miller and

Al Bierman are agents in this matter for Al Kevelson, who is the true party in interest herein.

32. A copy of the agreement of September 14, 1948 between Milmar Estates, Inc., a New Jersey corporation, and Al Bierman and William Miller, is hereto annexed, marked Exhibit A, and made a part hereof.

Your petitioner therefore prays that he be granted the following relief:

1. That the plaintiffs William Miller and Al Bierman and petitioner's co-defendant, Milmar Estates, Inc., a New Jersey corporation, its officers, directors, attorneys, agents and servants, all of whom are the respondents herein, be restrained and enjoined temporarily and until the final hearing of this cause, from acting in the capacity of officers and directors of the defendant, Milmar Estates, Inc.

2. That the above mentioned respondents be restrained and enjoined from continuing to negotiate with the State Highway Commissioner of the State of New Jersey, for the sale of the lands and premises of Milmar Estates, Inc., a New Jersey corporation, to the State of New Jersey.

3. That the above mentioned respondents or any of them, be restrained and enjoined from taking into their possession any monies whatsoever, which may be paid by the State Highway Commissioner of the State of New Jersey, for the lands and premises of the defendant, Milmar Estates, Inc., a New Jersey corporation.

4. That the State Highway Commissioner of the State of New Jersey be restrained and enjoined from paying over to the said Al Bierman and William

Miller, or to any other person purporting to be an officer or director of the Milmar Estates, Inc., a New Jersey corporation, or to the said Milmar Estates, Inc., a New Jersey corporation itself, any monies whatsoever for the acquisition of the lands and premises of the said Milmar Estates, Inc., until the further order of this court.

5. That a receiver be appointed to continue said negotiations with the State Highway Commissioner of the State of New Jersey for the sale or condemnation of the lands and premises owned by the defendant, Milmar Estates, Inc., and dispose of said monies as this Honorable Court may direct.

6. That petitioner may have such further and other relief as may be equitable and just.

ROBERT D. GROSMAN
Attorney for Petitioner

Verification of Samuel Marcus, Annexed to Foregoing Petition

STATE OF NEW YORK,
BOROUGH OF MANHATTAN, *ss.*:

SAMUEL MARCUS being duly sworn according to law upon his oath deposes and says:

1. I am the petitioner in the foregoing petition. The allegations of the petition are true to the best of my knowledge, information and belief. The said petition is made in truth and in good faith, and without collusion, for the causes set forth therein.

Verification of Samuel Marcus, Annexed to Foregoing Petition

2. The allegations thereof are made on my personal knowledge, except as otherwise stated and by reference are incorporated herein precisely as if repeated in words at length.

s/ SAMUEL MARCUS

Sworn and Subscribed to
before me this 22 day
of October, 1953.

s/ SARA M. STONE
Notary Public of New York

• • • • •

Order to Show Cause Why Preliminary Restraint Should Not Issue, and Receiver Pendente Lite Appointed

(Filed—October 30, 1953)

This matter being opened to the Court by Robert D. Grosman, Esq., Attorney for the Petitioner, Samuel Marcus, and the Court having read and considered the verified complaint filed herein:

It is on this 30th day of October, 1953, Ordered that William Miller, Al Bierman, Milmar Estates, Inc., who are the respondents herein, are hereby Ordered to show cause, at 10 o'clock in the forenoon (E. S. T.) on the 9th day of November, 1953, at the United States District Court Chambers, Federal Building, in the City of Newark, why the application for a preliminary restraint, and the appointment of a receiver pendente lite, as prayed for in the petition filed herewith, should not be granted; and

Verification of Samuel Marcus, Annexed to Foregoing Petition

It is further Ordered that a copy of the verified petition, which may be certified as such by the attorney for the petitioner, be served upon the respondents herein within 2 days from the date hereof.

s/ ALFRED E. MODARELLI
J.U.S.D.J.

Affidavit of William Miller

(Filed—November 9, 1953)

STATE OF NEW JERSEY,
COUNTY OF HUDSON, *ss.*:

WILLIAM MILLER, of full age, being duly sworn according to law upon his oath deposes and says:

I have made an affidavit in this cause in opposition to the petition of Samuel Marcus for appointment of a Receiver of Milmar Estate, Inc. and for restraint. The said affidavit is being presented by Milmar Estate, Inc. in opposition to the said petition. I personally reiterate the contents of the said affidavit and offer them in my personal opposition to the said petition.

/s/ WILLIAM MILLER
William Miller

Sworn and subscribed to
before me this 6th
day of November, 1953.

/s/ JAMES G. ROSS
James G. Ross,
Notary Public of New Jersey

(Seal)

Affidavit of William Miller

Affidavit of William Miller*

(Filed—November 9, 1953)

STATE OF NEW JERSEY,
COUNTY OF HUDSON, *ss.*:

WILLIAM MILLER, of full age, being duly sworn, according to law, upon his oath, deposes and says:

1. I am one of the plaintiffs in the action entitled as above and am a respondent in the petition filed by Samuel Marcus for appointment of a Receiver and for a restraint.

2. I am a stockholder, Secretary-Treasurer and director of Milmar Estate, Inc. Milmar Estate, Inc. is the owner of certain land, with the building thereon, known as The Riviera property, located in Fort Lee, New Jersey. This property was purchased by Samuel Marcus and me from Michael Realty Company by contract dated April 2nd, 1946. The property was conveyed by Michael Realty Company to Samuel Marcus and me by deed dated April 5th, 1946. By deed dated June 7th, 1946 Samuel Marcus and I conveyed this property to Milmar Estate, Inc. Milmar Estate, Inc. rented the property to Bill Miller's Riviera, Inc., a corporation of New Jersey, which operated the restaurant and nightclub business in the premises.

The property was encumbered with a mortgage originally in the amount of $300,000.00, which was a purchase money mortgage executed by Samuel Marcus and myself to Michael Realty Company.

3. The Riviera nightclub and restaurant were opened for business in about May, 1946. In December, 1946 Bill Miller's Riviera, Inc. was in bankruptcy proceedings in the

* All Exhibits Annexed to this Affidavit are omitted.

Federal Court, and in 1947 it made an arrangement with its creditors which called for payment to the creditors over a period of years.

4. In August and in the early part of September, 1948 Samuel Marcus, Al Bierman and I were the owners of all of the stock of Milmar Estate, Inc. My stock was pledged with Samuel Marcus as collateral for a $50,000.00 note. At that time and prior thereto the business of Bill Miller's Riviera, Inc., from which Milmar Estate, Inc. got its rent, was and had been bad. Riviera had not yet paid off the creditors from the bankruptcy arrangement proceedings. It did not have the necessary capital to put on the proper kind of shows and to hire the stars who would be necessary if the business of the Riviera was to be improved. Samuel Marcus told me that he was worried about his investment in Milmar Estate, Inc. and wanted to get out. He had tried without success to sell out his interest in Milmar Estate, Inc.

5. In or about August, 1948, I interested Mr. Al Kevelson in coming into Milmar Estate, Inc. and becoming financially interested in it. Al Bierman and I negotiated a deal with Samuel Marcus. Samuel Marcus was to get out of Milmar Estate, Inc. completely and cancel the $50,000.00 note of mine which he held. He was to receive $125,000.00, $30,000.00 in cash and the balance of $95,000.00 in installments. When we came to the actual closing, Marcus refused to go through with the deal unless he got more money, and I finally agreed to pay him an additional $15,000.00 in installments. On September 14th, 1948 a group of papers were signed to carry out this transaction. A copy of the agreement of sale is hereto annexed and made part hereof. The papers were signed at the office of Robert J. Schwartz, who was Samuel Marcus' attorney, and who was Secretary

of Milmar Estate, Inc. The transaction was this: Samuel Marcus was getting out, and all rights of the parties against each other were being wiped out, except the balance of the purchase price of $95,000.00 as a result of the sale, and an additional obligation of $15,000.00 which I, in writing, then agreed to pay to Samuel Marcus. All of the shares of stock were not physically present at the closing. Samuel Marcus said he could not find the stock certificates. The parties used the following mechanics: All of the issued and outstanding stock of Milmar, Inc., consisting of 1250 shares of stock, was marked cancelled on the stubs in the stock book. Four new certificates of stock in the total amount of 1250 shares, being two certificates of 500 shares each and two certificates of 125 shares each were issued to Samuel Marcus and by him endorsed in blank, and one-half of the stock, 625 shares was delivered in escrow to Abraham Lieberman, as security for the balance of the purchase price, and one-half of the shares was delivered without an escrow agreement.

The new certificates of stock nos. 17, 18, 19 and 20 were signed by Samuel Marcus, President, and Robert J. Schwartz, Secretary, and all endorsed in blank by Samuel Marcus. They are all dated September 14th, 1948. Photostats of these shares of stock are hereto annexed and made part hereof. At the same time both Samuel Marcus and Robert J. Schwartz signed resignations as officers and directors of Milmar Estate, Inc., which resignations are dated September 14th, 1948 and state that they are effective immediately. Photostats of these resignations are hereto annexed and made part hereof.

Upon Al Kevelson, Al Bierman and myself being the owners of all of the stock of Milmar Eestate, Inc., the stock division among us was to be and is as follows:

Al Kevelson	40%
William Miller	40%
Al Bierman	20%

That is the way in which all of the stock of Milmar Estate, Inc. is held.

Thereupon the following officers and directors were elected:

Officers:	President	Al Kevelson
	Vice President	Al Bierman
	Secretary-Treasurer	William Miller.

Directors: Al Kevelson, Al Bierman and William Miller.

6. Since September 14th, 1948 Al Kevelson, Al Bierman and I, as officers and directors of Milmar Estate, Inc. have conducted the business affairs of Milmar Estate, Inc. and have been in exclusive and complete control of its affairs.

Pursuant to the transaction of September 14th, 1948 we made payments to Samuel Marcus of the installments of $3,000. per month while the Riviera was operating and $1,500. per month when it was not operating, as called for by our agreement. After September 14th, 1948 numerous checks to Samuel Marcus were made by Milmar Estate, Inc. and signed by William Miller or Al Kevelson. Samuel Marcus endorsed or had endorsed and deposited these checks in his account. Photostats of these checks are annexed to the affidavit of Al Kevelson. Prior to September 14th, 1948 Samuel Marcus had been signing the checks of Milmar Estate, Inc. After that date he signed no checks and he took no part whatsoever in the business of Milmar. Prior to September 14, 1948 he was present at the Riviera at least several times every week during the business season which was generally from April to the middle of October, and often was present almost every day. Prior to September 14th, 1948 Samuel Marcus had been receiving and depositing rent check from Bill Miller's Riviera, Inc. and had been paying interest and amortization checks to the holder of the mortgage on the property. After September

14th, 1948 he ceased to do any of these things or to take any part in the affairs of the corporation.

7. As the contract of September 14th, 1948 for the sale of the stock of the corporation to William Miller and Al Bierman was made by Milmar Estate, Inc., as seller, and since the payments for this stock were being made to Samuel Marcus; Al Bierman and William Miller filed an interpleader suit in the United States District Court in December, 1950 in order to obtain an ajudication as to who was entitled to the payments, so that in the event that at some future date creditors of Milmar Estate, Inc. were unpaid, they should not be able to claim that Al Bierman and William Miller had failed to pay an obligation which they owed to Milmar Estate, Inc. Depositions of Samuel Marcus were taken in the said suit. Annexed hereto are excerpts from the said depositions. These excerpts from the depositions show the contradictory stories told by Marcus with regard to the ownership of the stock of Milmar Estate, Inc., and which stories are at variance with the written documents in the matter, and at variance with the allegations of Marcus in his petition for receivership. Up to the time that the interpleader suit was filed payments in the total amount of $90,000. were made to Samuel Marcus on account of the $125,000. purchase price, and since the filing of the interpleader suit, the amount of $35,000., being the balance of the $125,000. purchase price, was paid to the United States District Court, so that the full amount of $125,000. has been paid.

8. A question had arisen as to a possible outstanding right of dower in Sarah Marcus, wife of Samuel Marcus, in the real estate of Milmar Estate, Inc. known as The Riviera property, located in Fort Lee, New Jersey. When Samuel Marcus and William Miller executed a deed to Mil-

mar Estate, Inc. in 1946, their wives did not join in the deed. Sarah Marcus made a claim for dower. Milmar Estate, Inc., in January, 1951, started a suit in the Superior Court of New Jersey, Chancery Division, to have it adjudicated that Sarah Marcus had no interest by way of dower or otherwise in the real estate of The Riviera. Samuel Marcus took the position that he had no interest in that suit, that his wife acted for herself and that he had nothing to do with the conduct of the suit. At this time the interpleader suit was already pending. Before trial the said dower suit was settled by payment of the sum of $7,500. to Sarah Marcus, whereupon she surrendered all her claims in the property to Milmar Estate, Inc. Samuel Marcus did not object to the payment of this money by Milmar Estate, Inc. to Mrs. Marcus.

9. During a period of approximately one year, negotiations have been carried on by Walter Winne, Esq., as attorney of Milmar Estate, Inc. and by Al Kevelson, Al Bierman and myself as officers and directors of Milmar Estate, Inc. with the State of New Jersey, which has been seeking to take the Milmar Estate, Inc. property in condemnation. Samuel Marcus has known about this. In fact he knew when the sale of stock was made in 1948 that there might be a condemnation, as is shown by clause 12 of the contract dated September 14, 1948 which is hereto annexed and which mentions what is to happen in case of a condemnation. As a matter of fact, on October 20, 1952 Samuel Marcus caused to be filed a lis pendens in the Bergen County Clerk's Office, knowing that there was a condemnation pending or imminent, although I am informed by counsel that there is no legal warrant for the filing of a lis pendens by him.

10. At no time has Samuel Marcus returned or offered to return the money which was paid to him for the purpose

of the stock. This he has kept to his own use and has never returned it. He has never notified me that he is attempting to rescind the transaction.

11. The claim of Samuel Marcus that he is the owner of the stock, or any part of the stock, of Milmar Estate, Inc. is entirely and absolutely untrue as is shown above. As a matter of fact, in the depositions in which Samuel Marcus was sworn, he has told conflicting and absolutely contradictory stories about stock ownership of Milmar Estate, Inc., as shown in the annexed excerpts.

12. As to the allegations that I perpetrated a fraud or misrepresentation upon Samuel Marcus, that is absolutely false and without any foundation. I did not represent to Samuel Marcus that the business of Bill Miller's Riviera, Inc. was continuously falling off and that it could not continue to make its monthly rental payments to Milmar Estate, Inc. Samuel Marcus knew the business affairs of The Riviera very intimately. He was present at the club at least several days a week and often every day. He knew at all times exactly what was going on. Business was bad. He saw it. It was not necessary for me to tell him that business was bad. He knew it was bad. Of course, we kept discussing business, but I did not have to and did not make any representations to him, because he knew the business status of The Riviera as well as I did.

13. After the date of the closing of our transaction (September 14th, 1948) our business conditions continued to be difficult, and we had difficulty in making the payments to creditors.

14. I deny the allegations of paragraph 14(e) of the Petition. I did not represent to Sam Marcus that Ben Marden insisted on the restoration of the original install-

ments of $5,000. per month. From the very beginning Mil-Mar Estate, Inc. was unable to make the payments of $5,000. per month called for by $300,000. purchase money mortgage held by Michael Realty Company. Each year we had approached Ben Marden, explained to him our difficult financial situation and asked him to cut the mortgage payments. As a matter of fact, Samuel Marcus states in paragraph 14(d) of the Complaint that he had obtained permission from the mortgagees to pay $2,500. instead of $5,000. per month on account of the principal of the said mortgage. Samuel Marcus had been in touch with the mortgagees and they were just as available to him as they were to me. In fact, he had been signing and sending the Milmar checks to the mortgagees up to that time. For a five-cent phone call he could have talked to Marden, or he could have gone to see him. It is untrue that I made any misrepresentations in this connection or that Samuel Marcus relied on anything I told him. I did not in any way use trickery, deceit, fraud or misrepresentation upon Samuel Marcus, but I believe and charge that he is now attempting to use trickery, deceit, fraud and misrepresentation in his wrongful attempt to obtain the appointment of a Receiver.

15. Samuel Marcus has no ownership whatsoever in the stock of Milmar Estate, Inc. He is merely trying to "horn in" after he sold out.

16. As to the petition of Samuel Marcus, taking the same paragraph by paragraph:

As to paragraph 1, the affiant admits that Milmar Estate, Inc. is a co-defendant, and that it is named as a respondent in the petition of Marcus.

As to paragraph 2, petitioner is left to his proof.

Paragraph 3 is admitted.

Paragraph 4 is denied, and affiant states that Samuel Marcus owns no shares of the stock of Milmar Estate, Inc.

Paragraph 5 is denied.

Paragraph 6 is inaccurate. It does not state the true stock ownership of Al Bierman. He owns 20% of the stock of Milmar Estate, Inc., to wit, 250 shares.

17. Paragraph 7 is untrue and with reference thereto I annex hereto papers signed by Samuel Marcus, one dated June 14th, 1946 over the signature of Samuel Marcus, in which he acknowledges receipt of 500 shares of stock in Milmar Realty Inc. (meaning Milmar Estate, Inc.) "made out to the order of William Miller, and which is being assigned to me and held by me as collateral for the re-payment of certain demand notes which I hold". Annexed thereto is a list showing the stock certificates and the number of shares, totalling 500 shares of Milmar stock owned by me. Annexed hereto and made part hereof is a copy of a paper dated July 23rd, 1947, being an agreement between Samuel Marcus and William Miller stating that William Miller pledged his shares of stock to Samuel Marcus, and containing an agreement that in the event that either party shall desire to sell his stock he must give the first refusal to buy to the other party. From the very outset of Milmar Estate, Inc., Al Bierman and I together owned 50% of the stock of Milmar Estate, Inc. After the transaction of September 14, 1948, Al Bierman, Al Kevelson and I owned and now own all of the stock of Milmar Estate, Inc., namely, 1,250 shares.

18. As to paragraph 8 the affiant states that under the agreements of September 14th, 1948 all of the stock of Milmar Estate, Inc. became vested in William Miller and Al Bierman, and of the 1,250 shares issued and outstanding, 625 shares were placed in escrow with Abraham Lieberman, Esq.

Affidavit of William Miller

The allegations of paragraph 9 are denied.

19. As to paragraph 10 the allegation that the contract of September 14th, 1948 was never and cannot be performed is not true. Said agreement was performed. Furthermore, Samuel Marcus is not entitled to the return of any stock.

20. As to paragraph 11, Samuel Marcus is not the President or a director of Milmar Estate, Inc., he having resigned. A copy of his resignation is hereto annexed and made part hereof. Samuel Marcus does not own any stock in the corporation.

As to paragraph 12, the same is denied. The agreement between the parties has been performed.

21. As to paragraph 13, the agreements of September 14th, 1948 are valid and there was no trickery, deceit, fraud or misrepresentation practiced on Samuel Marcus by either William Miller or Al Bierman.

The affiant has previously denied the alleged misrepresentations set forth in paragraph 14 and repeats the denial.

22. Affiant denies the allegations of paragraph 17, and states that he executed a note of $50,000.00 to Samuel Marcus for affiant's investment. On September 14th, 1948 Samuel Marcus signed a paper addressed to William Miller which provides:

> "In the event that the contract of purchase, dated September 14th, 1948, is fulfilled, the said note of Fifty thousand ($50,000.00) Dollars is to be returned to you and we agree to exchange mutual releases."

Affiant states further that he was the directing force of the entire enterprise and that the enterprise could not be operated by Samuel Marcus without the affiant.

Affidavit of William Miller

Paragraph 18 is admitted.

23. As to paragraph 19, the stock deposited with Abraham Lieberman is deposited pursuant to the agreement of September 14th, 1948. William Miller and Al Bierman have properly and with the knowledge of Samuel Marcus acted as officers and directors of Milmar Estates, Inc.

Paragraph 20 is denied.

Paragraph 21 is denied. Affiant states that William Miller, Al Bierman and Al Kevelson have been and are legally and properly conducting the business of Milmar Estate, Inc.

Paragraph 22 is admitted.

As to paragraph 23, negotiations are being carried on with the State Highway Commission, as previously set forth in more detail in this affidavit.

24. Paragraph 24 is denied. William Miller and Al Bierman are officers and directors of Milmar Estate, Inc. and are acting by authority of the corporation.

As to paragraphs 25-26-27 and 28 as previously stated, William Miller and Al Bierman are properly carrying on negotiations with the State of New Jersey.

As to paragraphs 29 and 30 the affiant states that Samuel Marcus has no interest of any kind whatsoever in the said condemnation proceedings or negotiations and owns no stock whatsoever in Milmar Estate, Inc.

25. Affiant states that he, William Miller, Al Bierman and Al Kevelson are the owners of all of the stock of Milmar Estate, Inc.

26. Affiant believes and charges that the petition of Samuel Marcus is filed in bad faith for the purpose of

harassing the affiant and his associates and that there is no truth or merit to the petition.

/s/ WILLIAM MILLER
William Miller

Sworn and subscribed to
before me this 6th
day of November, 1953.

(SEAL)

/s/ JAMES G. ROSS
Notary Public of New Jersey

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Affidavit of Abraham Lieberman

(Filed—November 9, 1953)

UNITED STATES DISTRICT COURT

DISTRICT COURT OF NEW JERSEY

Docket No. 1026-50

Civil Action

AL BIERMAN and WILLIAM MILLER,

Plaintiffs,

—vs.—

SAMUEL MARCUS and MILMAR ESTATE, INC., a corporation organized under the laws of the State of New Jersey,

Defendants.

Affidavit of Abraham Lieberman

STATE OF NEW JERSEY,
COUNTY OF HUDSON, *ss.*:

ABRAHAM LIEBERMAN, of full age, being duly sworn according to law upon his oath, deposes and says:

1. I am an attorney-at-law of the State of New Jersey.

2. On September 14th, 1948, a transaction involving the sale of the stock of Milmar Estate, Inc. was concluded at the office of Robert J. Schwartz, the attorney of Samuel Marcus, in New York City. William Miller, Samuel Marcus, Robert J. Schwartz and I were present. I represented William Miller and Al Bierman. Mr. Schwartz represented Samuel Marcus. There had been negotiations between the parties prior to this closing.

3. The essence of the transaction, boiled down to its simple essentials, was that: Samuel Marcus was selling out and getting out completely from Milmar Estate, Inc., that William Miller and Al Bierman were, upon completion of the transaction, to own all of the stock of Milmar Estate, Inc., consisting of 1,250 shares, that half of the stock consisting of 625 shares should be placed with me in escrow as security for payment of the balance of the purchase price, that a note of William Miller in the amount of $50,000.00 made to Samuel Marcus should, upon completion of the payment of the purchase price as provided under the contract dated September 14th, 1948, be returned to William Miller, and the parties should exchange mutual releases. There were other details, but in essence this is the main outline of the agreement.

4. The purchase price was $125,000.00, payable $30,000.00 upon execution of the agreement, and the balance of $95,000.00 in monthly installments of $3,000.00 per month when

the Riviera is open for business and $1,500.00 per month when it is closed.

5. The previously issued Milmar Estate, Inc. stock certificates were not at the closing. I had been informed by both Samuel Marcus and Robert J. Schwartz that they could not be located. The previously issued stock was marked cancelled on the stubs in the stock book. Four new certificates were issued in the name of Samuel Marcus, in the total amount of 1,250 shares, which was the total of the issued and outstanding stock, and were immediately endorsed in blank by Samuel Marcus and delivered, pursuant to the agreement, of which 625 shares were placed with me in escrow. The new stock certificates were signed by Samuel Marcus, as president and Robert J. Schwartz, as secretary. There was considerable discussion of the details, in which Samuel Marcus took an active part. He read all the papers carefully.

6. After the papers had been prepared for signature, at the last moment Samuel Marcus and William Miller agreed that William Miller personally would pay Samuel Marcus $15,000.00 in installments, and William Miller signed a paper so providing.

7. I reiterate and there is no question in my mind whatsoever that it was the intention of Samuel Marcus to sell out and get out completely from Milmar Estate, Inc.

/s/ Abraham Lieberman
Abraham Lieberman

Sworn and subscribed to
before me this 6th
day of November, 1953.

/s/ Barkave G. Elian
Barkave G. Elian
An Attorney at Law of N. J.

Affidavit of Al Bierman*

(Filed—November 9, 1953)

STATE OF NEW JERSEY,
COUNTY OF HUDSON, *ss.*:

AL BIERMAN, of full age, being duly sworn, according to law, upon his oath, deposes and says:

1. I am one of the plaintiffs in the suit entitled as above, and I have been named a respondent in a petition by Samuel Marcus for a temporary restraining order and for the appointment of a receiver. I am making this affidavit in opposition to the said petition.

2. In August, 1948, together with William Miller, I negotiated with the said Samuel Marcus for the purchase from Samuel Marcus of all of the stock of Milmar Estate, Inc., owned by Samuel Marcus, which included all of the outstanding stock of the said corporation except that stock owned by William Miller and myself.

3. On August 27, 1948, Marcus and I were together at Bill Miller's Riviera, at Fort Lee, N. J., which was located on the property owned by Milmar Estate, Inc. On said date I had a discussion with Marcus in which he told me that he was anxious to get out of Milmar and that he was willing to sell all of his stock in the corporation, being all outstanding stock of Milmar Estate, Inc., except that stock owned by William Miller and myself, and get out completely from the corporation. We went upstairs to the Riviera office, and there we drew up a receipt, a copy of which is attached hereto and made a part hereof. The amount pro-

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* Photostat of Receipt Annexed to this Affidavit is omitted. This photostat is the same as Exhibit DME-3.

vided for in the first line was crossed out and the sum of $10,000 was written in. The change was initialed by Marcus and by me. The last line, which reads "Received two checks at $5,000 each" was written in. It was initialed by Marcus and myself. The words following that were crossed out, and that change was initialed by Marcus and myself. Marcus signed this paper and took the checks. While I was out of town, the sale was completed on September 14, 1948, and the said $10,000 was kept by Marcus and applied on account of the sale.

4. Since the commencement of the operation of Bill Miller's Riviera in 1946, Samuel Marcus was in intimate contact with its financial affairs and knew its business standing and operations on practically a day-to-day basis. Almost every time I came to the club (Riviera) in the evening, Marcus was present there.

5. Since September, 1948, I have never seen Samuel Marcus take any part in the conduct of the affairs of Milmar Estate, Inc. I am a stockholder, vice-president, and a director of Milmar Estate, Inc.

6. I never made any misrepresentation of any kind whatsoever to Samuel Marcus.

AL BIERMAN
Al Bierman

Sworn to and subscribed
before me this 4th day
of November, 1953.

EDITH B. WALTERS-STATEZNY
Edith B. Walters-Statezny
Notary Public of New Jersey
My Commission Expires Aug. 18, 1957

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Affidavit of Jacob Hoffman

(Filed—November 9, 1953)

STATE OF NEW JERSEY,
COUNTY OF HUDSON, *ss.*:

JACOB HOFFMAN, of full age, being duly sworn according to law, upon his oath deposes and says:

1. Since April 1946 I have been connected with Milmar Estate, Inc., as its accountant. I have also been the accountant for Bill Miller's Riviera, Inc., since its inception in 1946. In my capacity as accountant for the above corporations, I was in constant touch with William Miller and Samuel Marcus up to the time of the sale of the stock of Milmar Estate, Inc., by Samuel Marcus on September 14, 1948, regarding the financial affairs of the corporation.

2. From April 1946 to the middle of September, 1948, Samuel Marcus was intimately acquainted with the business operations of Milmar Estate, Inc., and of Bill Miller's Riviera, Inc. Samuel Marcus received from me at least once each week information regarding the business operations of Bill Miller's Riviera, Inc. During this period of time he was intimately acquainted with the financial and business affairs of Bill Miller's Riviera, Inc. on at least a week to week basis and very often on almost a day to day basis.

3. In December 1946 Bill Miller's Riviera, Inc., was in a very bad financial condition and filed a petition for arrangement under the Bankruptcy Act in the United States District Court for the District of New Jersey. In the early part of 1947 an arrangement was made in the United States District Court for the District of New Jersey to pay the creditors over a period of two years. In August

and September of 1948 some of the obligations which had been the subject of the arrangement were still partially unpaid and new liabilities had been incurred. The business of Bill Miller's Riviera, Inc. was in a bad financial condition and had been so for several years prior thereto. The obligations of Bill Miller's Riviera, Inc. in August and September of 1948 were approximately $175,000.00 and practically all of them were current obligations. As against this, the corporation had assets, current and fixed, of approximately $55,000. Bill Miller's Riviera, Inc. was getting along on a hand to mouth basis and was having difficulty meeting its bills. This difficult condition had existed since the time Bill Miller's Riviera, Inc. went into bankruptcy proceedings in December 1946 and prior thereto. Samuel Marcus knew these facts because of his intimate contact with the business. Below I am setting forth a statement of assets and liabilities of Bill Miller's Riviera, Inc. for the fiscal years ending March 31, 1947, March 31, 1948 and March 31, 1949:

Fiscal year ending March 31, 1947

Assets	$42,044.72	Liabilities	$139,253.47
	Deficit —	$ 97,208.75	

Fiscal year ending March 31, 1948

Assets	$54,241.55	Liabilities	$178,283.75
	Deficit —	$124,042.20	

Fiscal year ending March 31, 1949

Assets	$30,075.73	Liabilities	$159,480.93
	Deficit —	$129,405.20	

4. It was my practice and that of Mr. Marcus and Mr. Miller, from the start of the business of Bill Miller's Riviera, Inc. to see Mr. Ben Marden or Mr. Schimmel, his representative, to make arrangements with them to modify the requirements concerning mortgage payments, so that

$60,000.00 per year would not have to be paid as required on the mortgage. Generally, the arrangement made was to pay $30,000. per year in six payments of $5,000. per month each during the Club season, generally starting in May of the year. During 1947 and up to the time of the sale of stock in September 1948 it was Mr. Marcus' practice as the president of Milmar Estate, Inc. and because he had possession of the check book to write out the checks on the mortgage covering the Milmar Estate, Inc. property and to send the checks to the mortgagee in New York City.

5. Since September 1948 I have been connected with Milmar Estate, Inc. and with Bill Miller's Riviera, Inc. as accountant and have been in charge of the books and records of both corporations. Since the time in Sepembter 1948 when Mr. Marcus sold all his stock in Milmar Estate, Inc., and got out of Milmar, I have never known him to take part in any of the affairs or operations of Milmar Estate, Inc. After September 1948 I did not have anything to do with him regarding affairs of the corporation. After that date he did not sign any papers on behalf of the corporation, and never took part in the management of the business.

/s/ Jacob Hoffman
Jacob Hoffman

Sworn and subscribed to
before me this 6 day
of November, 1953.

(Seal)

/s/ James G. Ross
James G. Ross
Notary Public of New Jersey

Affidavit of Al Kevelson*

(Filed—November 9, 1953)

STATE OF NEW JERSEY,
COUNTY OF HUDSON, *ss.*:

AL KEVELSON, of full age, being duly sworn according to law upon his oath deposes and says:

I am President of Milmar Estate Inc. and am a stockholder and director of said corporation.

In or about September/1948 William Miller spoke to me concerning the purchase of an interest in Milmar Estate Inc. I told him that I would be interested in going into the corporation. After negotiations the deal was arrived at whereby Marcus was to get out completely for $125,000.00. As part of the deal a $50,000.00 note of Miller which Marcus held was to be cancelled. It was about that time that I received a phone call from Miller, who stated that he was with Marcus and that Marcus wants more than $125,000.00. Marcus got on the phone and I talked with him. I told Marcus that I would not agree to pay more than $125,000.00. Marcus said he wanted more. I then spoke with Miller and told him that I would not consent to more than $125,000.00. If more was to be paid he would have to pay the balance. Thereafter Miller personally agreed to pay Marcus an additional $15,000.00. The deal was that Marcus was getting out completely; that Miller and Bierman were getting all of the stock of the corporation which I was to share with them and the $50,000. note was to be surrendered. I became President and Director of the corporation and have served as such since that time. The deal was for the payment to Marcus of $30,000.00 at or before the closing of the deal

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* Photostatic copies of 22 checks Annexed to this Affidavit are omitted. These photostats are the same as Exhibit DME-32.

and the balance of $95,000. in monthly payments to be $3,000. per month when the Riviera was open for business and $1,500. per month when the Riviera was not open for business. In addition, Miller was to make installment payments on his $15,000. agreement. Thereafter, a number of checks were drawn by Milmar Estate Inc. in payment of the installments. Annexed hereto are photostatic copies of 22 checks from October 1948 through December 1, 1950 made to Sam Marcus by Milmar Estate Inc. signed by myself or William Miller as officers of Milmar Estate Inc. and endorsed and deposited by or on behalf of Sam Marcus. From the middle of September 1948 until the present time William Miller and I have been acting as officers and directors of Milmar Estate Inc. with the full knowledge of Sam Marcus. The receipt, endorsement and deposit of the aforesaid checks by him show his knowledge and approval of this course of action. Since the middle of September 1948, Marcus has not taken any part in the conduct of the affairs of Milmar Estate Inc. When a suit involving dower was brought against his wife in the latter part of 1950 by Milmar Estate, Inc., I spoke to Sam Marcus about it and told him that he should get his wife to sign the necessary papers. He offered no help whatsoever and did not offer to take part in the conduct of the litigation in any way whatsoever. He said he was in no way interested in the fact that there was an alleged dower claim outstanding in his wife, Sarah Marcus, and that this might affect the title of Milmar Estate, Inc. He said he had sold out. He never objected to the hiring of counsel by Milmar Estate, Inc. and the filing of a suit in the Superior Court of New Jersey, Chancery Division, to clear up this dower in question. He at no time questioned the authority of William Miller and of myself to act for Milmar Estate, Inc. He at no time claimed that we usurped our offices in Milmar Estate, Inc. He at no time objected to Milmar Estate, Inc. paying out $7,500. to his

wife, Sarah Marcus, in settlement of the dower litigation and in obtaining a release of any claims of dower right by a deed from Sarah Marcus to Milmar Estate, Inc., thus eliminating this title question. Marcus definitely understood that he had sold out completely and he knows that he has no stock or other interest whatsoever in Milmar Estate, Inc.

/s/ AL KEVELSON
Al Kevelson

Sworn to and subscribed
before me this 5th day
of November, 1953.

/s/ BARKAVE G. ELIAN
Barkave G. Elian
An Attorney at Law of New Jersey

* * *

Affidavit of Samuel Marcus

(Filed—December 28, 1953)

STATE OF NEW JERSEY,
COUNTY OF ESSEX, *ss.*:

SAMUEL MARCUS, being duly sworn according to law upon his oath deposes and says:

1. I am one of the defendants in the foregoing action, and the petitioner in the application for the appointment of a receiver, pendente lite.

2. I have read the affidavits of William Miller, Al Kevelson, Abraham Lieberman and Al Bierman.

Affidavit of Samuel Marcus

3. With respect to the affidavit of William Miller, I wish to say the following:

4. I deny that William Miller is a stockholder of Milmar Estates, Inc. Whatever office William Miller now claims to hold in the Milmar Estates, he holds as a usurper. The basis of my statement is this: Miller and I were to advance in equal shares, the monies required to purchase these lands and premises. I paid in over $100,000 Miller paid in nothing, except that he produced a check of $20,000 from Al Bierman. Originally, Miller was supposed to pay in the same amount as I. This he failed to do. Later he agreed to pay in $50,000, in addition to the $20,000 theretofore paid in by Bierman, upon the organization of the corporation. This he failed to do. He represented to me that he would have the $50,000 in the near future and requested that I take his note for $50,000 and set aside and retain in my possession, 500 shares of stock to be delivered when and if he paid me the aforementioned sum of $50,000. Accordingly, certificates for 500 shares of stock of Milmar Estates, Inc. were made out in the name of William Miller, endorsed by him in blank, and retained by me in pursuance of the aforementioned agreement. I still have the certificates for such 500 shares of stock issued in the name of William Miller, and endorsed by him in blank, and retained by me against the payment of the said $50,000. Said moneys never having been paid, I never delivered said certificates of stock to William Miller or anyone else from the time I received them, and I still retain the same in my possession.

5. With respect to the allegations of Paragraph 3, it is true that proceedings of the nature therein described, were had in 1946. This however was not the situation in 1948, when I was induced by William Miller to consent to the sale of my stock.

Affidavit of Samuel Marcus

6. In further amplification of my statement, I desire to say this: In light of subsequent happenings, I am firmly of the belief, and therefore charge, that practically from the inception of the nightclub business conducted by Bill Miller's Riviera, Inc., under the exclusive supervision of William Miller, the income of said business was never truthfully revealed. Such conduct on the part of William Miller, continued right down to the date when he induced me fraudulently as I have stated, to agree to sell my stock in Milmar Estates, Inc. It is my considered opinion, and therefore I charge the fact to be, that the books of Bill Miller's Riviera, Inc., never truthfully reflected the true financial condition of the business, but were manipulated by Bill Miller to show non-existing losses, as part of a scheme to depress the value of my stockholdings in Milmar Estate, Inc., and ultimately induce me to part therewith for a fraction of its value.

7. With respect to the allegation in Paragraph 4, I deny that in September, 1948, William Miller was the owner of any stock of Milmar Estate, Inc. As heretofore stated, he was privileged to purchase 500 shares of Milmar Estates, Inc., stock for $50,000, which privilege he never exercised. At no time did William Miller become the owner of or become entitled to said stock for reason of the fact that he never paid the $50,000 consideration therefor, or any part thereof.

8. I deny that at that time, the business of Bill Miller's Riviera, Inc., from which Milmar Estate, Inc., obtained its rent, was bad. It may be that the books of Bill Miller's Riviera, Inc., indicated a poor financial condition, but I am informed, believe it to be true, and therefore charge the fact to be, that said books did not truthfully set forth the financial condition of Bill Miller's Riviera, Inc., but to the

contrary, the income from said enterprise was purposely depressed by William Miller, acting individually and in a representative capacity, to trick me into selling my stockholdings in Milmar Estates, Inc. for a fraction of its true value.

9. It is not true that Bill Miller's Riviera was unable to put on the proper kind of shows. The Riviera enjoyed a national reputation for headline shows. They employed the finest talent in the Country.

10. It is true that I was worried about my investment; this because of the false representations constantly being made to me by William Miller and Al Bierman that the business of Bill Miller's Riviera, Inc., was unprofitable which representations were untrue.

11. With respect to Paragraph 5, I desire to say that this paragraph is replete with inaccuracies and half untruths. What actually happened was this:

12. William Miller and Al Bierman had consistently, over a period of time sought to convince me, and finally did convince me, that the business of Bill Miller's Riviera, Inc., was bad, and that said corporation, as tenant, would be unable to continue paying the rent which was being used for the purpose of paying the amortization on the mortgage covering the real estate owned by Milmar Estate, Inc. I realized that if such an eventuality came about my entire investment in Milmar Estate, Inc., would be lost. Relying upon the false representations made to me by William Miller and Al Bierman, (hereinafter called Miller & Bierman), at a chance meeting I had with Bierman at the Riviera, I agreed to sell my individual stockholdings, amounting to 625 shares. These 625 shares were exclusive of the 500 shares of stock of Milmar Estate, Inc., earmarked for Wil-

liam Miller, and held by me to be delivered to him when and if he paid me the sum of $50,000, as he agreed to do. At a later meeting it was agreed that I was to receive the sum of $140,000 as consideration for the sale of 625 shares of Milmar Estates, Inc. In addition thereto, it was further understood and agreed that I was to be paid all of the moneys advanced by me to or on behalf of Milmar Estates, Inc., for legal fees, loans, and miscellaneous items.

13. The transaction did not include the sale of 125 shares of the capital stock of Milmar Estate, Inc. owned by Robert J. Schwartz, which I subsequently acquired by purchase.

14. The paper writing annexed to the affidavit of William Miller, and designated in Line 1 on Page 3 of his affidavit, as "a copy of the agreement of sale is hereby annexed and made a part hereof", in no wise remotely carried into effect the true agreement between me, Miller & Bierman, acting individually and as agents for Al Kevelson, and I deny that said paper writing referred to by William Miller in Line #1, page 3 of his affidavit, is a copy of said agreement, but charge that said agreement was unilaterally altered after execution, without my knowledge or consent, by the addition in paragraph 5, page 2, and again in Paragraph 10 at page 4, thereof, of the words "up to 50%", which alteration is further evidence of the fraudulent intent and purpose with which William Miller and Al Bierman, their agents and servants, have sought to defraud and victimize me.

15. It is true by said alleged agreement of September 14, 1948, which I have stated is not in fact the true agreement made by me with Miller and Bierman, that 625 shares of the capital stock of Milmar Estates, Inc., of which I was the owner on September 14, 1948, were deposited in

escrow with Al Lieberman. With the exception of 125 shares of stock of Milmar Estates, Inc., owned at the time by Robert J. Schwartz, all of the shares of stock of Milmar Estates, Inc., were present at the closing on September 14, 1948, to wit: 625 shares owned by me which I deposited with Al Lieberman in escrow; 500 shares of the common capital stock of Milmar Estates, Inc., also owned by me, subject to Miller's option to purchase if and when he paid me the sum of $50,000 therefor. I deny that I said that I could not find the stock certificates. With the exception of the certificates owned by Robert J. Schwartz, I had all of the Certificates there. There was no reason for Mr. Schwartz to have his certificates at the conference because he was not party to the transaction and was not selling his shares.

16. I deny stating that I could not find the stock certificates. I deny the "mechanics" described in paragraph 5, of William Miller's affidavit.

17. I deposited with Al Lieberman, 625 shares of Milmar Estate common stock. This was all of the shares of stock that I was required to deposit under my agreement with Miller & Bierman, and was all of the shares of stock that I was selling to them for the sum of $140,000.

18. I deny that four new certificates of stock in the total amount of 1250 shares of Milmar Estates, Inc. were to be issued to anyone. The certificates annexed to Miller's affidavit bear my signature; I must have signed them unwittingly and unknowingly in the "group of papers" referred to on the last line of Paragraph 5 of William Miller's affidavit, on page 2 thereof, and the execution of said certificates of stock was accomplished by trickery, fraud and device, there being no agreement anywhere or

at any time for the execution and delivery of such certificates. The agreement of September 14, 1948, annexed to William Miller's affidavit (the substance of which instrument we charge to have been altered subsequent to execution), and also the escrow receipt issued by Abraham Lieberman under date of September 14, 1948, are both wholly silent with respect to the issuance of any new certificate of stock of Milmar Estates, Inc., which now Miller claims were in fact executed on September 14, 1948.

19. I have no recollection of having signed my resignation as president of Milmar Estates, Inc., on September 14, 1948, or at any other time. I was not required to resign under the terms of the agreement of September 14, 1948, annexed to William Miller's affidavit, and if such a document does exist, it must have been obtained by trickery and device on September 14, 1948, when I was called upon to sign a great number of papers. The escrow receipt executed by Abraham Lieberman under date of September 14, 1948, makes no mention of any resignations of officers of Milmar Estate, Inc., having been deposited with him. It merely refers to the resignation of officers of Bill Miller's Riviera, Inc.

20. I deny that Al Kevelson, Al Bierman and William Miller, ever became the owners of all of the stock of Milmar Estate, Inc., as charged, and the stock division among them was as charged in Paragraph 5 on page 4 of William Miller's affidavit.

21. If the persons named in the 5th paragraph of Miller's affidavit, on page 4 thereof, were in fact designated as officers and directors of Milmar Estates, Inc., they acted without legal authority, and were mere usurpers of the offices which they purported to hold.

22. As to paragraph 6, I have no knowledge or information whereon to form a belief as to whether or not Al Kevelson, Al Bierman, and William Miller conducted the business affairs of Milmar Estates, Inc. As to this charge, I place him upon his proof.

23. It is true that after September 14, 1948, payments were made to me in various amounts, on account of my stock, until the time when I was interpleaded by William Miller and Al Bierman, with Milmar Estates, Inc., in this Court. May I point out at this time that Al Bierman and William Miller in their capacity as plaintiffs, were also the officers of Milmar Estates, Inc., according to William Miller's affidavit. This fact was suppressed from this court at the time the application for leave to interplead me was made, and the restraints in this case were issued. As I have suspected all along, William Miller and Al Bierman and Al Kevelson trifled with this Court when they filed their complaint in this action, interpleading me with Milmar Estates, Inc., a corporation which they controlled, according to their own admission.

24. It is true that after September 14, 1948, I took no active part in the management of the affairs of Milmar Estates, Inc., because I relied upon the truth of the representations made to me by Miller, Bierman and Al Kevelson. It was until the interpleading action was filed in this Court, that my suspicions became aroused that I had been imposed upon by Miller & Bierman, in connection with the sale of my stock. I was unaware of the methods used by William Miller and Al Bierman, to accomplish their purpose to defraud me, but I felt that I had been defrauded. Thereafter, of course, I could take no action against them or the corporation, or to demand my rights as an officer and director of Milmar Estates, Inc., because

Affidavit of Samuel Marcus

I was restrained by the injunction of this court dated December 28, 1950.

25. I deny that Al Bierman and William Miller filed their interpleader complaint in this court in good faith. Miller's statement in this regard, in paragraph 7 of his affidavit, is absolutely contrary to the allegations made by him in Paragraph 5 of his affidavit. There he undertakes to state in unmistakable terms, that he and Bierman had agreed to buy the stock of Samuel Marcus, for $140,000.

26. In paragraph 7 of his affidavit, he professes to be in doubt as to who was entitled to the payment for said stock and states because of that fact he sought an adjudication in the interpleader suit filed by him in this court. This of course, cannot be true. William Miller and Al Bierman, Al Kevelson, undertook to act as officers of Milmar Estates, Inc. What they virtually did was to interplead themselves, because they were the Milmar Estates, Inc. corporation. They controlled it according to Miller's affidavit. Samuel Marcus had nothing to do therewith after September 14, 1948, so that Bierman and Miller used Milmar Estates, Inc., as a pawn for the purpose of tying up the remaining funds due to Samuel Marcus, according to their statement, by the injunctive orders of this court. All of these facts were suppressed and concealed by Bierman and Miller from this court at the time that they instituted their action for interpleader. These facts should have been made known to the court. I deny that Miller, Bierman and Kevelson, were the lawful officers and directors of Milmar Estates, Inc., but this of course has nothing to do with the representations made by these people in the complaint of the interpleader filed by Miller and Bierman.

27. With respect to the allegations of Paragraph 8, to the effect that I did not object to the payment of the settlement moneys to my wife, I admit this to be true. I did not concern myself with said suit.

28. As to Paragraph 9, I deny that I knew anything of the details of the negotiations between Walter Winne and others, acting for Milmar Estates, Inc., with the State of New Jersey. I admit that I filed a lis pendens, but this I did on the advice of my attorney in order to prevent a surreptitious sale of the realty of Milmar Estates, Inc., by Miller, Bierman and Kevelson, acting as pseudo officers of Milmar Estates, Inc.

29. As to the allegations of Paragraph 10, I deny that I never offered to return the money paid to me on account of the purchase price of 625 shares of the stock of Milmar Estates, Inc. The entire purchase price therefor was not paid to me. Subsequent to the filing of the interpleader suit (the balance of the money amounting to $35,000), was paid into this court. I have always been willing, and now reassert my willingness to refund to the Milmar Estates, Inc., all the moneys paid to me under the alleged contract of September 14, 1948 in payment of 625 shares of Milmar Estates, Inc., stock. This will be done in a formal manner upon the filing of my answer and counterclaim in this action, which will be done upon the completion of the discovery proceedings provided for by the rules of this court.

30. As to the allegations of Paragraph 11, they are denied. The excerpts annexed to William Miller's affidavit are taken out of context and the reading of the entire deposition given me by will indicate that there is no contra-

diction whatsoever in my statements with respect to my ownership of said stock.

31. As to the allegations contained in Paragraph 12, I can only state once again that William Miller by repeatedly misrepresenting to me the income of Bill Miller's Riviera, Inc., and repeatedly telling me that it would be unable to pay its rent to Milmar Estates, Inc., induced me to agree to the sale of 625 shares of my stock of Milmar Estates, Inc., which otherwise I would not have agreed to sell. The fact of the matter is that Bill Miller was to put up an equal amount of money with me. He maneuvered me into the position where I invested over $100,000 in the venture, while he invested nothing. In the first instance, Miller and I were supposed to each put up $100,000. He stated that he would definitely be able to secure $100,000. Based upon this understanding, I entered into the contract for the purchase of the realty involved and paid a deposit of $25,000. After I had done so, and after I was involved to the extent of $25,000, William Miller told me that he was unable to put up his $100,000 or any part thereof. He told me, however, that in the then near future, he would be able to put up $50,000, which he expected to receive from some investment he had in Luna Park, Coney Island. Being obligated on the contract by that time, I sought to make the best of a bad bargain, and agreed to permit him to contribute this reduced amount. When it came time for him to put up the $50,000, he said that he was unable to put any part of that amount. The result of all these machinations on the part of William Miller, was that I put up all of the moneys required for the purchase of the realty acquired by Milmar Estates, Inc., with the exception of $20,000, which Miller secured from Al Bierman and with the exception of $11,000 which Mr. Schwartz invested as the result of my solicitation.

William Miller did not put up a single penny from the time that he first agreed to put up $100,000, to the present date.

32. As to paragraph 13, I doubt the truth of the allegations contained therein, and place the said William Miller upon his proof.

33. As to paragraph 15, I deny that I am attempting to secure the appointment of a receiver for the use of trickery, deceit and fraud, but to the contrary charge that the receivership is absolutely necessary to preserve the subject matter of this suit, namely $750,000, which the State of New Jersey is prepared to pay for the acquisition of the title to the lands and premises owned by Milmar Estates, Inc.

34. As to paragraph 16, I deny that Al Bierman is the owner of 20% of the stock of Milmar Estates, Inc., to wit, 250 shares.

35. The allegations of paragraph 17 are denied. The factual situation with respect to the stockholdings in Milmar Estates, Inc., have already been detailed and require no repetition at this time, except to say that William Miller never owned any stock of the Milmar Estates, Inc., by reason of the fact that he never paid the consideration therefor as he was required and as he agreed to do.

36. Paragraph 18 is denied.

37. As to the allegations of paragraph 19, I can only again deny that the agreement of September 14, 1948, was performed or can be performed.

38. Paragraphs 20 and 21 are denied. I deny that the agreement between the parties has been or can be per-

formed. I deny further that said agreement is valid and assert that it was obtained by trickery, deceit fraud and misrepresentation.

39. Paragraph 22 is denied, excepting that I admit that William Miller was the directing force behind the enterprise. He used his position as such directing force to defraud and trick me out of my investment. The paper referred to by Miller was evidently requested by him in order that he be able to show Kevelson that the note was no longer in force. It was agreed by Miller and me that I held the 500 shares which had been issued in his name and endorsed by him to me, subject only to Miller's privilege to buy such shares from me for $50,000.

40. Paragraph 23 is denied, if William Miller in this allegation means that the stock deposited with Abraham Lieberman is the stock allegedly issued subsequent to the agreement of September 14, 1948. The stock deposited with Abraham Lieberman was the 625 shares of my stock issued to me prior to September 14, 1948.

41. I deny that William Miller, Al Bierman and Al Kevelson had been and are legally and properly conducting the business of Milmar Estates, Inc. They are usurpers and acting without lawful authority.

42. I admit that negotiations are being carried on by William Miller, Al Bierman and Al Kevelson, with the State Highway Commission for the sale of the lands and premises owned by Milmar Estates, Inc., which constitutes all of the assets of said corporation. This they have no right to do, and I have so advised the State Highway Commission, which is the major reason why I have petitioned for the appointment of a receiver to conserve the assets of Milmar Estates, Inc., until such time as this Honorable

Court may make a proper determination as to the issues in this case.

43. As to the allegations of Paragraphs 23, 24, 25, of William Miller's affidavit, I deny that the said William Miller, Al Bierman and Al Kevelson, are the owners of all of the stock of Milmar Estates, Inc., and that they are now acting as officers and directors of Milmar Estates, Inc., with authority or propriety. I repeat that I am the owner of all of the stock of Milmar Estates, Inc., with the exception of 20 shares of stock held by Al Bierman.

44. Paragraph 26 is denied.

45. As to the affidavit of Abraham Lieberman, I desire to say this: I deny that the transaction referred to involved the sale of "all of the stock of Milmar Estates, Inc.", and that the same was concluded. It merely involved the sale of my 625 shares. The sale did not include 125 shares of stock then owned by Robert J. Schwartz, which I subsequently acquired, nor 500 shares of stock earmarked for William Miller, if and when he paid me $50,000, as he had agreed to do.

46. I further deny that Abraham Lieberman acted as attorney for William Miller and Al Bierman alone. As escrow holder, he represented all of the parties concerned, including me.

47. I deny that Abraham Lieberman, in paragraph 3 of his affidavit accurately states the essence of the transaction. The best proof of this fact is the reading of the alleged agreement of September 14, 1948, which in no wise resembles or contains the provisions referred to by Abraham Lieberman in paragraph 3 of his affidavit.

48. As to paragraph 4, I admit this to be so with respect to 625 shares of Milmar Estates, Inc. stock, which I deposited with Mr. Abraham Lieberman in escrow.

49. With respect to the allegations of paragraph 5, I deny the necessary stock certificates were not at the closing. I had in my possession and delivered to Abraham Lieberman in escrow, 625 shares of the stock of Milmar Estates, Inc., and he issued his receipt therefor. Were the facts as he states, it would have been perfectly simple for him to have taken an affidavit or other writing from me and from the others present that the stock certificates in question were lost or missing. This he did not do because all of the required certificates were actually present and delivered to him, as evidenced by his said receipt.

50. I deny that I read all of the papers carefully. A large number of papers was given to me to sign. I assumed that they were correct, and I signed them. What I signed, I do not recall, but I do know that there was never any talk of the cancellation of the old stock and the issuance of new stock. I had 625 shares of stock of Milmar Estates, Inc., with me at the time; I delivered this stock, which was all of the stock involved, to Abraham Lieberman to hold in escrow.

51. The allegation in paragraph 3 of Abraham Lieberman's affidavit, to the effect "that half of the stock consisting of 625 shares should be placed with him in escrow as security for the payment of the balance of the purchase price * * * " is absolutely untrue. The copy of the contract of September 14, 1948, which bears the signature of the parties, and which was delivered to me, provides as follows:

> "The stock herein purchased by the buyer and endorsed in blank shall be deposited in escrow with Abe Lieber-

man, Esq., of 4000 Bergenline Avenue, Union City, New Jersey * * * ".

52. The photostated copy of said agreement of September 14, 1948, annexed to William Miller's affidavit indicates that in paragraph 5 there was inserted after the words "the stock", the following phrase in ink:

"up to 50%".

This addition is initialed in the margin, with the initials, A. L., whereas all other insertions and eliminations bear the initialing of both A. L. for Abraham Lieberman, and R. S., for Robert Schwartz. I charge that this contract has been altered after execution, without my knowledge for consent. A like alteration was made in paragraph "10" of the agreement.

53. I deny the allegations of paragraph 7 of Abraham Lieberman's affidavit, as to my intention, and again point to the radical difference between the contract of September 14, 1948, and Abraham Lieberman's and William Miller's references thereto. The alerations of the contract of September 14, 1948, in a substantial and material respect, is merely added proof of my charge that I was defrauded, and that I am entitled to have the subject matter of this suit preserved until the final hearing of this cause, with all the circumstances and ramifications of this case heard in detail.

54. With respect to the affidavit of Al Kevelson, I wish to say this: I deny that he is a lawful president of Milmar Estates, Inc., or a bona fide stockholder and director of said corporation.

55. I never had any negotiations directly with Mr. Kevelson. I never met him until some months after September

14, 1948, and never discussed any business matters with him until he visited me at my office in about September or October, 1951. He states on Page 1 of his affidavit that "As a part of the deal a $50,000 note of Miller which Marcus held was to be canceled". He is obviously stating what Miller told him. I do not doubt that Miller told him that because Miller had made such agreement with him as to prompt him to tell Kevelson that the note had been canceled while concealing from Kevelson the fact that he did not own any of the shares. As I have stated, Miller arranged with me that the 500 shares which had been issued in his name and endorsed by him to me will be held by me subject only to Miller's privilege to buy such stock from me for $50,000. As a matter of fact, when Mr. Kevelson saw me at my office in September or October, 1951, he told me that he was not interested in my troubles with Miller and that all he knew was that he bought 50% of the stock of the Milmar Corporation.

56. With respect to the affidavit of Al Bierman, I can only say again that $10,000 paid to me as evidenced by the writing of August 27, 1948, was merely preliminary to the purchase of my stock in Milmar Estates, Inc. It was in no sense a binding contract undertaking to sell, as a reading of said writing will clearly indicate.

57. My dealings with Al Bierman as the receipt dated August 27, 1948 indicates, was merely in the nature of "preliminary negotiations" for the sale of my stockholdings in Milmar Estate, Inc. At that time, for example, Robert Schwartz was the owner of 125 shares of stock of Milmar Estates, Inc., which I acquired subsequent to September 14, 1948. I could not have told Al Bierman that I was willing "to sell all of my stock in the corporation, being all outstanding stock of Milmar Estate, Inc., except that stock

owned by William Miller and myself, and get out completely from the corporation". This, of course, is what they now contend. It is a stilted phrase which runs through the affidavits of all of these people, and which I never used.

58. It is true that the writing dated August 27, 1948, was the result of the conversation which Al Bierman and I had one evening while we were drinking at the bar of the Riviera. I did not go upstairs with him as he states. He went upstairs himself, prepared the paper and brought it down to me at the bar, where I thereafter signed it. It is not a contract as will be observed from a reading thereof, and furthermore, the option, if it can be called one expired by its very limitations. It was to become operative only if a written contract was entered in pursuance thereof within ten days from August 27, 1958. The apology for a contract dated September 14, 1948, was of course entered more than ten days after the 27th day of August, 1948.

59. With respect to the affidavit of Jacob Hoffman, I wish to say this: I deny that he kept me informed of the affairs of Bill Miller's Riviera, Inc., as he states. I can only state once again, that I have been informed, I believe it to be true and therefore charge the fact to be, that the affairs of Bill Miller and his representatives, that they did not truthfully reflect the financial condition of that company. I, of course, had nothing to do with the bankruptcy and reorganization proceedings of Bill Miller's Riviera, Inc.

60. I deny that in September, 1948, I sold all of my stock of Milmar Estates, Inc., and got out, as this man says.

61. I wish to say further with respect to Jacob Hoffman. He had been my accountant for several months before I became interested in any ventures with William Miller. I introduced him to William Miller and he became the ac-

countant for Milmar Estates, Inc., and for Bill Miller's Riviera, Inc. He was known to my secretary. After the agreement of September 14, 1948, was signed I had possession of the minute and stock books of Milmar Estates, Inc. One day without my knowledge or consent, Jacob Hoffman came to my office in New York, during my absence, and requested my secretary to give him the books of Milmar Estates, Inc., which she did. What Jacob Hoffman has done with the corporate records of Milmar Estates, Inc., I do not know. He has failed to return them to me since the day that he obtained them under the circumstances I have stated.

62. This man is still in the employ of William Miller, and is completely subservient to him.

/s/ Samuel Marcus
Samuel Marcus

Sworn and subscribed to
before me this 21st day
of December, 1953.

/s/ Esther McDevitt
Esther McDevitt
A Notary Public of New Jersey

Notice of Motion for Restraint

(Filed—January 25, 1954)

To: Messrs. Chasin and Chasin,
Attorneys for plaintiffs
30 Journal Square
Jersey City, New Jersey

Maurice C. Brigadier, Esq.
40 Journal Square
Jersey City, New Jersey
Attorney for defendant, Milmar
Estates, Inc.

Please take notice that on Monday, January 25, 1954, at the hour of 10 o'clock in the forenoon (E. S. T.) at the United States District Court rooms, Federal Building, in the City of Newark, State of New Jersey, at the opening of the court on that day, or as soon thereafter as counsel can be heard, a motion will be made to restrain the plaintiffs and the defendant, Milmar Estates, Inc., a New Jersey corporation, their respective attorneys, agents and servants, jointly and severally from receiving or taking into their possession, the condemnation award of $757,410, made by the Commissioners in Condemnation in the suit of the State Highway Commissioner of the State of New Jersey, for the condemnation of the lands of Milmar Estate, Inc., a New Jersey corporation, or any part thereof, until the further order of this court.

Said application will be based upon the pleadings heretofore filed in the above action, and the affidavit hereto annexed.

Dated: January 19, 1954

/s/ Robert D. Grosman
Robert D. Grosman,
Attorney for Defendant,
Samuel Marcus

Affidavit of Samuel Marcus for Restraint Annexed to Foregoing Motion

STATE OF NEW JERSEY,
COUNTY OF ESSEX, *ss.*:

SAMUEL MARCUS, being duly sworn according to law upon his oath deposes and says:

1. I am one of the defendants in the foregoing action and the petitioner for the appointment of a receiver to take into his possession the proceeds of the condemnation of lands and premises owned by Milmar Estates, Inc., a New Jersey corporation, in an action instituted by the State Highway Commissioner of the State of New Jersey.

2. Heretofore, by virtue of proceedings duly had for the purpose, an order was made herein on the 30th day of October, 1953, requiring the plaintiffs herein and the defendant, Milmar Estates, Inc., a New Jersey corporation, to show cause on the 9th day of November, 1953, why an application for a preliminary restraint and the appointment of a receiver, pendente lite, as prayed for in the petitioner filed herein, should not be granted.

3. The hearing on the order to show cause was continued from time to time to the 25th day of January, 1954.

4. Thereafter, the defendant, Milmar Estates, Inc., obtained an ex parte order for the examination of one Robert Schwartz on the 19th day of January, 1954, at 2 o'clock in the afternoon. On said day, and hour, the said Robert Schwartz, appeared and refused to answer any questions intended to be propounded to him by counsel for Milmar Estates, Inc., on the ground that his knowledge of the subject matter, upon which he was to be interrogated, came to him in his capacity as attorney for Samuel Marcus,

the petitioner herein, and as such, he was privileged from being called upon to testify with respect thereto.

5. Thereupon, Maurice C. Brigadier, Esq., attorney for Milmar Estates, Inc., gave verbal notice that on Monday, January 25, 1954, he would appear before the Hon. Alfred E. Modarelli, United States District Court judge and apply for an order requiring the said witness to testify. No specific questions were put to the witness. He was merely informed generally as to the subject matter upon which he was to be interrogated.

6. Deponent has been informed, believes it to be true, and therefore charges the fact to be that on Friday, January 15, 1954, the Condemnation Commissioner appointed, in the suit of the State Highway Commissioner of the State of New Jersey for the condemnation of the lands of Milmar Estates, Inc., a New Jersey corporation, one of the defendants herein, filed a report herein that recommended that the said Milmar Estates Inc. be paid the sum of $757,410, as compensation for the condemnation of said lands and premises.

7. Deponent is unaware of whether the said Milmar Estates, Inc., a New Jersey corporation, or Al Bierman, William Miller and Al Kevelson, who have assumed control of the defendant, Milmar Estates, Inc., intend to accept said award. He fears, however, that they may do so, in which event, he will be left without remedy.

8. Deponent is informed and believes it to be true, that an application will be made on Monday, January 25, 1954, for a further adjournment on his application for an appointment of a receiver to take said funds into his possession. He fears that if a further adjournment is granted

Affidavit of Samuel Marcus for Restraint Annexed to Foregoing Motion

in this case, the defendant, Milmar Estates, Inc., William Miller, Al Bierman and Al Kevelson, or some of them, may accept said condemnation award, and thus render the instant proceedings academic.

9. Wherefore deponent respectfully requests that if, in the opinion of this Honorable court, the circumstances warrant a further continuance of his application for a restraint and the appointment of a receiver, the defendants, Milmar Estates, Inc., a New Jersey corporation, Al Bierman, William Miller and Al Kevelson, their attorneys, agents and servants, be jointly and severally restrained and enjoined from taking into their possession, the said award of $757,410, or any part thereof, until the further order of this court.

/s/ Samuel Marcus
Samuel Marcus

Sworn and Subscribed to
before me this 19th day of
January, 1954.

/s/ Estelle J. Lundy
Estelle J. Lundy
A Notary Public of New Jersey
My Commission expires
February 20, 1957

Excerpts from Hearing of January 25, 1954

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The Court: All right, No. 24, Al Bierman, and others, versus Samuel Marcus, and others; hearing on application for temporary restraint and appointment of receiver pendente lite. Mr. Grossman, Mr. Brigadier, Mr. Tepper, Mr. Kesselhaut and Mr. Chazin. As you speak please give

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your name and whom you represent so the court reporter can get it.

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Mr. Brigadier: If your Honor please, we served a subpoena duces tecum on Mr. Robert Schwartz, an attorney of the State of New York, member of the bar of the State of New York, for the purpose of taking his deposition to be used on the return of the order to show cause why a receiver should not be appointed. And at the taking of the deposition, as I will point out at great length in a moment, Mr. Schwartz refused to answer or testify until your Honor would first direct him to testify.

Now, may I say first, before I get to the heart of the problem, this, which I think your Honor should know:

Their client—by their client I mean Mr. Marcus, the defendant whom they represent—applied to your Honor on a verified petition for an order to show cause why a receiver should not be appointed. He filed a sworn statement reciting certain facts which, of course, your Honor must have relied upon in allowing the order to show cause.

That one statement of Mr. Marcus has been directly

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contradicted by affidavits that we filed in the cause, not

* All figures appearing throughout this transcript indicate page numbers of typewritten transcript.

only the affidavits of the plaintiffs, Al Bierman and William Miller, who are represented by Mr. Chazin, they are directly contradicted by the affidavits that have been filed by Mr. Kevelson, who is now represented, I understand, by Mr. Kesselhaut, directly contradicted by affidavits that were filed by the accountant, or made by the accountant, Mr. Hoffman, and directly contradicted by an affidavit made by Mr. Lieberman, Al Lieberman, a member of the bar of the State of New Jersey, known, I think, to your Honor as a former magistrate, I guess, of Weehawken.

The Court: Township of Weehawken.

Mr. Brigadier: As I say, here we had the one affidavit of Mr. Marcus alone. That affidavit, incidentally, and a reply affidavit that Mr. Marcus has since filed, charged all of these people not only with conspiracy to defraud, but charged them, as I see it, in very clear language with having committed perjury, forgery and a number of other crimes.

This includes, incidentally, the member of the bar of the State of New Jersey.

The Court: I might mention at this point, Mr. Brigadier, that I am firmly convinced in this case that somebody is committing deliberate and wilful perjury.

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Mr. Brigadier: I am absolutely in accord with you. I say there can't be the slightest doubt, either we are committing it or Mr. Marcus is. This is one case where there can't be any 'ifs', 'ands', 'buts', 'I meant' or 'I didn't mean'. There are direct assertions, direct contradictions. And I agree with your Honor that either Mr. Marcus has committed perjury of a very serious nature or Judge Lieberman, and all these people I have enumerated, have committed it.

It was at this point, when Mr. Marcus served a reply affidavit, that I became alerted to a doubt. I think anyone

would have been alerted to it by this time, if not long before it.

Mr. Marcus was represented in this transaction by an attorney, Robert Schwartz. Mr. Marcus testified not only that Schwartz had represented him, but in the course of the taking of the deposition both directly and indirectly stated that the papers that were presented to him for signature did not correspond with the instructions that he had given his attorney as to what should be in those papers.

The Court: That is a very serious charge, too, against the attorney.

Mr. Brigadier: There is not only an indirect charge, there are many direct charges, as I will point out, against his own attorney.

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In addition, Mr. Marcus said—and this became the crux of the case—in the deposition, and in the affidavits he has filed in this proceeding, that it is untrue, as we have stated, that he sold us all the stock on September 14, 1948, consisting of 1,250 shares, because it wasn't until after September 14, 1948 that he entered into a contract to purchase 125 of those shares that were owned by Robert Schwartz, and if he only purchased them from Schwartz after the date of the contract with us, how could he have possibly sold all the stock to us?

Sounds like a pretty good argument, if it is true. I think a very good one.

Therefore, I was doubly surprised that there was no affidavit submitted by them from Robert D. Schwartz, as the attorney, backing up Mr. Marcus, and as the person who sold this stock to Mr. Marcus after September 14, 1948.

At that point I went to Mr. Tepper and suggested that he go with me to Mr. Schwartz's office and that we con-

front Mr. Schwartz and get a statement from him as to what this transaction was.

Mr. Tepper said he would not go. Then later he said, "Well, I will take it up with Judge Grosman." He said, "At any rate, I won't go with you. If I go at all, it will be with Judge Grosman and with Marcus."

I said, "If that is what you want to do, that's all right

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with me; but go."

It seems to me, incidentally, that by this state they didn't have to wait for me to come to them to ask them to go to see Mr. Marcus. If I were the lawyer in the case—

The Court: Mr. Schwartz.

Mr. Brigadier: Mr. Schwartz. —or any other lawyer in the case, the first thing he would have done after this kind of testimony was given in the deposition, or this kind of affidavit about to be made, charging lawyers and everybody else with perjury, charging a lawyer with forgery, that at least some precaution would be taken by at least going to see this lawyer in New York.

The next thing I know I get a message from Mr. Tepper that they are not going, but they have served some kind of a letter on Mr. Schwartz making a demand upon him that he turn over to them any documents that he still had in his possession that he had not turned over and that they were led to believe—I think something to that effect, Mr. Tepper told me—that they were led to believe that he had such evidence.

Whereupon I went to see Mr. Schwartz myself. Now, the problem I was immediately confronted with when I went to see Mr. Schwartz is that Mr. Schwartz said, "Mr. Brigadier, this is involved in an attorney-client relation-

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ship, confidential relationship. There are certain papers in my possession. I can not exhibit them to you until the Court rules upon them."

Excerpts from Hearing of January 25, 1954

I then pointed out to him that there couldn't be privilege in many of these situations because, first, I wanted to question him about the transaction that took place in his presence and in the presence of Judge Lieberman, the two plaintiffs, and Mr. Marcus. Certainly if there is any Hornbook law that is settled it is that anything that took place in the presence of the opposing parties is not privileged.

So I suggested to Mr. Schwartz that he discuss that first with me. He said he felt the whole thing was intertwined and he wouldn't want to talk until there had been some ruling of the Court on the subject.

The second thing that I said I wanted to question him about was his acting as a stockholder of the corporation, as an officer of the corporation. He had signed these papers as secretary of the corporation. He, according to Marcus, was the beneficial owner of 125 shares of stock from way back. Therefore I said that is not a privileged situation and I didn't see why he shouldn't discuss that with me. But he gave me the same answer.

Then I asked him to discuss with me the sale of this stock by Marcus to him. And I pointed out that Marcus

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testified that he had sold the stock to him after September 14. The most I could get out of him was a whistle. If your Honor will allow me to imitate it, it went something like this (whistling). I don't know whether I whistle very well, but he wouldn't discuss that again.

Incidentally, he conceded that he couldn't substantiate any legal reason that obviously a sale of stock was not a privileged situation, but he felt that the whole thing should be passed upon by the court. And, of course, he would not exhibit to me the documents.

Nevertheless, I decided that the only way to compel him to do so is, of course, to first take his deposition because that was the only way we could invoke the ruling of the

Excerpts from Hearing of January 25, 1954

court. So we took the deposition—or, rather, we attempted to take it.

I wasn't at all surprised that Mr. Schwartz should do what he did, because I had forewarning when I went to see him that this was going to happen. I hadn't any doubt it would happen.

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Mr. Brigadier: No, I don't think we need go into it at this point, except for the fact that I called upon them to tell Mr. Schwartz that they consented to his testifying and they refused to make any statement at all. In other words, I wanted them, assuming there was any privilege—I am not conceding there is any at all—but I thought that might expedite the matter, so I turned to Judge Grosman and I said, "Will you consent to his giving testimony," because, after all, if there were any privilege, it is not the lawyer's, it is the client's, anyway, and I thought that would facilitate it, and they said they wouldn't make any statement at all—they didn't say they wouldn't, he said he didn't consent regarding it all and he said he wouldn't make any statement at all—and that is why we are here this morning.

Now, before I deal with this problem of the privilege in this motion, I would like to just briefly review with your Honor this litigation, because I think it is extremely important that your Honor should see against the background of this litigation what I think is not only a fantastic conspiracy—but, of course, that is something your Honor will eventually have to resolve, as to whether it is true or not—but that this conspiracy envisages something which I think is the nature of a highjack and nothing else.

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Your Honor should first know that the State of New Jersey has made an award in condemnation proceedings of the Riviera, it is a matter of public notice, it has been

in all the newspapers, and the columns—and Mr. Winne is here, he was the attorney who handled the condemnation proceedings for the Milmar people—and that an award of $757,000 has been made by the State.

This litigation was started in December, 1950. That is more than three years ago. The litigation, as far as the record shows, is a litigation solely and entirely by way of an action of interpleader with respect to a sum of $35,000 that has been deposited in this court. No answer or counterclaim has ever been filed by any of the defendants, but particularly by the defendant Samuel Marcus.

Three years have elapsed, more than three years, and to this date we haven't yet had any statement by Mr. Marcus in this action asserting what his claim is. Lo and behold, along comes a petition on behalf of Samuel Marcus why a temporary receiver should not be appointed.

Even at that stage, when he seeks the provisional aid of this court, he doesn't even resort to the most elementary thing of filing at least an answer and a counterclaim asserting something in relation to which a receiver could be sought. That is not even done.

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It seems to me that the defendant, Mr. Marcus, just assumes—and I personally feel it is most contemptuously that he assumes—that he can just blithely proceed along in this thing and do whatever he pleases without having to take any position.

Now, of course, the question that is going to arise in your Honor's mind immediately is: Why haven't I compelled him to take a position? Because, unfortunately, I consented to what turns out to be a very silly order. Not silly because the court made it, but silly because I consented to it.

That order was entered at the beginning of the taking of the depositions several years ago and it reads that the

Excerpts from Hearing of January 25, 1954

defendants are not required to file their answers or their counterclaims until the depositions are completed. And apparently they have never been completed. This can go on for the next twenty years.

Frankly, I am rather surprised that the Administrative Director hasn't stepped in at this point and said, "What's going on in this case?" I expected any day to have a communication from the court saying that there has been something of that kind inquired about, but I assume the Administrative Director in the Federal Court does not operate on the same basis as they do apparently in the State courts.

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Mr. Grossman: Thank God they don't.

Mr. Brigadier: I was going to say the same thing in that respect, but not in this particular case.

So, as I say, here is the fantastic situation that actually all there is before the court is a complaint in interpleader of $35,000, where the $35,000 has been deposited, and where, without the filing of a counterclaim or the bringing of any original proceeding in which this defendant would seek any kind of affirmative relief, he rushes into court with a petition in our interpleader action where the only res is $35,000, and asks for a receiver appointed by the court.

Actually what I am leading up to at this point is that I am going to ask your Honor to see whether there isn't some way of bringing this thing to an end. I think your Honor would like it brought to an end. I know I would like it brought to an end.

The Court: I am surprised that your clients have been so patient during this three years.

Mr. Brigadier: Well, they haven't been, if you want to know the truth. And I feel somewhat responsible for this situation. All I am saying is—I don't want to alibi the past, I want to deal with what we have now.

Excerpts from Hearing of January 23, 1954

It seems to me that the time has come for this thing to reach an end. There is only one way it can reach an end

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and that is to fix a short date by which all the defendants in the action will be required to file whatever answers and counterclaims they want to file and that a date be fixed for the trial of this case.

If that is done—and that is why I am bringing this up now—it will render all of this unnecessary, except the one thing—the deposition, I think, of Robert Schwartz must still be taken, because I think it is such a crucial turning point of this case that it would be unfair not only to us but to the court not to be assured in advance of what this problem is with respect to Robert Schwartz that I will deal with in a moment.

But, as I say, all the rest of it, the receivership, the restraints, all of it will become purely academic.

Now, you might say, "Well, how can it become academic? There are seven hundred and fifty thousand there that have to be protected in the meanwhile."

And this is what I would like to propose to your Honor. If a short date can be fixed, the matter set down for trial, there will be no problem of the seven hundred and fifty thousand.

I spoke to Mr. Winne this morning and a suggestion was

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made between us which I think would solve this whole problem. Mr. Winne said, "Why not do it this way: Offer to have the seven hundred and fifty thousand held by Winne & Banta, in a trust account, not to be disposed of in any way except by order and direction of this court."

Now, if that is done, why any need for receiverships, or restraints, or any of this other interlocutory nonsense that we are now apparently engaged in? It will mean that this money can be put out on interest, so that my clients are

not going to be highjacked, with the threat of losing this interest, into trying to force them into doing something that they might not want to do of their own free accord. And they are in no way injured. And, therefore, that is what I would like to suggest to your Honor.

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Mr. Grosman: Now they come along while this thing is going on—the State comes along and condemns this property. It is elemental that we are entitled to have the subject

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matter of the suit preserved until the final hearing. There would be no purpose to this money going over to Miller, and Bierman, and Kevelson, and we fighting about who is entitled to it. Bierman comes from Kentucky somewhere; and Miller, I understand, is out in Las Vegas somewhere; I don't know where Kevelson comes from—I think Staten Island.

Now, we made our application, your Honor, for the appointment of a receiver to take this money and hold it. All we are asking is that the subject matter be preserved.

We made our application back in October, on the 30th of October of last year. An adjournment was requested and, of course, we agreed to it.

Mr. Brigadier: You requested it. Let's be accurate.

Mr. Grosman: It may be. Maybe the first adjournment I requested. I don't remember.

But anyway—may I say this: When I requested an adjournment I communicated with Counsel. Mr.—somebody on behalf of Mr. Brigadier, and Mr. Chazin, came down here ex parte the last time and obtained an order for two weeks' adjournment from your Honor.

The Court: I understood they explained it to you.

Excerpts from Hearing of January 25, 1954

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Mr. Grosman: He spoke to Mr. Tepper. As I understand it, Mr. Tepper said, "If we can get a short day—"

Mr. Brigadier: That's right. And I communicated that to your Honor.

Mr. Grosman: Please, please. I didn't interrupt you.

"—if we can get a one day adjournment because of the situation as it is developing we will agree to it."

The next thing we knew we got an adjournment from—I think for two weeks.

Now, in the meantime the Commissioners have made their report. They are prepared now to pay $757,000 for the title to this property. All we want is that this money be safeguarded until this litigation is terminated.

We have an order signed by your Honor, consented to by these people, that we are not to be called upon to file an answer or a counterclaim, because of our complete ignorance at the time of what happened, until we took our depositions.

We ask that a receiver be appointed—the order to show cause is returnable today—merely to take this money and

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hold it. They agree, of course, that the money ought to be held. They want Mr. Winne, for whom I have the highest regard, to hold it. But we want a receiver appointed under the authority and responsible to this Court.

Mr. Winne, of course, is counsel to these people in the condemnation proceedings and I don't think he ought to be called upon to hold this money. I think somebody impartial, under the control of this Court, ought to be required to do it.

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Excerpts from Hearing of January 25, 1954

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Mr. Grosman:

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But I do object to these people being permitted to remain free to take this money and scatter it to the four corners of the country and leave us with a lot of empty litigation.

And so I ask your Honor that irrespective of—insofar as Schwartz is concerned, let them examine to their heart's content, properly, question by question, so that we may know precisely what we are up against. And in the meantime don't let's permit these people to take the horse out and then lock the stable door. We want the money safeguarded in some way because now they are privileged to go in there any day they see fit and accept the award and do whatever they see fit with it.

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Mr. Grosman: All we are asking for, your Honor, is that this money be safeguarded. Now, at the proper time we go into the question of who altered that contract and why it was altered—

The Court: And whether Marcus knew about it.

Mr. Grosman: Whether he knew about it, and all that kind of business.

The Court: Off the record.

(Discussion off the record.)

Mr. Grosman: At the proper time we will go into all these questions. They can bring this case to a conclusion just as fast as they like. All I ask your Honor to do is see that we don't bring the case to a conclusion over subject matter that is no longer existent.

So I ask your Honor, pending the doing of all these

Excerpts from Hearing of January 25, 1954

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things that Mr. Brigadier says that he wants me to do, or he thinks I ought to do, and all that kind of business, that you safeguard the money, put it in the hands of a receiver, put it in somebody's hands under your control, not under the control of the clients.

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Mr. Tepper: Yes, sir; and unnecessarily. --and I think we ought to cut all of that business away and get right down to the meat, the heart of this thing. And what is the heart of this thing? The heart is that there has been an award of seven hundred and fifty some odd thousand

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dollars which is claimed by somebody other than Milmar Estate, somebody other than Mr. Miller, somebody other than Mr. Kevelson. And we who represent people who are claimants, and who have made a very good showing on the face of it,—

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Mr. Tepper: In the meantime this money should be in custodia legis. I have the highest regard for Mr. Winne. But Mr. Winne is the lawyer in the condemnation matter. It should be an officer of the Court. And the only person answerable to the Court would be a receiver or a sequestrator. In this particular instance it should be a receiver subject to the direction of the Court.

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Mr. Kesselhaut: Yes, sir. And with respect to the appointment of a receiver, we hardly see the need for it.

Excerpts from Hearing of January 25, 1954

So far as I am concerned, it is agreeable to me that these monies, if, as and when they are paid over by the Highway Commissioner—bearing in mind at the moment, I think all of us have overlooked one thing, that the monies will

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not be paid over unless there is the lifting of a lis pendens that has been filed by Samuel Marcus in this matter.

The Court: Yes, I was wondering how the State would pay over, or the paying authority would pay over with the lis pendens there.

Mr. Kesselhaut: I am quite certain that with the lis pendens filed that no monies will be turned over to anyone. I don't know whether Mr. Grosman would like to say anything with respect to the lis pendens.

The Court: I was wondering how they would turn the money over with the lis pendens on file.

Mr. Grosman: Of course, the State is free to do it. That is the thing that has worried me about it. They may disregard it and say, "We don't think a lis pendens is a proper pleading to file in this case because the title to the property is not involved."

We filed as a measure of desperation. You see, they have got us tied up. We can't proceed until they get through taking the deposition of Marcus. They haven't finished yet. We can't go ahead with the case.

Mr. Brigadier: Judge Modarelli, I don't want you to be shocked. I happen to agree with Judge Grosman the first time I agreed with him today. I think he is right. As a matter of fact, I will eventually move to discharge

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that lis pendens and I think your Honor will have to discharge it. I want to be fair with the Court, because if I kept silent you may say later, "Mr. Brigadier, you allowed me to be under the delusion that the lis pendens would operate." I don't think it will. I think that if I make the motion, as I plan to, your Honor will have to discharge

Excerpts from Hearing of January 25, 1954

the lis pendens. So it comes back to the other basic question.

But may I just add this, that we are not arguing that today. As I understand, that has gone off to another—

The Court: Yes, I understand.

Mr. Grosman: Well, I don't know. I want to talk to you about it. I want to think about it. It is the only hold, tenuous as it may be, that we have had upon this thing.

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Mr. Chazin: Now I want to address myself briefly to this petition for a restraint and try to cut through all of the propaganda and general talk.

The Court: Well, now, Mr. Chazin, apparently neither side objected to somebody being appointed to hold the money. It is a question of who should be appointed.

Mr. Chazin: Well, we do object to a receiver being appointed and we are not arguing that this morning. As I understand it, that wasn't being argued this morning, but the argument this morning was on a restraint against taking the funds or disbursing the funds.

And I wanted to address myself briefly to that. And in that respect I want to say this: I want to try to separate the facts from the propaganda. Now, uniformly, the arguments of Marcus begin with the propaganda statement that the plaintiffs, or Miller, did not put in any money and that he was a sucker.

But I think in this Court we deal with facts and I want to boil down the claim of Mr Marcus, see what it amounts to in fact, what he charges.

When you go through his long affidavit on this petition for the appointment of a receiver and restraint, he gets down to two charges of fraud.

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Excerpts from Hearing of January 25, 1954

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Now, I want to address myself briefly to the law on the question of restraint. I cite you the case of Kellean versus Maryland Casualty Company, 312 U. S., 377—

The Court: Are you going to file a memorandum on

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that?

Mr. Chazin: I can, your Honor.

The Court: Go ahead. I'll see if I need it.

Mr. Chazin: —in which the court states:

> "This Court has frequently admonished that a Federal Court of Equity should not appoint a receiver where the appointment is not a remedy auxiliary to some primary relief which is sought and which Equity may appropriately grant."

Now, they have never filed a counterclaim or a direct action. And the reason for it is that they didn't know what to file because they had no proof, and they have no proof today. All they have today is these general statements, "He defrauded me."

But fraud is a specific thing. And when they get down to fraud, they get down to these two elements, "He told me business was bad" and "He told me the mortgagee was going to demand the five thousand dollar payment."

Now then, I merely want to cite one more case and I am through—and I will furnish your Honor with these citations—the case of Wilkinson versus Dobbie, in 12 Blatchf. 298, Federal Cases, in which the court said:

> "An injunction will not be granted or a receiver appointed where it is not apparent that the ultimate

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> determination of the suit in favor of the plaintiff is reasonably probable."

Excerpts from Hearing of January 25, 1954

I believe if they wanted restraint, or if they wanted a receiver, they should have put the Court in a position to do something for them by, one, filing a counterclaim; and, two, coming through with some proof.

The Court: Well, we have thirty-five thousand dollars in registry with the Court, haven't we? And that is all I am concerned with up until now. And I didn't see how I could tie up seven hundred odd thousand dollars now, on what basis I can tie it up, unless you gentlemen will file within a reasonable time an answer and a counterclaim.

Mr. Grosman: We have an order of this Court, your Honor, that we are not required to file an answer and a counterclaim until we were able to ascertain from them what happened to us and until they had completed their depositions.

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Now, we are going to file an answer and a counterclaim. We are going to ask for rescission of that contract. We are going to request this Court eventually to rule on the fact that we own practically all of the stock of this corporation. And we say so in this affidavit.

Now, if you are going to give them the money, why, there is no use litigating.

The Court: I don't want to give them anything they are not entitled to have, but I certainly want authority for what I am doing. I can't assume that everything your client claims is true.

Mr. Brigadier: If your Honor please, I think this is a piece of presumption. They say to you, "True, you can't—"

The Court: Please, Mr. Brigadier. This is off the record.

(Discussion off the record.)

Mr. Brigadier: I was going to back up the statement—that you can't say to the Court, "You are to blame if you

don't give us a receivership and a restraining order," even though the rules say you can't give it unless there is some precedent.

The Court: I won't give it unless I am authorized to give it.

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Mr. Winne: I think I ought to say this, if your Honor please, for the record. I incorporated Milmar Estate. I have represented them in their real estate dealings ever since their incorporation and represented them all through

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the hearings, first, trying to prevent the State from condemning the property, and then getting them permission to stay in business for the entire year, 1953, and on the hearing represented them before the Commissioners, and have the award, and have told the State of New Jersey that Milmar Estate would accept the award.

And I am anxious to say that for the record, because if there is anyone thinks it shouldn't be accepted they better move pretty quickly.

Now, the State has not indicated that they will pay the award as yet, but I believe they will. However, everyone treats this as if it was cash in somebody's hands. I haven't this money, Milmar Estate hasn't this money, and I don't think anyone on earth could get this money in less than thirty, or forty-five, or maybe ninety days. So it isn't as though somebody was going to take the money and start for Las Vegas tonight.

I think also, with all seriousness, having closed a few titles in my life, that the State will not pay this money over while this lis pendens is on record. While I don't think the lis pendens is a correct paper, don't think it should be on record, I think we are going to have to get it off before the

State pays out any such money. So there is really no emergency about this money being squandered overnight.

—61—

Now, I state here to the Court, I would under no circumstances see this money disbursed, and it would have to be disbursed through me, unless I am fired, until this litigation was out of the way, because if Marcus should have this money I would be the first one to help him get it.

So I don't think there is any reason why anyone ought to express fear that the money will be dissipated. I will do whatever the Court indicates. I will take the Court's instructions, if the Court so instructs me to be responsible to see that, so far as I can, the money is not disbursed; I will accept it under any circumstances, if I can get it; but, frankly, I don't think I or anyone else could get it in less than thirty days, at the very least, and I doubt very much if in less than sixty days.

The Court: Yes, sir.

Mr. Brigadier: I consent to it, too.

Mr. Grosman: We have no objection. Of course, I don't want to make any recommendation to your Honor, that is up to you, whether you think that Counsel for one of the parties ought to be—

The Court: Well, he will only be holding the money.

Mr. Grosman: All right.

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The Court: It is not much to argue about. There won't be any big fees involved. So nobody will complain about that.

Mr. Kesselhaut: Will you, for the record, indicate that the lis pendens will be lifted or discharged?

Mr. Grosman: If the Court appoints a receiver or a Master, somebody under his control, to hold this money we will be glad to consent to the vacation of the lis pendens so that a good title may be made to the State.

Excerpts from Hearing of January 25, 1954

The Court: All right. Then you will prepare an appropriate order, submit it to your adversary, so that the money will be controlled through the Court and everybody will be happy.

• • •

Order Appointing Master to Take Into His Possession Funds, Etc.

(Filed—February 18, 1954)

This matter being opened to the courts by Messrs. Robert D. Grosman and Jules E. Tepper, attorneys for and of counsel with the defendant, Samuel Marcus on notice to and in the presence of Maurice C. Brigadier, Esq. attorney for the defendant, Milmar Estates, Inc., Abraham Chasin, of the firm of Chasin & Chasin, attorneys for the plaintiff, Al Bierman and William Miller, and George Kesselhaut, Esq., attorney for Al Kevelson, on the return of an order to show cause made herein why a receiver should not be appointed to take into his possession the proceeds of a condemnation award made by the commissioners in condemnation in the suit of the State Highway Commissioner of the State of New Jersey for the condemnation of lands of Milmar Estates, Inc., which award approximates $757,410; and why the plaintiffs and the defendant, Milmar Estates, Inc., a New Jersey corporation should not be restrained from taking into their possession jointly or severally, the aforementioned proceeds of said condemnation proceeds, or any part thereof; and the court having heard the argument of counsel for the respective parties and having duly considered the matter:

It is thereupon on this 18th day of February, 1954. Ordered and adjudged as follows:

Order Appointing Master to Take Into His Possession Funds, Etc.

1. The state Highway Commissioner of the State of New Jersey shall pay over the proceeds of the condemnation award made in favor of Milmar Estates, Inc., by the commissioners in condemnation in the matter of the Petition of the State Highway Commissioners of the lands of Milmar Estates, Inc., a corporation of New Jersey before Honorable J. Wallace Leyden, Superior Court Judge, Bergen County, New Jersey, which premises are situated in Fort Lee, Bergen County, New Jersey, owned by Milmar Estates, Inc., and which premises are commonly known as "Bill Miller's Riviera" to Peoples Trust Company of Bergen County, 210 Main Street, Hackensack, New Jersey, which said bank shall receive said money and place the same upon deposit in an account designated "Walter G. Winne, Master of the United States District Court," District of New Jersey; and which said money shall not be disbursed by said banking institution or subject to withdrawal by any person except upon the express order of the United States District Court, District of New Jersey; no bond shall be required of the bank, Peoples Trust Company and Walter G. Winne, Master.

2. Peoples Trust Company of Bergen County shall pay out of the proceeds of the aforesaid award the sum of $77,500.00 together with interest computed from February 1, 1954 at the rate of 5 per centum per annum to the holder of record of the first mortgage on lands and premises of Milmar Estates, Inc., situated in Fort Lee, New Jersey heretofore condemned by the Highway Commission of the State of New Jersey.

3. Upon the entry of this order, the defendant, Samuel Marcus, or his attorney shall sign the necessary documents to vacate lis pendens filed by him in the County of Bergen, affecting the lands and premises of Milmar

Order Appointing Master to Take Into His Possession Funds, Etc.

Estates, Inc., which are the subject of the aforementioned condemnation proceedings.

Dated: February 18th, 1954.

ALFRED E. MODARELLI
U. S. D. J.

Notice of Motion

(Filed—August 5, 1954)

To: ROBERT D. GROSMAN, Esq.
Attorney for Defendant, Samuel Marcus
24 Commerce Street
Newark, N. J.

JULES E. TEPPER, Esq.
Of Counsel with Attorney for Defendant,
Samuel Marcus
1060 Broad Street
Newark, N. J.

CHAZIN & CHAZIN, Esqs.
Attorneys for Plaintiffs
30 Journal Square
Jersey City 6, N. J.

SIRS:

PLEASE TAKE NOTICE that the undersigned, Maurice C. Brigadier, attorney for defendant, Milmar Estates, Inc., will apply before the United States District Court for the District of New Jersey, at the Federal Building, in the City of Newark, N. J., on the 11th day of August, 1954, at ten

o'clock in the forenoon, or as soon thereafter as counsel can be heard, before the Honorable Alfred E. Modarelli, for an order granting the following relief to the movant:

1. That, pursuant to the concluding paragraph of an opinion of the Honorable Alfred E. Modarelli filed in the above captioned matter on the 23rd day of June, 1954, a time be established for the completion of the taking of all the depositions and other pretrial discovery proceedings, so that a trial date can be made certain for the trial of the above captioned matter.

2. That a time be established for the completion of the service and filing of all pleadings by all of the parties in the above captioned matter, so that a trial date can be made certain for the trial of the above captioned matter.

The ground of the applications for relief in paragraphs numbered 1 and 2 above is that the above captioned interpleader action was commenced by the filing of a complaint on December 28, 1950, and the policy and Rules of Court warrant that discovery proceedings be terminated at the earliest practicable time, and that in an orderly manner and within a reasonable period of time the parties should serve and file their pleadings, so as to join issue on the matters to be determined by trial.

3. That a date be fixed for the trial of the above captioned action.

4. That Walter G. Winne, Master of the United States District Court for the District of New Jersey, be permitted, authorized, directed and instructed to invest all of certain moneys received by him in the above captioned matter and placed upon deposit in an account designated "Walter G. Winne, Master of the United States District Court", with People's Trust Company, in legal investments authorized

under the laws of the State of New Jersey, and that for this purpose he be permitted to withdraw the said sum deposited as aforementioned and that the said bank permit the said disbursement.

5. That Walter G. Winne, Master of the United States District Court for the District of New Jersey, be permitted, authorized, directed, and instructed to pay from the moneys received and deposited as aforementioned certain obligations of Milmar Estates, Inc., in the amounts and to the creditors hereinafter named, and to take receipts for such payments and undertake all steps necessary to effectively cancel the obligations hereinafter enumerated:

(a) to repay to the Public National Bank and Trust Company, Pitkin and Watkins Avenues, Brooklyn, N. Y., the sum of $65,000.00 in satisfaction of two notes now due and owing to the said bank, each discounted on the 21st day of July, 1954, and due on the 21st day of August, 1954, being one note payable in the amount of $40,000.00, and another payable in the amount of $25,000.00, as shown in Schedule A annexed hereto.

(b) To pay to the United States Government, Director of the Bureau of Internal Revenue, the sum of $42,583.41 plus accrued interest at 6% per annum, from May 7, 1954, in payment of Federal income and excess profits taxes payable from Milmar Estates, Inc., the said matter being established as a result of an examination by the Bureau of Internal Revenue for the fiscal years ending March 31, 1950, March 31, 1951, and March 31, 1952, and being the income and excess profits taxes due for the said fiscal years, as shown in Schedule B annexed hereto; and

To pay to the creditors of Bill Miller's Riviera, Inc., all debts of Bill Miller's Riviera, Inc., amounting to $86,496.59, and in particular including the income and excess

profits taxes of Bill Miller's Riviera, Inc., and the Federal unemployment tax due and owing by Bill Miller's Riviera, Inc., to which payments William Miller, Al Kevelson, and Al Bierman consent.

6. And that such other relief be granted as under the circumstances is incidental, fitting, and proper in order to accomplish the hereinabove enumerated objectives.

/s/ Maurice C. Brigadier
Maurice C. Brigadier
Attorney for Defendant,
Milmar Estates, Inc.

Schedule A

Notes Payable—Milmar Estates, Inc.

Creditor: Public National Bank and Trust Company
Pitkin and Watkins Avenues, Brooklyn, N. Y.

Date Discounted	Amount Received	Date Due
July 21, 1954	$40,000.00	August 21, 1954
July 21, 1954	25,000.00	August 21, 1954
		65,000

Schedule B

TAXES PAYABLE SCHEDULE
MILMAR ESTATES, INC.

Income and Excess Profits Taxes

Due for Fiscal Year ended March 31, 1950	$ 4,610.22
Due for Fiscal Year ended March 31, 1951	27,953.54
Due for Fiscal Year ended March 31, 1952	10,019.65
Total	$42,583.41

plus accrued interest at 6% per annum from May 7, 1954

Affidavit of J. B. Hoffman

(Filed—August 12, 1954)

STATE OF NEW JERSEY,
COUNTY OF HUDSON, *ss.*:

J. B. HOFFMAN, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am a member of a firm of certified public accountants known as Hoffman and Granick, maintaining offices in the City, County and State of New York.

2. I am executing this affidavit in support of a certain Notice of Motion made by Milmar Estates, Inc. in the above captioned matter, returnable before the United States District Court on August 11, 1954, wherein, in part, an order is sought authorizing the payment of certain obligations of Milmar Estates, Inc. to creditors thereof and payment to creditors of Bill Miller's Riviera, Inc.

Affidavit of J. B. Hoffman

3. I have examined the account books and other fiscal books, bills, checks and other fiscal documents of Milmar Estates, Inc. and Bill Miller's Riviera, Inc., and the annexed schedules constitute a summary of the said books and records revealing the obligations of the said corporations on the dates referred to on the said schedules.

4. Exhibit "A" is a schedule of notes payable September 2, 1948 to June 21, 1954 which schedule was prepared on July 15, 1954. This schedule indicates that as of July 15, 1954 there was due and owing by Milmar Estates, Inc. the amount of $65,000.00 consisting of two notes, one in the amount of $40,000.00 and the second note in the amount of $25,000.00, each of which notes was due June 21, 1954. This schedule reveals the fact that it has been the continuous practice of Milmar Estates, Inc. during the past six years to borrow funds from the Public National Bank and Trust Company, Pitkin and Watkins Avenues, Brooklyn, New York, for the purpose of paying current operating obligations.

5. The $65,000.00 obligation aforementioned was satisfied when due and pursuant to the practice of Milmar Estates, Inc. as hereinabove referred to, Milmar Estates, Inc. did on July 21, 1954 discount with Public National Bank and Trust Company, Pitkin and Watkins Avenues, Brooklyn, New York, two notes in the total amount of $65,000.00 consisting of one note in the amount of $40,000.00 and a second note in the amount of $25,000.00, and Milmar Estates, Inc. received these funds and the said notes discounted as aforementioned are due and payable on the 21st day of August, 1954.

6. Schedule "A" annexed to this affidavit constitutes the factual and fiscal background from which to view the Schedule A annexed to the aforementioned Notice of Motion, which Schedule A sets forth the notes payable of

Milmar Estates, Inc. and indicates the true fact that on July 21, 1954 two notes were discounted in the amounts above referred to, each due on the date above referred to.

7. Annexed hereto as Schedule "B" is a schedule of federal income and excess profits taxes of Milmar Estates, Inc. totalling $42,583.41 plus accrued interest at 6% per annum from May 7, 1954 as the same was revealed by an examination of the books of Milmar Estates, Inc. as of July 15, 1954 when I made the examination of the books as aforementioned. These taxes payable are the result of an examination of the Bureau of Internal Revenue for the fiscal years ending March 31, 1950, 1951 and 1952.

8. Annexed hereto as Schedule "C" is a schedule of federal income and excess profits taxes of Bill Miller's Riviera, Inc. showing a balance outstanding of $8,046.44, said tax balance being the result of an examination by the Bureau of Internal Revenue for the fiscal years ended March 31, 1950, 1951 and 1952. The above amount of $8,046.44 is the net balance due after giving effect to an over-assessment tax for the fiscal year ended March 31, 1952 as revealed in the said schedule. This $8,046.44 bears additional interest at 6% per annum from May 7, 1954. The figures set forth in the said schedule are the result of an examination which I made of the fiscal books and papers of Bill Miller's Riviera, Inc. as of July 15, 1954.

9. Annexed hereto as Schedule "D" is a schedule of federal unemployment taxes. There is one item in the amount of $8,911.23 as shown on the books of Bill Miller's Riviera, Inc. as of July 15, 1954. This obligation for federal unemployment taxes constitutes a tax lien and claim with respect to which service has been made upon Walter G. Winne, Esq., as Master in Chancery. This item is shown under Form No. 940 for the calendar years 1946, 1947 and 1948. In addition thereto, there is a balance in

the amount of $765.13 (plus accrued interest) due for the unpaid federal unemployment insurance tax for the calendar year 1953 and $197.14 for the first quarter of 1954 social security and withholding taxes. The total of these federal tax obligations, exclusive of accrued interest as of July 15, 1954, is $9,873.50.

10. Annexed hereto as Schedule "E" is a schedule of 67 creditors of Bill Miller's Riviera, Inc. showing a list of accounts payable of Bill Miller's Riviera, Inc. as of July 1, 1954, resulting from an examination of the books of the said corporation as of July 15, 1954. This accounts payable schedule of Bill Miller's Riviera, Inc. as of July 1, 1954 indicates a total indebtedness of $68,576.65.

11. The obligations aforementioned as shown by the books of Milmar Estates, Inc. and Bill Miller's Riviera, Inc. as of July 15, 1954 remaining outstanding and unpaid and the only change in the schedules prepared on July 15, 1954 is the fact that the notes payable schedule of Milmar Estates, Inc., which reveals as of July 15, 1954 under numbers 46 and 47, that two notes are due and outstanding, must be supplemented, as indicated above, by the fact that those two notes have been paid and in their place two substitute notes have been executed and discounted on July 21, 1954 in the total amount of $65,000.00 and are due on August 21, 1954.

/s/ J. B. Hoffman
J. B. Hoffman

Subscribed and Sworn to
before me this 10th day
of August, 1954.

/s/ Edith B. Walters-Statezny
Edith B. Walters
Notary Public of New Jersey
My Commission Expires Aug. 18, 1957.

Exhibit "A"

Photostat

(See Opposite) ☞

EXHIBIT "A"

MILMAR ESTATE, INC.

Notes Payable Schedule - September 27, 1948 - June 21, 1954

No.	Date Discounted	Interest Paid	Amount Received	Date Repaid	
1	Sept. 27, 1948	$151.67	$20,000.00	12/24/1948	
2	Dec. 24, 1948	150.00	20,000.00	3/24/1949	
3	Mar. 24, 1949	153.33	20,000.00	6/24/1949	
4	June 24, 1949	156.67	20,000.00	9/26/1949	
5	Aug. 3, 1949	64.17	10,000.00	10/11/1949	
6	Sept. 8, 1949	87.33	8,000.00	12/2/1949	
7	Sept. 27, 1949	203.33	20,000.00	10/26/1949	
8	Dec. 1, 1949	103.50	5,000.00	4/3/1950	
9	Dec. 2, 1949	62.92	2,500.00	5/1/1950	
10	Jan. 3, 1950	49.17	2,500.00	5/1/1950	
11	Jan. 26, 1950	158.33	20,000.00	5/1/1950	
12	Feb. 1, 1950	37.08	2,500.00	5/1/1950	
13	Mar. 1, 1950	25.42	2,500.00	5/1/1950	
14	Apr. 3, 1950	11.67	2,500.00	5/1/1950	
15	April 4, 1950	23.33	5,000.00	5/1/1950	
16	May 1, 1950	295.20	37,500.00	9/19/1950	
17	Aug. 1, 1950	41.56	7,500.00	10/17/1950	
18	Dec. 11, 1950	587.50	25,000.00	5/1/1951	
19	Sept. 28, 1951	480.00	30,000.00	1/31/1952	
20	Jan. 2, 1952	404.17	25,000.00	5/1/1952	
21	Jan. 31, 1952	76.67	5,000.00	5/1/1952	
22	May 8, 1952	238.00	24,000.00	8/21/1952	
23	Nov. 20, 1952	590.00	30,000.00	1/11/1953	
24	Nov. 20, 1952	108.33	10,000.00	1/12/1953	
25	May 5, 1953	613.33	40,000.00	8/4/53	
26	Aug. 4, 1953	480.00	40,000.00	10/15/1953	
27	Nov. 2, 1953	103.33	20,000.00	12/2/1953	
28	Nov. 19, 1953	90.63	25,000.00	12/23/1953	
29	Dec. 31, 1953	7.50	2,500.00	1/31/1954	
30	Dec. 2, 1953	60.00	20,000.00	1/2/1954	
31	Dec. 23, 1953	96.88	25,000.00	1/23/1954	
32	Dec. 23, 1953	103.33	20,000.00	1/23/1954	
33	Jan. 7, 1954	5.00	2,500.00	2/4/1954	
34	Jan. 8, 1954	11.67	10,000.00	2/7/54	
35	Jan. 20, 1954	96.88	25,000.00	2/18/1954	
36	Jan. 20, 1954	180.83	35,000.00	2/18/1954	
37	Feb. 18, 1954	87.50	25,000.00	3/18/1954	
38	Feb. 18, 1954	163.33	35,000.00	3/18/1954	
39	Mar. 19, 1954	186.67	35,000.00	4/19/1954	
40	Mar. 19, 1954	100.00	25,000.00	4/19/1954	
41	Apr. 21, 1954	175.00	35,000.00	5/21/1954	
42	Apr. 21, 1954	93.75	25,000.00	5/21/1954	
43	May 19, 1954	192.50	35,000.00	6/21/1954	
44	May 19, 1954	103.13	25,000.00	6/21/1954	
45	June 7, 1954	10.83	5,000.00	6/21/1954	
46	June 21, 1954	193.33	40,000.00 •	7/21/1954	Due
47	June 21, 1954	90.63	25,000.00 •	7/21/1954	Due

Exhibit "B"

MILMAR ESTATE, INC.

Taxes Payable Schedule
Income and Excess Profits Taxes

Due for fiscal year ended March 31, 1950	$ 4,610.22
Due for fiscal year ended March 31, 1951	27,593.54
Due for fiscal year ended March 31, 1952	10,019.65
Total	$42,583.41

Exhibit "C"

BILL MILLER'S RIEVIERA, INC.

Income and Excess Profits Taxes

Due for the fiscal year ended March 31, 1950	$ 673.05
Due for the fiscal year ended March 31, 1951	11,133.20
Total	11,806.25
Less: overassessment for the fiscal year ended 3/31/1952	3,759.81
BALANCE DUE	$ 8,046.44

Exhibit "D"

Federal Unemployment Tax Obligations of Bill Miller's Riviera, Inc.

Under Form No. 340 for the calendar years 1946, 1947 and 1948	$8,911.23
Under Form No. 940 for the calendar year 1953—balance	765.13
Under Form No. 941 for the first quarter of the year 1954	197.14
Total	$9,873.50

Exhibit "E"

BILL MILLER'S RIVIERA, INC.

Accounts Payable Schedule as of July 1, 1954

1—Am. Society of Composers & Authors, 744 Broad St., Newark, N. J.	$ 635.00
2—H. Baker Milk Co., Inc., 2-4 East Monroe St., Passaic, N. J.	1,507.44
3—Beacon Distributing Co., 707 Tenth Ave., N. Y. C. 19, N. Y.	1,035.61
4—A. Beck & Son, 880 River Road, Edgewater, N. J.	191.11
5—Mme. Bertha, 110 West 47th Street, N. Y. 36, N. Y.	70.88
6—Blue Sea Fish Co., Inc., 422 Cedar Lane, Teaneck, N. J.	3,983.08

Exhibit "E"

7—Broadcast Music, Inc., 580 Fifth Ave., N. Y. 36, N. Y.	425.00
8—Brenon & Morgan Associates, 270 Park Ave., N. Y. 17, N. Y.	22.00
9—Blackstone Advertising Inc., 221 West 57th St., N. Y. 19	791.77
10—Canada Dry Ginger Ale, Inc., 635 West 54th St., N. Y. 19	1,087.68
11—Congregation Talmud Torah Ohev Sholom, 1379 E. 96 St., B'klyn, N. Y.	3,000.00
12—Carroll Musical Inst. Service, 209 W. 48th St., N. Y. 36	58.00
13—B. R. Doerfler Co., 530 West 58 St., N. Y. 19, N. Y.	1,815.99
14—Electric Products Inc., 57 W. Allendale Ave., Allendale, N. J.	124.85
15—Albert Ehlers, Inc., 1300 Flushing Ave., B'klyn 37, N. Y.	536.92
16—Esso Standard Oil Co., c/o A. B. Hartman, 317 W. 90 St., N. Y. 24	62.78
17—First National Pickle Products, 507 Kent Ave., B'klyn 11, N. Y.	88.80
18—Flagstaff Foods, Perth Amboy, New Jersey	1,171.71
19—Frankel Lumber & Supply Co., 6415—14th Ave., B'klyn, N. Y.	5,118.00
20—Eddie Guttenplan, Inc., 391 Washington St., N. Y. 13	2,743.63
21—General Meat Corporation, 826 Washington St., N. Y. 14	739.31

Exhibit "E"

22—Gnome Bakers Inc., 320 E. 65th St., N. Y. 21, N. Y.	1,215.62
23—N. C. Greenfield, Inc., 570 Seventh Ave., N. Y. 18	150.22
24—Globe Neon Sign Co., 1360 Garrison Ave., N. Y. 59	655.95
25—Chas. Glanzrock & Co., 79 Fifth Ave., N. Y.	552.50
26—Nathaniel S. Goldring, Esq., 24 Commerce St., Newark, N. J.	150.00
27—Graff, Washbourne & Dunn, 158 W. Forest Ave., Englewood, N. J.	935.00
28—Half Moon Meat Co., 405 West 14th St., N. Y. 14, N. Y.	10,000.00
29—Hoebel Florist, Route #1 #6, Fort Lee, N. J.	10.00
30—Home Fuel Co., 255 Jackson Street, Englewood, N. J.	790.00
31—Hofmann & Katz, Esq's., 1475 Broadway, New York City, N. Y.	40.00
32—Peter Henderson Stumpf & Walter Co., 48 Cortlandt St., N. Y. 7	37.80
33—Hoffman & Granick, C. P. A's., 527 Lexington Ave., N. Y. C.	3,900.00
34—International Business Machine Co., 240 Broadway, Paterson, N. J.	63.55
35—Larry's Sea Food, 126 Brunswick St., Jersey City, 2, N. J.	1,647.61
36—Manhattan Egg Co., Inc., 349 Greenwich St., N. Y. 13, N. Y.	167.92

Exhibit "E"

37—Merolla's Market Inc., 759 Second Ave., N. Y. 17, N. Y.	266.75
38—Master Electric Motor Repair, 240 Route 17, Paramus, N. J.	34.00
39—Monroe Plumbing & Heating Supply Corp., 1066 Bedford Ave., B'klyn 5, N. Y.	3,825.00
40—Mc Kay Bros., 278 Secaucus Road, Secaucus, N. J.	198.00
41—New Jersey Telephone Co., 604 Anderson Ave., Cliffside, N. J.	475.00
42—National Tinsmith Supply Co., 604 Broadway, Brooklyn, N. Y.	5,388.60
43—National Cleanser Products Co., Inc., 437 11th Ave., N. Y.	187.88
44—Noxall & U. S. Linen Co., 113 No. 1st Street, Paterson, N. J.	2,454.79
Noxall & U. S. Linen Co. (in dispute) ($4,030.00)	
45—Joseph Nesta Construction Co., 100 Riverside Ave., Newark, N. J.	262.65
46—Parisi Contractors Corp., 20 N. Van Brunt St., Englewood, N. J.	5.15
47—Pepsi-Cola, North St., Teterboro, N. J.	12.00
48—Pesin Bros., 351 Pallisade Avenue, Jersey City 7, N. J.	780.01
49—Public Building Material Co., Inc., 5 Commercial Ave., Garden City, N. Y.	4,383.40
50—Philadelphia Dairy Products, 25 Delford Ave., Bergenfield, N. J.	416.34

Exhibit "E"

51—Pitney-Bowes, Inc., Stamford, Conn.	14.85
52—Quaker Soap Co., 330-354 Secaucus Road, Secaucus, N. J.	96.37
53—Robin Sales Company, 1133 Broadway, N. Y. 1, N. Y.	680.56
54—Abraham Sobil, Esq., 349 East 149th Street, Bronx, N. Y.	50.00
55—Sameth Exterming Co., Inc., 157 Chambers St., N. Y. 7, N. Y.	100.00
56—John T. Stanley Co., 308-354 Secaucus Road, Secaucus, N. J.	96.30
57—Standard Sales Book Co., Inc., 409 Duke, Norfolk 10, Va.	31.00
58—Standard China Co., Inc., 220 Bowery, N. Y. 12, N. Y.	173.10
59—Steiner, Towers Co., 221 West 57th St., N. Y. 19, N. Y.	36.90
60—Seddons Gas Station, Englewood, New Jersey	25.00
61—Tanenbaum Harber Co., Inc., 221 West 57th Street, N. Y.	2,600.00
62—United Stationers Inc., 51 E. Palisades Ave., Englewood, N. J.	3.36
63—Windsor Cleaning & Dyeing Co., Inc., 9 Columbus Terrace, Edgewater, N. J.	84.00
64—S. Wolf Sons, 771 Ninth Avenue, New York 19, N. Y.	78.28
65—Western Union, 832 Broad Street, Newark, N. J.	11.50

Exhibit "E"

66—Zaccar Offset Co., 45 Rose Street, New York 38, N. Y.	30.00
67—Benjamin Zucker, Esq., 401 Broadway, New York City, N. Y.	250.00
TOTAL	$68,576.65

SUMMARY

Page One	$27,933.85
Page Two	37,123.23
Page Three	3,519.57
TOTAL	$68,576.65

Excerpts from Hearing August 11 to 12, 1954

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• • •

Mr. Brigadier: May I make this additional request. Mr. Walter Winne, under very strong pressure from me, has remained here all day, and his statement that he would make to the Court is very brief, and I wonder whether with the remaining time you would listen to him. It is out of context, but we will fit it in later. And then he won't have to return tomorrow. I will appreciate it, and I know Mr. Winne would very much, if your Honor can see your way.

The Court: I see no reason why we shouldn't listen to Mr. Winne's brief statement, because he really isn't necessary to this.

Mr. Winne: If your Honor please, I am not a party to the central proceedings, except your Honor knows the fund was deposited in my custody in the People's Trust Company in Bergen County, New Jersey, and I have said to all counsel that since that has happened every creditor of

these parties seems to think that I should pay the bill. And I am sympathetic, naturally, to creditors and I would like to see them paid, and I have been compelled to tell them that while there is money I can't say who is going to

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receive it until the Court has so ordered. And I am under almost daily pressure by somebody, by mail or telephone, about these various claims.

Now, they include two very substantial claims by the Federal Government, which liens have been filed with me, and the rest, generally speaking, are merchandise creditors, like the man that sold fish, and a man that sold meat, a man that sold ginger ale, and the rest of the merchandise creditors. And they are all people who are worthy of consideration. But that is not my particular interest. I told the gentlemen that I hope they would relieve me some time of being the recipient of all these requests, because I have no client, nobody is going to pay me for my time.

And to that extent it would be an advantage to me if I could get some of these small—comparatively small merchandise creditors, and others, paid. And that is what I told the gentlemen outside and I told them that was the only purpose I had in being here this morning, that I was hoping to get some relief in that matter.

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Mr. Tepper: We can agree that lienors of the property of Milmar Estates, Inc., who can prove their claims, should be paid. We can agree upon that without any difficulty. In other words, if there is a mortgage on the property, that can be disposed of. If taxes are due to the municipality, that may be disposed of. If there is a Government claim against Milmar Estates, Inc., which has been proved, that may be disposed of.

But what they would like to have done, and we might just as well discuss it here now—Mr. Winne just stated that

he is being bothered by creditors. Creditors of what corporation? Not of Milmar Estates, Inc., but of some other entity, the Riviera operating company, which I believe is a separate and distinct corporation, is unrelated to Milmar Estates, Inc., and by no stretch of the imagination would your Honor issue an order permitting this Master to pay any creditors of that corporation. It hasn't anything to do with this present suit.

Now, that's the thing in a nutshell. So I told Mr. Brigadier, "We will have no difficulty with this. Let us

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agree now. We will fix a date to continue to take these depositions. We will complete our depositions. If you want to pay creditors whose claims have been ascertained, approved, and are against Milmar Estates, Inc., we will have no difficulty about that."

Then why are we here before the Court? It's my judgment that they would like to have your Honor rule once and for all, in order to satisfy counsel for creditors of the Riviera operating company, and the creditors themselves, that Mr. Winne can not pay out of this fund such claims. That is the whole thing in a nutshell.

The Court: Wasn't this check made to Milmar Estates, Inc., as the owner of the property?

Mr. Grosman: Yes, your Honor.

Mr. Tepper: That's right.

Mr. Grosman: May I say that I agree with everything that Mr. Tepper says.

The Court: Well, now you know where to start tomorrow morning, Mr. Brigadier.

Now, Mr. Davis, whom do you represent?

Mr. Davis: If your Honor please, I don't know whether the Court knows it, but there is presently pending in the

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State court, in the chancery division, application for a

receiver, in which there are two defendants, Milmar Estates and Bill Miller's Riviera.

The Court: Is that the corporate title of the Riviera, Bill Miller's Riviera?

Mr. Davis: Bill Miller's Riviera, Inc.

Mr. Grosman: A separate entity.

Mr. Davis: Well, that's one corporation. Then there is Milmar Estates, Inc. This money was on deposit with the Court of Chancery—that is, the Chancery Division of the Superior Court—and all counsel—I won't say all counsel, but Mr. Winne, Mr. Chazin, myself, Judge Grosman and Mr. Tepper were all before Judge Grimshaw. Now, that matter has not been dismissed, either by consent or by formal order. It is presently pending. There is no doubt in my mind that if there is strenuous opposition by these gentlemen in behalf of—whoever they represent to the payment of the general creditors that there is going to be a receiver appointed, because Bill Miller's Riviera has a substantial interest in this money, because of their leasehold interest on the property itself.

I say to the Court, and I know that Mr. Winne would say it, too, if he were here, that these general creditors are—

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Mr. Kesselhaut: He is here.

Mr. Davis: I am sorry. I thought that he had gone home. I will make the statement in his presence then, that he will say that the general creditors should be paid and paid immediately, because they are the sufferers.

And I don't know the exact legal status of Mr. Bierman, and the other gentlemen that counsel represent, but I say that this petition should be granted.

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Mr. Grosman: Now, that's our position. We object to this money being dissipated.

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May I say one more thing? Now, Counsel, my friend here—

The Court: Mr. Davis.

Mr. Grosman: —out in Hackensack before Judge Grimshaw was making an application for the appointment of a receiver for Milmar and for Bill Miller's Riviera, because some claim that he had against Bill Miller's Riviera or—I think it was Bill Miller's Riviera, and Mr. Kevelson guaranteed his debt.

Now, what they are doing in here now, I don't know.

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But these debts, of this poor little fish man, and the others, that are due from Bill Miller's Riviera, with which we are not concerned in this suit at all, as I understand it, if not all, at least my friend's claim was guaranteed by Kevelson. And the matter was adjourned without date in Hackensack.

The Court: Let's see. Milmar was the owner of the fee at the time.

Mr. Grosman: Yes.

The Court: Bill Miller's Riviera, I take it, was the lessee, is that right?

Mr. Grosman: A separate corporation.

The Court: And when the award was made in the State court, it was not apportioned as between lessee and owner, but the value of the leasehold was taken into consideration. And I suppose, under the rules that prevail in condemnation cases, that whatever it was worth more than the rental value, that was taken into consideration. But one check was made to Milmar Estates, Inc.

Mr. Brigadier: May I just say, your Honor, that the State expert, Mr. Winne informs me, testified that the leasehold was worth more than the rental of the property, and that was taken into consideration by him in giving his

estimate of the value. That I have from Mr. Winne and

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I so state to you.

The Court: Well, it would have to be worth more, otherwise they wouldn't have gotten anything for the unused portion of the lease. I learned that the hard way thirty years ago.

Mr. Grosman: We don't know just what portion there—

The Court: No, I don't know, either.

Mr. Grosman: They said they were losing money. Bill Miller's Riviera claimed they were losing money all along.

Mr. Tepper: How could it be worth anything?

Mr. Chazin: If your Honor please,—

The Court: Now, wait. I only can do things legally. Not that I must do things expeditiously, or anything like that, it's a question of doing things legally.

How could I pay any debts of Bill Miller's Riviera out of the funds of Milmar Estates?

Mr. Chazin: Mr. Brigadier, do you want to answer that?

The Court: How can I, legally?

Mr. Brigadier: I am not asking you to pay it—to order any check drawn to Bill Miller. I am asking you to draw a

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check to Milmar Estates—

The Court: I know.

Mr. Brigadier: —on the basis of—let me point out what the basis is—that at best, the best claim that could be asserted is ownership of one half of the stock, that we already have in court a hundred—that is, we have thirty-five, and ninety is admitted he received, is a hundred and twenty-five. So that I say, let it come out of Kevelson's share, let the order so read, if you want to, as a protective order. But there is still three hundred and fifty thousand, half, that would be clear, and the amount that we are asking for is less than that half. It is a total of a hundred and ninety-four thousand.

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The Court: I know, but, Mr. Brigadier, if I heard Judge Grosman right, he says that Mr. Marcus will ultimately claim all of the stock, except ten thousand dollars' worth—by Mr. Bierman, is it, the other—

Mr. Grosman: That's right.

Mr. Brigadier: May I ask your Honor just to do this—it's very brief, it's Exhibit P-80 in the deposition, a receipt signed by Marcus, Schwartz had nothing to do with the drawing of it, wasn't present, it's admitted by all parties

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that he wasn't—I ask you merely to look at that and then see whether or not I shouldn't say to your Honor, as I will have to. "Let's read these depositions and let's discharge this whole Master at this point."

The Court: "August 27, 1948. Received from Al Bierman check for ten thousand dollars as deposit pending negotiations for the purchase of my stock of Milmar Estates, Inc., which includes all outstanding stock, excepting that stock owned by William Miller and Al Bierman. In the event that a written contract is not entered into within ten days from the date of this letter satisfactory to my attorney, I will return this deposit without obligation to either party. Received two checks of five thousand dollars each."

I take it that is Mr. Marcus' signature.

Mr. Brigadier: Now, one other thing, your Honor. Whatever Mr. Grosman may have said about the deposition, the deposition will speak for itself, as to what Mr. Schwartz testified to.

The Court: I know, but am I in a position at this stage of the proceedings to start making findings of fact? That's practically what you want me to do.

Mr. Brigadier: Except this, sir. I can make an applica-

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tion, if that is what you prefer I do. I was trying to hope

to save you to read all this record. You have made an order—that has been consented to—that the money be deposited. But that was done on the basis, as you know, of an application that was made for a receiver.

Let's assume the worst and you had appointed a receiver. If it can be brought to your Honor's attention by the depositions that are taken subsequent to your appointment of a receiver that no receiver should be appointed, you would vacate the receiver, would you not?

The Court: I suppose I would.

Mr. Brigadier: So that's the only alternative I am left with. I will then have to serve a motion based upon the depositions in this case, which will satisfy you, I think, beyond a reasonable doubt,—

The Court: Only by a preponderance—

Mr. Brigadier: —that this fund should not—I'm sorry.

The Court: By a preponderance of the evidence.

Mr. Brigadier: But I'll go further.

The Court: You will?

Mr. Brigadier: Yes. I will tell you something else I will

do, sir. I will rest it on Schwartz's deposition, including their cross.

And the last thing, after all of this is done—just let me read you the final sum-up, tie-up question that was asked of Mr. Schwartz—"Is there any doubt in your mind about the fact that Marcus intended to sell all right, title and interest that he had in any stock certificate, any shares, any interest in Milmar that he had on September 14, 1948, by reason of the execution of these agreements?" Answer: "No, I don't have any doubt at all about it."

The Court: Well, that's what his lawyer said. But we have got to hear a lot of other witnesses.

Mr. Brigadier: This is his lawyer, who corroborates the five other affidavits that have been filed with you on this

receivership application, and Marcus stands on his own uncorroborated word.

The Court: So far it's uncorroborated. I don't know by the time we get through what corroboration—

Mr. Brigadier: Sir, the only other alternative then is, is it not, that I should serve the motion? That's what you are saying to me, that you have no basis for this present application. There is this basis.

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The Court: What is the basis?

Mr. Brigadier: The basis of the evidence that has now been taken by way of deposition, plus the affidavits that are file, which were the basis of the original application for vacating that whole mastership, sir. There is no basis for it now.

Mr. Chazin: May I be heard on that point, your Honor?

The Court: You may be heard in a few minutes. We will take a five minute recess.

(Short recess.)

The Court: Yes, Mr. Chazin wanted to be heard.

Mr. Chazin: If your Honor please, I think that I have to say a few things to attempt to clarify the confusion in the facts, which I believe Judge Grosman has created this morning.

Whenever these arguments take place there are a lot of general statements made, but when Mr. Marcus finds that he has got to reduce his claim, or position, to paper, the position gets down to nothing or practically nothing.

Now, that was a general statement and I will tell your Honor what I mean by that. First, the statement was made by Judge Grosman that Mr. Marcus walked out of

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that deal with five hundred shares still in his pocket. But what he didn't say was that Mr. Schwartz testified, and the

various affidavits filed before your Honor state, that there was some discussion that all the stock wasn't available, so they decided to use the method of canceling all the stock, and the record shows—the testimony of Mr. Schwartz, and his writing in the stock book, show that all the stock was canceled in the stubs and twelve hundred and fifty new shares were issued signed by Mr. Marcus, that was the total capitalization beforehand, made out to Mr. Marcus and endorsed in blank by him and delivered to Judge Lieberman.

Mr. Marcus admits his signature on those. They have been presented before your Honor, those twelve hundred and fifty shares of stock, the entire capitalization.

The Court: That's the entire capitalization.

Mr. Chazin: He admits the signature on those four certificates, he admits the signature on the endorsement, but he doesn't remember signing it.

There was also put in evidence—

The Court: What's that? He doesn't remember signing them?

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Mr. Chazin: No, he doesn't remember signing those certificates. His signature is there, if your Honor please, as large as day, on the front and back of these four certificates totaling twelve hundred and fifty shares, but he doesn't remember signing those certificates; and they must have been given to him with a lot of papers; and he is a very innocent, careless fellow who doesn't know what's going on, who sits during the taking of depositions, makes voluminous notes, and sits alongside of counsel with his voluminous notes and tells counsel what to ask. And the man doesn't know what's going on.

He is the same man, your Honor, who on the original depositions, when asked for certain records, a certain book of his, said his secretary who used to work for him

took it home and she never brought it back, so he can't get it.

I remember your Honor made some remark about no secretary of yours would ever be permitted to do anything like that.

So the transaction was very simple, so far as his signing, issuing all the stock and transferring it over.

And he also signed a resignation. He admits his signature on it.

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The Court: He doesn't remember that, either?

Mr. Chazin: He doesn't remember that, either.

Now, a lawyer is supposed to have traduced him. He didn't know what he was doing. But it happens that this exhibit, which was shown to you by Mr. Brigadier, P-80, is admitted to have been drawn up by Mr. Marcus and Mr. Bierman themselves, one night at the Riviera, without the help or interference, if you call it that, of counsel.

And Mr. Marcus signed it, he made changes in it in his handwriting, initialed it, and applied—and the testimony is in the depositions—that the two five thousand dollar checks which were given to him, for which he receipted on this receipt, were applied on account of the ultimate transaction.

And in his own language he says, "Deposit pending negotiations for purchase of my stock of Milmar Estates, Inc., which includes all outstanding stock, excepting that stock owned by William Miller and Al Bierman."

Now, on the deposition he was asked some very simple questions. "What claims do you have against Milmar Estates, Inc.? What claims do you have against Bill Miller's

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Riviera?" And his answer always was, "I don't know until my lawyers tell me."

Now, finally, he reached the point where he had to commit himself, because here he saw this fund—this property

turned into cash, and he was afraid that they might distribute it. So he had to act. So he files an application for a receiver. And what does he say in that application? After all, in an application for a receivership he must state facts. So when we get through with all of the propaganda in the application, there are two alleged facts. He says he was induced to sell by fraud. And the fraud was, No. 1, they told him that the business was bad, whereas it was good.

There is an affidavit of his—a man who was formerly his accountant, that Marcus knew as much as anybody about the affairs of the company, used to be in there all the time and get practically daily reports.

The second item of alleged fraud—and that, by the way, is uncorroborated, just his own affidavit—The second item of alleged fraud, and that's all the fraud he sets forth in the affidavit—of course, in the argument there is a lot of talk, but that's the only other item of fraud set forth in

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the affidavit—that there was a first mortgage on the property; that the first mortgagee in prior years had consented to take smaller payments than the payments called for by the mortgage; that Mr. Marcus in a prior year had arranged that, but this particular year Miller told him that the mortgagee refuses to take smaller payments, and he was, therefore, afraid the mortgage was going to be foreclosed.

There is no corroboration of the mortgagee. The mortgagee was right in New York. He could have called him for a nickel. That was the cost of a telephone call then. He knew the mortgagee. He, himself, had arranged that with the mortgagee.

Now, when they got down to the application for a receivership, that was all they could dig up. And the reason they haven't filed a counterclaim and the reason that they haven't filed an action is that they have nothing to go on. They are looking.

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But Marcus would like to walk into court, without presenting to the court sufficient evidence to entitle him to a receivership, and willy-nilly get a receivership, just as he got effective action by filing that lis pendens which Mr. Brigadier described.

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Now, I make the point to your Honor that on the application for a receiver, no receiver was appointed. There was not sufficient proof before this Court to appoint a receiver.

The Court: Before what court?

Mr. Chazin: Before your Honor, on the application made by Mr. Marcus. He filed a petition before your Honor to appoint a receiver. We came in and argued that and then it was consented to put this fund—

The Court: That's right. But there was never a determination on it.

Mr. Chazin: There was never a determination on that.

Now, I say as to that, Mr. Marcus is now acting as if he had a receiver appointed. And he says, "if they are creditors, let them go and prove their claims and get paid."

What I say is this, your Honor, that the fund has been held intact by the Court. But the time arises when the urgent necessities require some of the fund to be paid out. And if it isn't, if those things aren't to be paid, on the objection of Mr. Marcus, if they are not to be paid out—I don't

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say to the creditors of Bill Miller's Riviera, I say to Milmar Estates, Inc., so that it could use it to pay the creditors of Bill Miller's Riviera, if it wants to; but to it, not directly to the creditors of Bill Miller's Riviera.

If Mr. Marcus objects to that money being paid out, or part of it being paid out, and wants to hold the entire fund, he must prove a case entitling him to the appointment of a receiver. And that he has not done, because on the argument, on the receivership, it was pointed out to the Court

that the application for a receivership must be ancillary to main relief sought in the principal case by the petitioner. And also, the cases hold, that in that posture of affairs there must be a strong likelihood—not merely a possibility, a strong likelihood of the plaintiff prevailing in his main action.

Now, here is an application which, if granted—paying out of this approximately a hundred ninety-four, say two hundred thousand out of the seven hundred thousand, would still leave over five hundred thousand in the fund with the Master, plus thirty-five thousand which is deposited with the Clerk of this Court, plus ninety-five thousand, or ninety

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thousand, which Mr. Marcus would have to return if he attempts to claim a rescission. So that there would be on hand $625,000 to satisfy any possible claim which, by the remotest possibility, Mr. Marcus might be able to prove.

And I feel for that reason, your Honor, that the application of Mr. Brigadier should be granted.

Mr. Davis: If it please the Court, Judge Grosman has kindly consented to allow me to address the Court rather than answer anybody else at this time.

You know, I feel, on behalf of the creditors, the general creditors of Bill Miller's, like a shuttlecock in a badminton game. I am going back and forth, back and forth, for six months now. And all the creditors know—at least those that I represent, is that they are not being paid.

And there are certain things that I would like to present to your Honor at this time because I appreciate your Honor's position. You are looking for a legal reason why you should pay the general creditors of Bill Miller's.

The Court: That's right.

Mr. Davis: Now I say, sir, that—first, I don't know who Mr. Grosman and Mr. Tepper had to try to serve their

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papers. All I know is that I proceeded in the Superior

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Court of New Jersey, Chancery Division, with a complaint and order to show cause for the appointment of a receiver and joined as party-defendant Milmar Estates and Bill Miller's Riviera, alleging, among other things, the commingling of funds, and that there was an insolvency, or such assets as to indicate an insolvency. And I didn't have any difficulty serving the defendant corporation. They were served by Judge Grimshaw's secretary, Mr. Welsh, who served—I don't know who he served, but all I know is an attorney by the name of Francis McEntee entered an appearance for both corporations.

And, among other things, after a considerable length of time, and after numerous continuances, an answer was filed by both corporations alleging in the answer that Bill Miller's Riviera has an interest in the fund, namely, the seven hundred and seventy some odd thousand dollars, to the extent of three hundred thousand dollars. That is an answer by the corporate defendant and by which the corporate defendant is bound.

And I say, sir, just on that—for that reason, because there is an answer by a corporate defendant, that—admitting that there is money due to Bill Miller, that would be

sufficient to approve the payment to whoever the Court wants to make the payment to for further transmittal to the general creditors.

However, I want to point out this very substantial fact. On September 15, 1948, a lease was entered into by Milmar Estates, Inc., by Al Kevelson, President, and Bill Miller's Riviera, Inc., by William Miller.

Now, that lease is, in my opinion, a very crucial point. Marcus, whatever his interest may be in this entire matter, never took any step whatsoever to say there shouldn't have been a lease—that I have this position in the corporation, Milmar Estates; that Kevelson should not have acted as

President; that I was never consulted; that anything that the corporation did could not bind me and my interests.

They have taken advantage of the position of Milmar Estates to this very day and just stood back and said nothing that Milmar Estates did was wrong, that it was doing acts beyond the scope of the corporate powers.

Now, I say very frankly, for five years Bill Miller's Riviera to the general world was the only corporation that

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existed. Nobody knew, except the attorneys and possibly the parties in interest, but the general public knew nothing about Milmar Estates being owner of the corporate fee. But the general creditors extended credit to an existing corporation, Bill Miller's Riviera. They extended credit for five years from the time of this lease.

Now, whatever benefits have accrued to Mr. Marcus, assuming that they do accrue, will accrue by virtue of the fact that Bill Miller's was a going concern and built a reputation and built up the premises, that the leasehold was the thing that everybody knew about, not just the ordinary vacant land.

Fortunately for the corporation—whichever corporation it was that owned the land—the State Highway Department wanted to come through and build a road.

But I say, sir, even looking beyond the legal grounds, there are equitable grounds, and your Honor sitting as a United States District Court Judge can look at the equities of the situation. Mr. Marcus can lose nothing, as Mr. Brigadier showed before, by the payment to general creditors, because the fund isn't going to be dissipated. The fund is going to remain in Court so far as Mr. Marcus

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is concerned. His interest is going to be "X" dollars. There is enough money in court to meet that obligation, if it accrues.

Now, I say, sir, in all fairness to these general creditors who have gone along with numerous requests for continuances in the State court—and I can truthfully say this, whether it's off the record or on the record—if it wasn't for the fact that Walter Winne was involved, that A. Chazin was involved, that Mr. Brigadier was involved, that Mr. Tepper and Mr. Grosman was involved, I would have insisted that a receiver be appointed in the State court at the last time that this matter was heard in May.

But these gentlemen said, "Look. Let's not add cost upon cost to this fund, because if a receiver was appointed in the State Court I don't know how much more the court would allow the receiver, and the attorney for the receiver, for fees and costs, and one thing and another."

Now, I, in good conscience, in behalf of these creditors and my clients—the amount due my clients totals about thirteen or fifteen thousand dollars, of approximately seventy-five thousand, so that I represent substantial interests—in spite of the fact that they said, "Go ahead," I said,

"No. I don't want to burden these corporations with extra expense. I have a consideration for the fellow-members of the bar."

In fact, there was a call put through that day to Mr. Kevelson in Chicago, advising Mr. Kevelson of the situation. And I have a written guarantee by Milmar Estates for the payment of creditors, as well as Mr. Kevelson.

So I say, sir, here is a written guarantee to which Mr. Marcus has never objected. He could have gone to either the State court or to this Court and sought an injunction time and time again against whatever action Milmar Estates took, so far as their actions with third parties or Bill Miller's was concerned. But they sat back and are trying to reap the benefit of any situation or any contract that Milmar made with Bill Miller's.

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Now, I say, sir, that there are other things that I want to bring to the Court's attention. For instance, Bill Miller's own the property, the personal property in the premises. I don't know what happened to that money. It more than likely was co-mingled with the funds of Milmar Estates.

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But the creditors, the general creditors, haven't gotten anything out of that. In fact that was one of the allegations in my original complaint. What happened to that money? So far as the general creditors are concerned, they think that they are being fleeced. And I can't blame them for thinking that way. They extended credit to a corporation. They knew nothing about two corporate entities.

And I say, sir, that in fairness to these general creditors, that in view of the answer of Milmar Estates in a Chancery proceeding that there is three hundred thousand dollars due, in view of the fact that there is a guarantee by Milmar Estates to the creditors that I represent, that there should be payment.

Now, I can't see how Mr. Marcus is going to be hurt by payment of eighty-eight thousand dollars, which roughly is about eleven percent of this total sum. And I say very honestly—and I have even discussed this with counsel—that doesn't take into consideration my costs, or other incidentals that can be determined at a later date between the parties. But these general creditors have been patient. Mr. Winne has been—he stated yesterday—bothered by fish

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men, and everything else. I can assure you I have had more calls—or as many calls as Mr. Winne has had. And to be truthful with you, I have been trying to shove them off on Mr. Winne, because I was tired of getting them. And every representation has been made to Judge Grimshaw, to the people themselves, that these general creditors were going to be paid.

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Now, Milmar Estates is reaping the benefit of Bill Miller's operation over a period of five years. And legally and equitably these general creditors should be paid.

And I must say, sir, that if the Court wants me to—I don't want to burden the testimony or make the proceedings any lengthier—but I would like to submit into evidence this lease, this guarantee, the complaint and the answer in the Chancery proceedings.

And I say with that in front of the Court, then I think you will be—resolve that the application, so far as point five, with reference to the general creditors, should be approved.

And furthermore, let me say this, that there was also—I want to say this in conclusion—that in the Superior Court

of New Jersey, the State of New Jersey, by the Acting State Highway Commissioner, deposited in the court the proceeds —that's the seventy-five hundred dollars that went down the drain—and one of the parties that was made a defendant was Bill Miller's Riviera, Inc.

The Court: But you see, unfortunately, Mr. Davis, nobody disputes that they should be paid in equity and good conscience. It is impossible that Milmar and Riviera think they are going to keep this money and pay nobody. That's out of the question. But I don't know what part of that fund belongs to Bill Miller's Riviera. I mean, officially.

Mr. Davis: Assume for the sake of argument that what you say is correct. And I will agree with your Honor that—

The Court: You don't believe that I don't want to pay people. I pay my own debts, why shouldn't other people pay them.

Mr. Davis: I say, sir, then that Mr. Marcus is coming into this Court without clean hands, because he is fully protected. The Court is only concerned, basically,—Is anything due to Mr. Marcus; and, if so, what amount?

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The Court: If I could answer that I'd be a wonder.

Mr. Davis: Well, that may be so, but—

The Court: That may be true when we get through with the trial, too.

Mr. Davis: That's right. But I say, sir, Mr. Marcus should not in good conscience come into this Court and stop payment to general creditors at this time. And I say to Mr. Grosman and Mr. Tepper, that they ought to at this time get up and say to the Court, "We will agree and consent to the payment, because we will lose nothing."

Mr. Tepper: May I be heard for a moment?

Mr. Davis: May I say this, your Honor? I want to go to Connecticut with my wife to visit my daughter and I don't know what Mr. Tepper is going to say, but I know able counsel may be able to answer him. With the Court's permission, I would like to be excused.

The Court: You may be excused.

Mr. Davis: And if the Court wants to read these documents, I will be glad to bring them out at any time.

The Court: If I think it is necessary.

Mr. Davis: That's right.

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The Court: You have already heard my philosophy. I pay my own debts, why shouldn't other people pay them, even if they are corporations?

Mr. Davis: Thank you, very much.

The Court: Mr. Tepper, you heard Mr. Davis' eloquent plea for his clients.

Mr. Tepper: Yes, sir. I rise because of Mr. Davis' invitation that I should express myself to the Court on the subject.

I agree that creditors who have money coming from debtors should be paid. Nobody quarrels with that.

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Excerpts from Hearing August 11 to 12, 1954

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Now, we have here Milmar Estates, Inc. It is a separate and distinct corporation. Your Honor has put his finger right on the point. There isn't any way that your Honor can make an order touching upon the payment of anything to anybody, other than Milmar Estates, and only, in the case of Milmar Estates, where everybody agrees that the amount is correct.

Your Honor isn't going to authenticate a claim. Your Honor isn't going to sit as receiver. We asked that a receiver be appointed, not to encumber this estate with expense, but to relieve the Court. The Court shouldn't as-

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sume responsibility and Counsel shouldn't impose upon the Court the responsibility and address things to his conscience which should not be addressed. He shouldn't be required to, because there may be an expense to the estate, adjudicate something which is not before him and which he shouldn't take the time even to consider. That should be done through a receiver.

Now, insofar as Milmar Estates, Inc., is concerned, that corporation was made a party defendant in the condemnation proceedings. So was Marcus, so was Marcus' wife, and many others.

In the case of Marcus and Marcus' wife, we filed with the State Highway Commission in the condemnation proceedings notice, a declaration that we claim the money that Milmar is not entitled to.

It was for said reason, see, that the Highway Commission declined to do anything until there was some determination on our side. They were on notice.

So how was that done? It was done through the cooperation of Judge Grosman and myself in saying to Counsel, opposing counsel, "We will give you a discharge of the lis pendens."

Excerpts from Hearing August 11 to 12, 1954

Irrespective of what Mr. Brigadier may say, this lis
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pendens was filed in contemplation and preparatory to the filing of a suit. I take it a counterclaim is a suit. So we filed the lis pendens.

If the lis pendens was improper, improvidently filed, they had their remedy. It was on record for many, many months. They didn't move to discharge it. It was there.

So insofar as your Honor is concerned, the presumption must be that the lis pendens was properly upon the record. And based upon an agreement with Counsel, we discharged voluntarily this lis pendens, which we didn't have to do. We could have adjudicated the entire thing and had all of the money tied up, but in the interests of acceleration of this matter, and cooperation with counsel, we consented to the discharge of the lis pendens, and it was discharged upon condition, the consent being that which was made before your Honor.

And your Honor will recall when Mr. Brigadier—or Mr. Kesselhaut I think it was who said, "Why should we have a receiver with all of these expenses? Will you not go along?" Your Honor will remember that.

The Court: Yes, I remember.

Mr. Tepper: I said, "Why do you impose upon the Court
—84—
that way? It's an injustice to the Court for you to say that. There should be a receiver."

Now, there wasn't a receiver. But in the case of Milmar Estates, Inc., there is a right way of doing things and there is a wrong way of doing things. This, today, is the wrong way of trying to get what they seek to accomplish.

The right way would have been for a receiver to have been appointed for Milmar Estates, Inc., and then let the receiver, stepping into the shoes of Milmar Estates, Inc., deal with the creditors by making certain applications and starting certain actions. That they didn't do.

Excerpts from Hearing August 11 to 12, 1954

Another thing, Milmar Estates, Inc., was left with all of the equipment in the establishment. They know that that equipment was sold. They know that money was realized for that equipment. I don't know why the fish peddler wasn't paid out of that.

The Court: That's what I have been thinking all the while. How is it they weren't paid out of that money?

Mr. Chazin: I am told there were many other creditors and that was a final payment of creditors.

The Court: Oh, it was?

—85—

Mr. Tepper: I might also say this. Assuming that there were, then they should have marshaled what they had. They should have taken all of their creditors, as is normally done in practice—and I might say, while we are on the subject, that Mr. Marcus himself, individually, is a creditor to the extent of many, many thousands of dollars, evidenced by notes of Milmar Estates, Inc.

Since their application is a class application, it is also an application for Mr. Marcus as an individual. This was the suit that Judge Grosman referred to, that we tried to institute, in which they refused to acknowledge service. Mr. Miller being the statutory agent, and being out of town, we had nobody, no person upon whom to make service.

But in the case of Mr. Davis, Mr. Davis brought in also, in some fashion or another, Milmar, about which we knew nothing, and apparently in some conference with counsel on the other side, who wanted to see—and properly so—the creditors of Milmar Estates paid, said, "If that suit is started we will enter an appearance," and they did by filing an answer.

I didn't understand what Mr. Davis meant when he said that there was an answer filed admitting the debt. He

—86—

didn't state for the record whether the answer was on the

part of Milmar admitting the debt of Milmar to Bill Miller's Riviera or an answer on the part of Bill Miller's Riviera admitting the debt on its part.

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• • • There should be an order made only directing that taxes be paid on behalf of Milmar Estates, which are owed, not by Bill Miller's Riviera to the Government, but by—

The Court: Milmar Estates.

Mr. Tepper: —Milmar Estates to the United States Government.

And there should not be paid this bank note now, which on its surface appears to be a recent situation, but they have given us a statement showing renewals, etc. And after examining that we may consent to that because it will be in the interest of anybody concerned to have it paid, if

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it is the debt of Milmar Estates.

And other than that, Mr. Winne can be ordered—the language in here is that your Honor should order and direct Mr. Winne, who is a Master of the Court,—he isn't even under bond—to withdraw certain money from here and invest it in legals. What is legals? Going into the mortgage business, first mortgages, when this thing may be cleared up in six months or eight months?

I don't think the Court is going to do anything like that, or even assume the responsibility of doing anything like that.

So I respectfully urge upon your Honor—

The Court: I suppose they mean legals that are recognized by the State of New Jersey as proper investments for trust funds, don't you?

Mr. Brigadier: Yes.

Mr. Tepper: That's right, first mortgages.

Excerpts from Hearing August 11 to 12, 1954

The Court: They do permit it?

Mr. Tepper: First mortgages, up to a certain percent, indeed it is.

The Court: Is that so?

Mr. Tepper: Sure. So that would permit them to go

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into the mortgage business.

The Court: No.

Mr. Brigadier: The notice says legal investments authorized under the laws of the State of New Jersey.

Mr. Tepper: That's right. And a first mortgage, I represent to your Honor, is a legal investment on the part of a trustee up to a certain percentage of the value.

So he could go out and make a mortgage for five years, or for six years, or for seven years, and where would the fund be?

The Court: I don't think Mr. Brigadier wants that, either.

Mr. Tepper: But there would be no objection, of course, in taking all of this money and putting it into a Government bond, or Government bonds, on a diversified basis, under the custody and supervision of the bank, because as it stands now the Master is only a stakeholder insofar as being a party signatory on the account, with the bank assuming not to release anything until the further order of this Court. Therefore, there is no bond of any kind.

I have the highest regard for Mr. Winne. If I had $750,-

—90—

000 I would entrust it to him. But we are representing clients and you are the Court.

So I respectfully urge that the application be denied in its entirety, with the exception that payment should be made to the United States Government of the indebtedness of Milmar Estates, Inc.

Excerpts from Hearing August 11 to 12, 1954

The Court: You see, the thing that puzzles me, Mr. Brigadier, is this. Bill Miller's Riviera, Inc., is not even a party in this litigation.

Mr. Brigadier: I think I am going to satisfy your Honor on—

The Court: A total stranger, as far as I am concerned.

Mr. Brigadier: I ask leave of Court to withdraw, without prejudice, the last paragraph of the relief sought, paragraph 7. That is the reference to Bill Miller's Riviera.

Instead I will serve a separate application, based upon evidence that you can take notice of, to dismiss the mastership. Because that is the only way I think—if I get your Honor's thinking in this matter—that is the only way I can reach the fund.

The Court: Well, one thing is settled. Mr. Tepper concedes that any lawful debts of Milmar Estates, Inc., should

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be paid, is that right?

Mr. Tepper: Yes, sir.

The Court: And all that they want now on those notes is an opportunity to look into what you gave them, and if they are convinced they are renewals, they will consent to the payment of those.

Mr. Brigadier: I served them with a copy. May I file with you the original of that affidavit so that you will know what it is all about.

The Court: All right. Now, what disposition will we make of the present motion then?

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The Court: Yes. And I think that you can get together on that and will get together.

Excerpts from Hearing August 11 to 12, 1954

—10—

And you have no objection to Mr. Winne, as Master, paying all the just obligations of Milmar Estates, Inc. So that should be done without any trouble.

Now, as to the bank, you want to be satisfied, after you read the information that they have given you, that they are old obligations of Milmar Estates, Inc., is that right?

Mr. Tepper: Yes.

The Court: And not new ones that have been incurred since.

Mr. Tepper: That's right.

The Court: And, of course, anything they owe the Government, Milmar Estates, should be paid.

Mr. Tepper: But not the Bill Miller—

The Court: No, I will not order any of Bill Miller's Riviera, Inc., and I can't order it. They are not a party to this proceeding. How can I order it, Mr. Brigadier? You are a very good lawyer. You teach law to neophytes. How could I make an order affecting Bill Miller's Riviera?

Mr. Brigadier: Sir, I can't add to anything I have already said before. And I don't think—

The Court: I don't think I can.

Mr. Brigadier: I don't think you want me to repeat my

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argument.

The Court: No, sir. I'll have to deny that request.

Mr. Brigadier: Well, I asked to withdraw it, you remember.

The Court: Oh, yes. That may be withdrawn.

Mr. Brigadier: I contemplate another application today.

The Court: All right.

Mr. Brigadier: That was without prejudice.

The Court: Yes, sir.

Mr. Tepper: Your Honor, do I understand that Counsel is going to address another motion on the same subject to the Court? If so,—

Excerpts from Hearing August 11 to 12, 1954

Mr. Brigadier: I will inform you.

Mr. Tepper: —I urge the Court to have it dismissed with prejudice, because we have argued here for two hours on it, if it's the same point, that the Milmar Estates should pay the debts of—

The Court: Not unless he is going to bring in some new matter and some law.

Mr. Brigadier: I have told you what my application was, sir. My application was going to be to discharge the mastership.

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The Court: Oh. Well, that's something else again.

Mr. Brigadier: Yes. That's all.

The Court: All right.

And again, in the spirit of cooperation, I shall ask you gentlemen to go as fast as possible and bring it to trial.

Mr. Tepper: I might say to your Honor that what we would like to reserve, and without making any point of it at this time, is any motion addressed to a fund in Court for counsel fees at the termination of this action, if we can make out a case for that. In other words, we are making no application as we go along on these motions. And it may be that at the termination of these proceedings we should like to make an application, so we reserve the right to make any such applications.

The Court: If you are entitled to it, you may reserve it.

Order

(Filed—August 23, 1954)

This matter having been heard by the Court on August 11th and 12th, 1954 in the presence of Maurice C. Brigadier, Esq., attorney for defendant, Milmar Estate, Inc., Robert

Order

D. Grosman, Esq. and Jules E. Tepper, Esq., attorneys for defendant, Samuel Marcus, and Abraham Chazin, Esq. of the firm of Chazin & Chazin, attorneys for the plaintiffs, and good cause appearing THEREFOR;

It is on this 21st day of August, 1954 ORDERED;

1. That Walter G. Winne, Master heretofore appointed by the United States District Court in the above cause be and is hereby permitted, authorized, directed and instructed to pay from the funds on deposit in his name as Master of this Court in the Peoples Trust Company, Hackensack, N. J. to the United States Government, Director of Internal Revenue, the sum of $42,583.41, plus accrued interest at 6% per annum from May 7th, 1954, being income and excess profit taxes due the United States of America from Milmar Estate, Inc. for the fiscal years ending March 31st, 1950, March 31st, 1951 and March 31st, 1952 as set forth in Schedule "B" attached to the Notice of Motion served and filed by Maurice C. Brigadier, Esq., attorney for defendant, Milmar Estate, Inc., returnable on said August 11th, 1954, and which Notice of Motion has been filed in this cause.

2. That Walter G. Winne, Master heretofore appointed by the United States District Court in the above cause be and is hereby permitted, authorized, directed and instructed to pay from the funds on deposit in his name as Master of this Court in the Peoples Trust Company, Hackensack, N. J. to the Public National Bank & Trust Company, Pitkin and Watkins Avenues, Brooklyn, New York, the sum of $65,000.00 and interest in payment of two notes of Milmar Estate, Inc. discounted with the said Bank on July 21st, 1954 and due on August 21st, 1954, one in the amount of $40,000.00 and the other in the amount of $25,000.00, as

set forth in Schedule "A" attached to the said Notice of Motion.

/s/ ALFRED E. MODARELLI
J.U.S.D.C.

Notice of Motion to Vacate Order of August 21st, 1954

(Filed—September 16, 1954)

To: MAURICE C. BRIGADIER, Esq.
Attorney for Defendant, Milmar Estates, Inc.
40 Journal Square
Jersey City 6, New Jersey

MESSERS. CHAZIN & CHAZIN
Attorneys for Plaintiffs
30 Journal Square
Jersey City, New Jersey

WALTER G. WINNE, Esq.
Master—U. S. District Court
210 Main Street
Hackensack, New Jersey

GEORGE KESSELHAUT, Esq.
Attorney for Al Kevelson
786 Broad Street
Newark, New Jersey

GENTLEMEN:

TAKE NOTICE that on the fourth day of October, 1954 at the hour of ten o'clock in the forenoon, at the United States District Court Chambers, Post Office Building, Federal

Notice of Motion to Vacate Order of August 21st, 1954

Square, in the City of Newark, I shall apply to the Honorable Alfred E. Modarelli, United States District Court Judge, for the following relief:

1. To vacate the Order entered in this cause on the 21st day of August, 1954 directing Walter G. Winne, Esq., Master, to pay the sum of $65,000 together with interest to the Public National Bank and Trust Company, Pitkin and Watkins Avenue, Brooklyn, New York, on the ground that said Order was improvidently entered, without a prior adjudication by this Court and without the consent of the defendant, Samuel Marcus with respect to the payment of said sum of $65,000.00 to said Public National Bank and Trust Company of Brooklyn, New York.

2. That the person or persons responsible for the entry of said order, be required to restore to the account of Walter G. Winne, Master, for the funds of Milmar Estate, Inc. in the Public National Bank and Trust Company of Brooklyn, New York the aforesaid mentioned sum of $65,000 with interest paid out by Walter G. Winne, Esq., Master, as aforesaid, under the Order of August 21st, 1954.

This application will be based upon the minutes of the argument made to the Court on the plaintiff's application for the payment of said funds to said Bank and to the United States Government, Director of Internal Revenue, etc.; as well as upon the depositions taken in this case.

/s/ Robert D. Grosman
Robert D. Grosman, Esq.
Attorney for Defendant, Samuel Marcus

Dated: September 9th, 1954

Notice of Motion

(Filed—September 16, 1954)

To: Robert D. Grosman, Esq.,
Attorney for Defendant, Samuel Marcus,
24 Commerce Street
Newark 2, N. J.

Jules E. Tepper, Esq.,
Of Counsel for Defendant, Samuel Marcus,
1060 Broad Street
Newark, N. J.

Chazin & Chazin, Esqs.,
Attorneys for Plaintiffs,
30 Journal Square
Jersey City, N. J.

George Kesselhaut, Esq.,
Attorney for Al Kevelson,
786 Broad Street
Newark, N. J.

Walter G. Winne, Esq.,
Master of the United States District Court
210 Main Street,
Hackensack, N. J.

Sirs:

Please take notice that on the 4th day of October, 1954, at 10 o'clock in the forenoon or as soon thereafter as the matter may be heard, Milmar Estates, Inc. will apply before the Honorable Alfred E. Modarelli, Judge of the United States District Court for the District of New Jersey, at the Federal Building, in the City of Newark,

Notice of Motion

N. J., for an order modifying the order heretofore entered in the above entitled cause on the 18th day of February, 1954 so as to require Walter G. Winne, Esq., Master of the United States District Court, to pay over to Milmar Estates, Inc. the entire balance now contained in the account created pursuant to said order at the Peoples Trust Company of Bergen County, 210 Main Street, Hackensack, N. J., which account is designated "Walter G. Winne, Master of the United States District Court" or in the alternative, that the said Walter G. Winne, Esq., Master of the United States District Court, be ordered to pay over to Milmar Estates, Inc., one-half of the balance remaining in the aforesaid account.

The ground for said motion is that no reason exists at the present time in point of law or fact for withholding the said monies from Milmar Estates, Inc., and the said application will be based upon the entire record in the above entitled matter, including the depositions taken in this cause and the affidavits heretofore filed with the court in this cause.

/s/ MAURICE C. BRIGADIER
Maurice C. Brigadier
Attorney for Defendant, Milmar Estates, Inc.

Dated: September 15th, 1954

Notice of Motion

(Filed—October 7, 1954)

To: Robert D. Grosman, Esq.,
Attorney for Defendant, Samuel Marcus,
24 Commerce Street
Newark 2, N. J.

Jules E. Tepper, Esq.,
Of Counsel for Defendant, Samuel Marcus,
1060 Broad Street
Newark, N. J.

Chazin & Chazin, Esqs.,
Attorneys for Plaintiffs,
30 Journal Square
Jersey City 6, N. J.

George Kesselhaut, Esq.,
Attorney for Al Kevelson,
786 Broad Street
Newark, N. J.

Walter G. Winne, Esq.,
Master of the United States District Court
210 Main Street,
Hackensack, N. J.

Sirs:

Please take notice, that on the 25th day of October, 1954, at 10 o'clock in the forenoon or as soon thereafter as the matter may be heard, Milmar Estates, Inc. will apply before the Honorable Alfred E. Modarelli, Judge of the United States District Court for the District of New

Notice of Motion

Jersey, at the Federal Building, in the City of Newark, N. J., for an order modifying the order heretofore entered in the above entitled cause on the 18th day of February, 1954 so as to require Walter G. Winne, Esq., Master of the United States District Court, to pay over to Milmar Estates, Inc. the entire balance now contained in the account created pursuant to said order at the Peoples Trust Company of Bergen County, 210 Main Street, Hackensack, N. J., which account is designated "Walter G. Winne, Master of the United States District Court" or in the alternative, that the said Walter G. Winne, Esq., Master of the United States District Court, be ordered to pay over to Milmar Estates, Inc., one-half of the balance remaining in the aforesaid account.

The ground for said motion is that no reason exists at the present time in point of law or fact for withholding the said monies from Milmar Estates, Inc., and the said application will be based upon the entire record in the above entitled matter, including the depositions taken in this cause and the affidavits heretofore filed with the court in this cause.

/s/ MAURICE C. BRIGADIER
Maurice C. Brigadier
Attorney for Defendant,
Milmar Estates, Inc.

Dated: October 4, 1954

Order

(Filed—October 14, 1954)

This matter being opened to the Court by Robert D. Grosman, Esq., and Jules E. Tepper, Esq., attorneys for the defendant, Samuel Marcus, and the consent of counsel for all the parties being hereunto appended,

Order

It is on this 14th day of October, 1954,

ORDERED that the time of the defendants, Samuel Marcus and Milmar Estate, Inc., to file answers, cross-claims or counterclaims be and is hereby extended to and including Friday, October 22, 1954.

/s/ ALFRED E. MODARELLI
Judge, U.S.D.C.

We hereby consent to the entry of the above Order.

/s/ ROBERT D. GROSMAN
Robert D. Grosman,
Attorney for Defendant,
Samuel Marcus.

/s/ JULES E. TEPPER
Jules E. Tepper,
Attorney for Defendant,
Samuel Marcus.

MAURICE C. BRIGADIER,
Attorney for Defendant,
Milmar Estate, Inc.

/s/ CHAZIN & CHAZIN
Chazin & Chazin,
Attorneys for Plaintiffs.

By /s/ ABRAHAM CHAZIN
Abraham Chazin
A Member of the Firm

Notice

(Filed—October 22, 1954)

To: Samuel Marcus and Jules E. Tepper, Esq. and Robert D. Grosman, Esq., his attorneys,

Milmar Estates, Inc., and Maurice C. Brigadier, Esq., its attorney.

Sirs:

Please take notice that the undersigned, as attorneys for the plaintiffs, Al Bierman and William Miller, in the above entitled cause, will move on the 8th day of November, 1954, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, before The Honorable Alfred E. Modarelli, Judge of the United States District Court, at the Federal Building, Newark, N. J., the hearing of the order to show cause heretofore allowed in the above entitled cause on the 28th day of December, 1950, pursuant to the provisions of the order made in the above entitled cause on the 2nd day of January, 1952, with respect to the hearing of the said order to show cause.

/s/ Chazin & Chazin
Chazin & Chazin
Attorneys for Plaintiffs

By: /s/ Abraham Chazin
Abraham Chazin
A Member of the Firm

Dated: October 22nd, 1954.

Excerpts from Answer and Cross-Claim of Defendant, Milmar Estates, Inc.

(Filed—October 25, 1954)

• • •

CROSS-CLAIM

• • •

FOURTH COUNT

The defendant, Milmar Estate, Inc., by way of cross-claim says:

1—This defendant herein repeats the allegations contained in paragraph 1 and paragraph 2 of the Complaint to the same extent as if repeated at length herein. The jurisdiction of this Court arises out of the fact that the parties are citizens of different states, and that the amount in controversy is in excess of $3,000.00, exclusive of interest and costs.

2—At all of the times hereinafter mentioned, the defendant, Milmar Estate, Inc., was the owner of certain real property in the City of Fort Lee, County of Bergen and State of New Jersey, which said premises were conveyed to Milmar Estate, Inc., by Deed dated June 7, 1946, executed by William Miller and Samuel Marcus, and recorded on the 1st day of August, 1946, in Book 2667 of Deeds for Bergen County, at page 35 thereof.

3—Prior to the month of October 1952, the State of New Jersey instituted a condemnation proceeding, the object and ultimate effect of which was to acquire for the State of New Jersey the title and all rights and interest in the aforedescribed property. Thereupon the State of New Jersey became obligated to make payment to Milmar Estate,

Inc., for the acquisition of the title to the said property as just compensation therefor.

4—Thereafter and on or about October 20, 1952, Samuel Marcus maliciously and without probable cause and without justification in law or fact asserted a claim of right, title or ownership in and to the aforementioned property, and Samuel Marcus did maliciously and without probable cause and without justification in law or fact, file with the Bergen County Clerk, in the Office of the Bergen County Clerk, a Notice of Lis Pendens captioned in the above entitled cause, which said Notice of Lis Pendens described the premises and property above mentioned, and which Notice of Lis Pendens was recorded in the public records of the said County Clerk, to wit, Liber 43 of Lis Pendens, page 467.

5—The Notice of Lis Pendens aforementioned states in part as follows:

> "NOTICE is hereby given that a suit entitled as above has been commenced and is now pending in said United States District Court, District of New Jersey.
>
> The general object of said suit is to compel the above named defendants to interplead and determine their rights to collect the obligation described in the complaint filed in such suit and the installments thereof; to discharge the above named plaintiff from all liabilities to said defendants upon payment into the Registry of said Court of the moneys mentioned in the complaint."

6—The said lands, aforedescribed, were not the subject matter of the interpleader action described in the said Notice of Lis Pendens. The lands aforedescribed being the property of the defendant, Milmar Estate, Inc., were not affected and would not be affected by the said interpleader

action. At the time of the filing of the Notice of Lis Pendens by Samuel Marcus no action or court proceeding had been instituted which might affect the said lands.

7—Since the date October 20, 1952, to the present date, no action, claim, counterclaim or court proceeding has been instituted or commenced by the said Samuel Marcus affecting or which might affect the lands described in the Notice of Lis Pendens.

8—On or about February 18, 1954, an Order was entered in the above captioned matter providing in part as follows:

> "Upon the entry of this order, the defendant, Samuel Marcus, or his attorney shall sign the necessary documents to vacate lis pendens filed by him in the County of Bergen, affecting the lands and premises of Milmar Estates, Inc., which are the subject of the aforementioned condemnation proceedings."

9—Subsequent to the entry of the aforedescribed Order and pursuant thereto the Notice of Lis Pendens was vacated by Samuel Marcus.

10—The conduct of the defendant, Samuel Marcus, in causing the said Lis Pendens to be filed, as aforesaid, constituted a malicious use of process and Samuel Marcus in causing said Lis Pendens to be filed, as aforesaid, acted for a purpose other than to secure an adjudication of any claim relating to the lands described in said Notice of Lis Pendens. The said Lis Pendens was used wrongfully and willfully for a purpose and in a manner not legally justifiable. The Lis Pendens was filed by said Samuel Marcus as a matter of desperation and to harass and embarrass Milmar Estate, Inc.

Excerpts from Answer and Cross-Claim of Defendant, Milmar Estates, Inc.

11—By reason of the fact that the Notice of Lis Pendens was filed by Samuel Marcus, as aforesaid, the State of New Jersey delayed in compensating Milmar Estate, Inc., in the amount of the reasonable value of its property as just compensation for the taking thereof. By reason of the filing of the said Lis Pendens by Samuel Marcus, as aforesaid, the State of New Jersey refused to pay to Milmar Estate, Inc. the amount of the condemnation award. By reason of the wrongful filing of said Notice of Lis Pendens by and on behalf of Samuel Marcus, Milmar Estate, Inc. was deprived of payment to it of a fund consisting of the proceeds of the condemnation award by the State of New Jersey for the taking of said real estate and said moneys were paid to the Clerk of the Superior Court of New Jersey. As a result of the foregoing, Milmar Estate, Inc. was required to pay to the Clerk of the Superior Court the sum of $7,700.09. As a further result of the foregoing, Milmar Estate, Inc. has been and to this date is deprived of the use of the moneys constituting the condemnation award. Milmar Estate, Inc. has been continuously deprived of the opportunity to invest the said fund in income-producing investments and has otherwise sustained loss and damage.

12—The defendant, Samuel Marcus, has used the mechanics of filing a Notice of Lis Pendens to accomplish a purpose for which it was not designed, as a result of which the defendant, Milmar Estate, Inc. has suffered pecuniary loss and damage.

13—The aforesaid improper and illegal filing of the Notice of Lis Pendens was done by the defendant, Samuel Marcus, with malice and intent to damage, harass, and embarrass the defendant, Milmar Estate, Inc. and defendant, Milmar Estate, Inc. demands punitive damages for same.

Excerpts from Answer and Cross-Claim of Defendant, Milmar Estates, Inc.

WHEREFORE defendant, Milmar Estate, Inc. demands judgment against Samuel Marcus in the amount of $100,000.00 together with interest and costs of this action.

FIFTH COUNT

The defendant, Milmar Estate, Inc., by way of cross-claim says:

1—This defendant herein repeats each and every allegation, claim and statement contained in each and every paragraph in the Fourth Count of the Cross-Claim, as hereinabove set forth, to the same extent as if repeated at length herein.

2—The conduct of the defendant, Samuel Marcus, in causing the said Lis Pendens to be filed, as aforesaid, constituted a malicious abuse of process and a malicious prosecution, and Samuel Marcus in causing said Lis Pendens to be filed, as aforesaid, acted for a purpose other than to secure an adjudication of any claim relating to the lands described in said Notice of Lis Pendens. The said Lis Pendens was used wrongfully and willfully for a purpose and in a manner not legally justifiable. The Lis Pendens was filed by said Samuel Marcus as a matter of desperation and to harass and embarrass Milmar Estate, Inc.

3—This defendant herein repeats the allegations contained in paragraph 11 of the Fourth Count of the Cross-Claim, as hereinabove set forth, to the same extent as if repeated at length herein.

WHEREFORE defendant, Milmar Estate, Inc. demands judgment against Samuel Marcus in the amount of $100,000.00 together with interest and costs of this action.

Excerpts from Answer and Cross-Claim of Defendant, Milmar Estates, Inc.

SIXTH COUNT

The defendant, Milmar Estate, Inc., by way of cross-claim says:

1—This defendant herein repeats the allegations contained in paragraph 1 and paragraph 2 of the Complaint to the same extent as if repeated at length herein. The jurisdiction of this Court arises out of the fact that the parties are citizens of different states, and that the amount in controversy is in excess of $3,000.00, exclusive of interest and costs.

2—This defendant herein repeats the allegations contained in paragraph 2 of the Fourth Count of the Cross-Claim to the same extent as if repeated at length herein.

3—This defendant herein repeats the allegations contained in paragraph 4 of the Fourth County of the Cross-Claim to the same extent as if repeated at length herein.

4—This defendant herein repeats the allegations contained in paragraph 5 of the Fourth Count of the Cross-Claim to the same extent as if repeated at length herein.

5—The effect of the acts of defendant, Samuel Marcus, as aforesaid, was to disparage and slander the defendant's title to the property aforedescribed.

6—This defendant herein repeats the allegations contained in paragraph 6 of the Fourth Count of the Cross-Claim to the same extent as if repeated at length herein.

7—This defendant herein repeats the allegations contained in paragraph 7 of the Fourth Count of the Cross-Claim to the same extent as if repeated at length herein.

Excerpts from Answer and Cross-Claim of Defendant, Milmar Estates, Inc.

8—Since the date October 20, 1952, to the present date, no action, claim, counterclaim or court proceeding has been instituted or commenced by the said Samuel Marcus affecting or which might affect the lands described in the Notice of Lis Pendens.

9—The claims and allegations contained in the Notice of Lis Pendens filed by Samuel Marcus were and are false and defamatory and were known by Samuel Marcus to be false and defamatory when the said Notice of Lis Pendens was filed in the public records, as aforementioned, and the said claims and allegations were asserted by Samuel Marcus willfully and maliciously and with the intent to injure Milmar Estate, Inc. and its title to said property. The Notice of Lis Pendens containing said false and defamatory matter was filed by Samuel Marcus willfully and maliciously and with the intent to thereby injure Milmar Estate, Inc. and its title to said property.

10—As a result of the aforesaid acts of Samuel Marcus, the slanderous and defamatory matter was communicated to all persons examining and inspecting the public records wherein the said Notice was filed.

11—This defendant herein repeats the allegations contained in paragraph 10 of the Fourth Count of the Cross-Claim to the same extent as if repeated at length herein.

12—This defendant herein repeats the allegations contained in paragraph 11 of the Fourth Count of the Cross-Claim to the same extent as if repeated at length herein.

WHEREFORE defendant, Milmar Estate, Inc. demands judgment against Samuel Marcus in the amount of $100,000.00 together with interest and costs of action.

Excerpts from Answer and Cross-Claim of Defendant, Milmar Estates, Inc.

SEVENTH COUNT

The defendant, Milmar Estate, Inc., by way of cross-claim says:

1—This defendant herein repeats the allegations contained in paragraph 1 and paragraph 2 of the Complaint to the same extent as if repeated at length herein. The jurisdiction of this Court arises out of the fact that the parties are citizens of different states, and that the amount in controversy is in excess of $3,000.00, exclusive of interest and costs.

2—This defendant herein repeats the claims, allegations, facts and statements contained in each and every paragraph of the Fourth Count, the Fifth Count and the Sixth Count to the Cross-Claim as hereinabove set forth, to the same extent as if repeated at length herein.

3—The acts and conduct of Samuel Marcus, as aforesaid, constituted a malicious interference with prospective economic advantages of Milmar Estate, Inc.

WHEREFORE defendant, Milmar Estate, Inc. demands judgment against Samuel Marcus in the amount of $100,000.00 together with interest and costs of this action.

/s/ MAURICE C. BRIGADIER
Maurice C. Brigadier
Attorney for Defendant, Milmar Estate, Inc.

Notice of Motion to Join Third Persons to Counterclaim

(Filed—October 25, 1954)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Equity Division

Civil Action No. 1026-50

AL BIERMAN and WILLIAM MILLER,

Plaintiffs,

—vs.—

SAMUEL MARCUS and MILMAR ESTATES, INC., a corporation organized under the laws of the State of New Jersey,

Defendants,

by original summons, and between the said
SAMUEL MARCUS,

Plaintiff,

—vs.—

AL BIERMAN and WILLIAM MILLER,

Defendants on Counterclaim,

MILMAR ESTATES, INC., *a New Jersey Corporation,*

Defendant on Cross-claim,

and

AL KEVELSON and ABRAHAM LIEBERMAN, Esq.,

Additional Defendants on Counterclaim.

Notice of Motion to Join Third Persons to Counterclaim

To:

MAURICE C. BRIGADIER, Esq.
Attorney for the defendant, Milmar Estates, Inc.
40 Journal Square
Jersey City, New Jersey

Messrs. CHAZIN & CHAZIN
Attorneys for Plaintiffs
30 Journal Square
Jersey City, New Jersey

GEORGE KESSELHAUT, Esq.
Attorney for Al Kevelson
786 Broad Street
Newark 2, New Jersey

ABRAHAM LIEBERMAN, Esq.
4000 Bergenline Avenue
Union City, New Jersey

GENTLEMEN:

PLEASE TAKE NOTICE that on Monday, the eighth day of November, 1954, at the United States District Court Chambers, Federal Courts Building, in the City of Newark, in this State, at the hour of ten o'clock in the forenoon (EST), or as soon thereafter as the matter may be heard, I shall apply to the HON. ALFRED E. MODARELLI, Judge of said Court or such other Judge as may then be hearing Equity Motions, for the following relief:

1. An Order making Al Kevelson and Abraham Lieberman, Esq., defendants to the Counterclaim set up in this defendant's answer in this cause, pursuant to Rule 13 (H) of the Rules of Civil Procedure, on the ground that their presence is required for the granting

Notice of Motion to Join Third Persons to Counterclaim

of complete relief in the determination of said counterclaim, and that the jurisdiction of the said Al Kevelson can be obtained, he having taken an active part in the prosecution of this suit, was examined on oral deposition in this cause and is represented in this matter by counsel of his own choosing, namely, George Kesselhaut, Esq., a member of the Bar of this State; that the said Abraham Lieberman is domiciled in this State and amendable to process of subpoena.

This application will be based upon the depositions of William Miller, Al Kevelson and Abraham Lieberman, taken in this cause.

Dated: October 21st, 1954

ROBERT D. GROSMAN
Attorney for Defendant-counterclaimant, Samuel Marcus

JULES E. TEPPER
Of counsel with Samuel Marcus, Defendant-counterclaimant.
Per R. J. G.

Excerpts from Hearing of December 13, 1954

—2—

• • •

Mr. Winne: Judge Modarelli, I have got a little incidental motion that I think everybody is agreed to in order to get a little compensation for Christmas for myself. And I don't think there is any objection.

The Court: That's to require the Master to pay moneys

due Winne & Banta for professional services rendered?

Mr. Winne: That's right.

The Court: Was that in the condemnation?

Mr. Winne: That's right. I represented all of the parties concerned--that is, the Milmar Estate and Bill Miller's Riviera, both in the condemnation trial and for a great deal of negotiation prior thereto, for about two years, to try to prevent condemnation.

And I have rendered a bill—I don't think anyone cares too much about the details, but I rendered a bill in detail to my client, which I thought was reasonable. And we agreed after a long conference with my client. My six page bill was the result of a compromise and both Milmar Estate and Bill Miller's Riviera, parties in interest, agree that I should be paid a sum which I agreed to take.

—3—

And I offer to your Honor for your inspection a modified bill, which was the subject of an agreement. And since the money is available, I gave everyone notice that I would apply to the Court for permission to pay myself, or to pay my firm, out of the moneys in my hand the sum of $20,000 as a fee and $619.61 as a return of an actual out of pocket disbursement.

The Court: That was in compromise, I see.

Mr. Winne: That's right. I, frankly, rendered a bill of $50,000 and as a result of a long discussion agreed to take the lesser sum, which I think is a moderate charge, and everyone I talked to thinks it is a moderate charge.

The Court: Is there anyone who feels that Mr. Winne shouldn't be paid or that his bill is excessive in any way?

Who did you serve notice on, because I can't go wading through all these? Have you got a copy of the notice?

Mr. Winne: Yes, sir. I served notice on Mr. Grosman, Mr. Tepper, Chazin & Chazin, Mr. Kesselhaut, Mr. Brigadier.

Excerpts from Hearing of December 13, 1954

The Court: Let me have that, please.

(Document handed to the Court.)

The Court: Suppose we take them down in the order in which they appear on the notice.

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* * *

The Court: All right, give me an order and I will sign it.

* * *

Order

(Filed—January 14, 1955)

Certain motions having come before the Court, in the above matter on December 13, 1954, as hereinafter set forth in this Order, and the following counsel having appeared thereon: Robert D. Grosman, Esq. and Jules E. Tepper, Esq., Attorneys for Defendant, Samuel Marcus, Maurice C. Brigadier, Esq., Attorney for Defendant, Milmar Estate, Inc., Chazin & Chazin, Esqs., by Theodore S. Chazin, Esq. and Abraham Chazin, Esq., Attorneys for Plaintiffs, Al Bierman and William Miller, George Kesselhaut, Esq., Attorney for Al Kevelson, and Abraham Lieberman, Esq., Pro Se; and the Court having heard the arguments of Counsel, and good cause appearing therefor,

It is on this 14th day of January, 1955,

ORDERED

1. The motion of Samuel Marcus to join third persons to counterclaim is denied as to Abraham Lieberman, Esq. The motion is granted as to Al Kevelson, The Court find-

ing that the counterclaim of Samuel Marcus is a compulsory counterclaim over which the Court has ancillary jurisdiction, and the Court further finding that the joinder of Al Kevelson does not deprive the Court of jurisdiction.

2. The following motions are carried to the final hearing and trial of the case:

A. Motion of Samuel Marcus, by Robert D. Grosman, Esq., his Attorney, to vacate the order of August 21, 1954, and for other relief set forth in the same notice of motion.

B. Motion by Milmar Estate, Inc., by its Attorney, Maurice C. Brigadier, Esq., for an Order modifying the Order heretofore entered on February 18, 1954, so as to require Walter G. Winne, Esq., Master of the United States District Court, to pay over to Milmar Estate, Inc. the entire balance in the account created pursuant to said Order in the Peoples Trust Company, Hackensack, N. J., or in the alternative, one-half of said balance.

C. Motion of the plaintiffs, Al Bierman and William Miller, by Chazin & Chazin, Esqs., their attorneys, moving the hearing of the Order to Show Cause heretofore allowed in the above entitled cause on the 28th day of December, 1950, pursuant to the provisions of the Order made in the above entitled course on the 2nd day of January, 1952, with respect to the hearing of the said Order to Show Cause. The restraints contained in the said Order to Show Cause are hereby continued until the trial of this case and until the further order of this Court.

D. Notice of motion by defendant, Samuel Marcus, by Robert D. Grosman, Esq. and Jules E. Tepper, Esq., his Attorneys, to require inspection of books and records.

Order

IT IS FURTHER ORDERED that this case be set down for trial on Thursday, January 20th, 1955.

/s/ A. E. MODARELLI
U.S.D.J.

We hereby consent to the form of the above Order.

/s/ CHAZIN & CHAZIN
Chazin & Chazin
Attorneys for Plaintiffs

/s/ ABRAHAM CHAZIN
By: ABRAHAM CHAZIN, Esq.
A member of the Firm.

/s/ JULES E. TEPPER
Jules E. Tepper, Esq.
and

/s/ ROBERT D. GROSMAN
Robert D. Grosman, Esq.
Attorneys for Defendant, Samuel Marcus

/s/ MAURICE C. BRIGADIER
Maurice C. Brigadier, Esq.
Attorney for Defendant, Milmar Estate, Inc.

/s/ GEORGE KESSELHAUT
George Kesselhaut, Esq.
Attorney for Al Kevelson

Excerpts from Hearing of April 23 to 24, 1956

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Mr. Winne: Addressing myself to this paragraph, I think there must be a qualification in this paragraph that the money that I have in my hand be paid over after certain sums have been reserved for another purpose. I don't want to argue it now, but I am under levy from the United States Government in a very large sum of money for taxes, and there are a couple of other minor amounts levied from the Sheriff's office that I think have got to be reserved, and an allowance to myself I think has got to be reserved. So I don't like the language that this be forthwith paid over, the entire balance, because the balance can't be paid over, because it is subject to certain reservations.

The Court: That can be taken care of. Mr. Schapira, I agree.

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The Court: Yes, sir.

Now, your problem, Mr. Winne.

Mr. Winne: Well, I don't think it will concern the Court too much, but I want to be protected when this final order is entered against a claim that I obey the Court's order and

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pay out moneys and then I am called upon to pay them out again to somebody. And in that respect I will be extremely brief.

The Federal Government has filed from time to time liens, levies, pieces of paper by an Internal Revenue man that is levying on this money that is in my possession. I must protect myself against those levies. If they should be paid, the Court should order them paid. The United

Excerpts from Hearing of April 23 to 24, 1956

States Attorney is present and a representative of the Internal Revenue Department, and if your Honor should find they should be paid, I think it should appear on the record that the government was represented, that the United States of America was here. They have been advised by me to be here, and they are here. And whatever is done in this order should bind the United States of America against ever claiming that I unjustly or improperly paid these moneys over, if that is what the Court orders.

So there probably should be some reservation in this order concerning these claims. I will state that there is a lien filed upon me claiming against B. M. R. Corporation trading as Bill Miller's Riviera in the sum of $6,361.31, upon which there probably is interest.

There is a lien filed with me against Bill Miller's Riviera, Inc., for $71,343.64, upon which there is probably interest.

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There is a lien or levy filed upon me against Milmar Estates, Inc., for $30,537, upon which there is probably interest.

I have asserted that I have no funds in my hands belonging to anyone except Milmar Estate, Inc., but the government still claims that the moneys I have are subject to levy against these other corporations.

Now, I had a great deal of correspondence during this period with individual creditors. I imagine the same people that wanted a receiver appointed. And as to those I think I ought to state to the Court that I told them I could not protect them. I answered any inquiry about what money I had, and how it was being held. For instance, Mr. Lieberman served a bill on me for his $29,000, or whatever it is, and I told him I could take no responsibility in getting him paid. All I could do is tell him the facts.

And the same way with their accountant, a man named Hoffman. He served a bill on me for some forty odd thou-

sand dollars. And a great many individual creditors through their attorneys have served me.

(Comments off the record.)

Mr. Winne: So with one exception I have not taken any responsibility about any of these letters claiming sums, whether they are correct or not. But in one instance the

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firm of Wilentz, Goldman, Spitzer & Sills of Perth Amboy got a judgment. Now, the judgment is against Bill Miller's Riviera for the sum of $1,234.69. Nevertheless, they did get a sheriff's execution and had the sheriff serve me with an execution. And I think there should be some reservation as to that; if it is going to be paid, pay it out of the fund, or somehow or other protect me against that levy.

Now, as Mr. Brigadier was good enough to say, having in mind this hour would come when your Honor was going to make an order, I said I was going to apply to your Honor for a modest allowance for the trouble I have had since I was designated to hold this money, and rather than burden your Honor with the obligation, or the duty of fixing the amount, the gentlemen in question, Milmar, Bill Miller and Kevelson, met in my office and I agreed to accept the sum of $3,500, and they agreed that I should be paid out of moneys in my hand the sum of $3,500. And I think I would like to be protected by the Court's order in that respect.

Now, the only other thing I have to say, if your Honor please, is that I would like not to have everybody in a race to try to get me to sign checks while the adversary proceedings are trying to get me not to sign checks. As I understand the law, the mere taking of an appeal will not stay

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your Honor's judgment. But, on the other hand, there undoubtedly will be, I assume, an effort to get a stay, possibly to file a bond, and I do think that the final judgment in this

case ought to direct me to execute the judgment at a certain time, not forthwith, because if you say forthwith, before I get to my office the gentlemen will be there to try to get me to draw checks. And on the other hand, these gentlemen will be running down to Philadelphia trying to get a stay.

So I think for my own protection—I am serious about it, if I should pay this money out, and these gentlemen then made a claim that I paid it precipitously, and shouldn't have paid it until they had a chance, they will be suing me for all this money. And I think that the order should definitely provide when I should distribute such moneys as your Honor orders distributed.

I would like the record to show who is here from the government, please.

Mr. Herman Scott: Your Honor, I am here on behalf of the government. As to the first item mentioned by Mr. Winne, the $6,000 levy on account of tax indebtedness of B. M. R. Corporation, I want to state that the government is withdrawing that levy.

However, the levy of $71,000 against Bill Miller's Riviera still stands.

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Mr. Scott: So we have $71,000 on that account, and we have made an additional levy of $30,967 against Milmar Estate, Inc., for the same type of taxes, and income taxes.

However, an additional levy will be made of approximately twenty-one thousand, bringing that particular account up to $51,871. So the total amount due to the government in this case is $123,842.25.

The Court: A hundred and twenty-three thousand.

Mr. Scott: Of course, your Honor, interest has been run-

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ning on this account.

Excerpts from Hearing of April 23 to 24, 1956

The Court: Oh, yes, galloping interest, I know.

Mr. Scott: And for that reason I would ask that a portion of that claim be paid to the government now to save all the parties here some money, and in the meantime, we will get some, too.

It appears that there is substantial agreement between the accountants for the corporations and the Internal Revenue agents that approximately a hundred thousand dollars of this amount is not in dispute. There is some dispute about some penalties and interest. So I would suggest that there be an immediate distribution of a hundred thousand dollars to the government now, at the present time, and that there be reserved from distribution an additional $25,000, which would cover the balance due to the government.

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The Court: • • • Now, didn't you get any attachments by creditors—fish peddlers and fishmongers?

Mr. Winne: No, I had no legal documents served upon me—

The Court: Except Mr. Wilentz' clients, and that's against Bill Miller's Riviera, Inc.?

Mr. Winne: That was a levy by the sheriff, but the judgment was against Bill Miller's Riviera, Inc.

The Court: So therefore you refused to pay it since you have no funds of Bill Miller's Riviera, Inc.

Mr. Winne: That's right.

Mr. Chazin: If your Honor please, the reason that those creditors didn't push was because Mr. Kevelson personally paid a number of them or made arrangements with them.

The Court: He did, personally? That's very nice of Mr. Kevelson.

Does that finish our work for today?

Mr. Brigadier: As far as I know.

Excerpts from Hearing of April 23 to 24, 1956

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The Court: Of course, Francis, I shall require a transcript of all this, which I will again have to analyze and synthesize to decide what I should do.

Mr. Scott: Do I understand, your Honor, that there will be a reservation of distribution until these tax matters are resolved?

The Court: There will be no distribution ordered by me until I am certain of what I am doing, because I don't want Mr. Winne to get in trouble, and I don't want to get in trouble, either, about this case.

Mr. Scott: Very well.

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Notice of Motion for Summary Judgment

(Filed—September 24, 1956)

To: Maurice Brigadier, Esq.
Attorney for Defendant Milmar Estate, Inc.
26 Journal Square
Jersey City, New Jersey

Sir:

Please take notice that on Monday, October 8, 1956, at 10 A. M. or as soon thereafter as counsel can be heard, I shall apply to the Hon. Alfred E. Modarelli at the United States District Court for the District of New Jersey at the Federal Building in Newark, New Jersey for an order for the entry of a summary judgment in favor of the defendant Samuel Marcus and against the defendant Milmar Estate, Inc., dismissing the fourth, fifth, sixth, and seventh counts of the cross-claims of the defendant Milmar Estate, Inc.

against the defendant Samuel Marcus. In support of this application I shall rely on the affidavits of Jules Tepper and Samuel Marcus, annexed hereto, as well as upon all of the pleadings heretofore filed in this cause and upon the prior proceedings had in this cause.

Dated: September 20, 1956.

s/ MAURICE SCHAPIRA

Maurice Schapira
Attorney for Defendant
Samuel Marcus

Affidavit in Support of Motion for Summary Judgment

STATE OF NEW JERSEY,
COUNTY OF ESSEX, *ss.*:

JULES TEPPER, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am an attorney and counsellor at law of New Jersey. I was co-counsel of record in the within cause for the defendant Samuel Marcus with the late Robert D. Grosman, who died subsequent to the trial of this case. Since the passing of Mr. Grosman, Maurice Schapira, Esq., has been substituted as attorney of record for the defendant Samuel Marcus.

2. At the time Mr. Marcus retained Mr. Grosman and myself as his attorneys in the within action, he disclosed not only his own contentions but also the conflicting contentions of the plaintiffs Al Bierman and William Miller and the defendant Milmar Estate, Inc. More particularly, while

Mr. Marcus advised us of the conflicting claims of himself and the other parties as to the ownership of Milmar stock, he at no time claimed any direct or indirect interest personally in Milmar's real or personal property.

3. At no time in the course of these proceedings and prior to the filing of a notice of lis pendens on October 20, 1952, did Mr. Marcus consult with me, to the best of my knowledge, or with Mr. Grosman concerning the filing of a notice of lis pendens nor did either Mr. Grosman or myself ever advise or consult with Mr. Marcus concerning the same until after the filing of the same. To the best of my knowledge and belief the decision to file a notice of lis pendens and the actual filing thereof was the sole decision of Mr. Grosman, taken without the knowledge of Mr. Marcus.

4. On October 20, 1952, Mr. Grosman, as aforesaid, filed a notice of lis pendens in the office of the Clerk of Bergen County, which was recorded in Book 43 of Lis Pendens page 467. This notice stated in full as follows:

> "Notice is hereby given that a suit entitled as above has been commenced and is now pending in said United States District Court, District of New Jersey.
>
> "The general object of said suit is to compel the above named defendants to interplead and determine their rights to collect the obligation described in the complaint filed in such suit and the installments thereof; to discharge the above named plaintiff from all liabilities to said defendants upon payment into the Registry of said Court of the moneys mentioned in the complaint. The lands which may be affected in said suit by a counterclaim to be filed at an appropriate time, are described as follows:"

There then followed a description of the land in question.

Notice of Motion for Summary Judgment

5. Subsequently, the State Highway Commissioner of the State of New Jersey instituted condemnation proceedings before the Hon. J. Wallace Leyden, Judge of the Superior Court of New Jersey, Bergen County, in a cause entitled "In the Matter of the Petition of the State Highway Commissioner of the State of New Jersey for the Condemnation of Lands of Milmar Estate, Inc., a Corporation of New Jersey". A petition in that cause, dated June 2, 1953, and verified June 15, 1953, set forth the existence of record of the aforesaid notice of lis pendens in the following terms:

> "Your petitioner further shows that the owner of record of the said lands and premises is Milmar Estate, Inc., a corporation of New Jersey; that no other person or corporation appears of record to have any interest in the said lands and premises except Tessie Schlesinger, residing at 400 West End Avenue, New York, and Julia Steinberger, residing at 185 East 182nd Street, Bronx, New York, the present holders of a certain mortgage made by William Miller and Samuel Marcus to Michael Realty Company, a corporation of New Jersey, under date of April 5, 1946 in the sum of $300,000.00 and duly recorded in the Office of the Clerk of Bergen County on April 10, 1946, in Book 2093 of Mortgages at page 202&c, and duly assigned to the said Tessie Schlesinger and Julia Steinberger by assignment dated July 29, 1949 and duly recorded in said clerk's office on August 5, 1949, in Book 369 of Assignments of Mortgages at page 256&c, which said mortgage affects the said lands and premises; State of New Jersey which, by reason of corporation franchise tax against Milmar Estates, Inc., a corporation of New Jersey, has or may claim to have an interest therein; Mary Miller, otherwise known as Anna Miller, whose place of residence is unknown, wife of William Miller,

who has or may claim to have an inchoate right of dower therein; Sarah Marcus, residing at 685 West End Avenue, New York, New York, wife of Samuel Marcus, who has or may claim to have an inchoate right of dower therein; Al Bierman, residing at Charlotte, North Carolina, and William Miller, residing at 161 Brayton Street, in the City of Englewood, in the County of Bergen and State of New Jersey each of whom, by reason of a Lis Pendens recorded and filed on October 20, 1952 in Book 43 of Lis Pendens in the County Clerk's Office of Bergen County at page 467 and a suit pending in the United States District Court for the District of New Jersey, wherein Al Bierman and William Miller are plaintiffs and Samuel Marcus and Milmar Estate, Inc., a corporation of New Jersey, are defendants, has or may claim to have an interest therein; Bill Miller's Riviera, Inc., a corporation of New Jersey which, as tenant, occupant, or otherwise, has or may claim to have an interest therein; Eli Quain, residing at 1420 Grand Concourse, Bronx, New York who, as tenant, occupant, or otherwise, has or may claim to have an interest therein; Samuel Marcus, residing at 685 West End Avenue, New York, New York who has or may claim to have an interest therein; Borough of Fort Lee, in the County of Bergen, a municipal corporation of New Jersey which, by reason of certain taxes and assessments duly levied and assessed, has or may claim to have an interest therein."

6. The record of the aforesaid proceedings shows that this petition was served upon the defendant Milmar Estate, Inc., on or about June 29, 1953.

7. The next action which appears of record which resulted in affecting the aforesaid notice of lis pendens was a notice of motion for restraint dated January 19, 1954,

filed by Mr. Grosman as attorney for the defendant Samuel Marcus, in which application was made to restrain the plaintiffs and the defendant Milmar Estate, Inc., from receiving or taking into their possession a certain condemnation award of $757,410.00, made by the Commissioners in the suit of the State Highway Commissioner.

8. The aforesaid application came on for hearing before this Court on January 25, 1954, along with certain other matters then pending in this cause, in the presence of the attorneys for all the parties hereto. Mr. Brigadier, the attorney for Milmar, was the first to address the Court on the subject matter of the said application. He stated, among other things, as follows (Tr. 1/25/54, p. 22-23):

> "But, as I say, all the rest of it, the receivership, the restraints, all of it will become purely academic.
>
> Now, you might say, 'Well, how can it become academic? There are seven hundred and fifty thousand there that have to be protected in the meanwhile.'
>
> And this is what I would like to propose to your Honor. If a short date can be fixed, the matter set down for trial, there will be no problem of the seven hundred and fifty thousand.
>
> I spoke to Mr. Winne this morning and a suggestion was made between us which I think would solve this whole problem. Mr. Winne said, 'Why not do it this way: Offer to have the seven hundred and fifty thousand held by Winne & Banto, in a trust account, not to be disposed of in any way except by order and direction of this court.'
>
> Now, if that is done, why any need for receiverships, or restraints, or any of this other interlocutory nonsense that we are now apparently engaged in? It will mean that this money can be put out on interest, so that my clients are not going to be high-jacked, with

the threat of losing this interest, into trying to force them into doing something that they might not want to do of their own free accord. And they are in no way injured. And, therefore, that is what I would like to suggest to your Honor."

After further colloquy, the matter was taken up by Mr. Kesselhaut, attorney for the defendant Kevelson, as follows (Ibid. at p. 59):

"If your Honor will bear with me just for one moment, I think I have a suggestion that I am quite certain—well, I know will meet with the approval of both Mr. Tepper and Judge Grosman and I hope with counsel on the other side. That is, we are all in agreement that there are seven hundred and some odd thousand dollars. We don't know where it will eventually go. We do know it will go to Milmar Estate. But who are the stockholders of Milmar Estate will be determined on final hearings.

I would like to suggest that Walter Winne be designated by this Court as a Master of this Court to hold those monies under the direction of this Court and not to disburse them without the prior order of this Court.

Mr. Winne, I am quite certain, will consent to accept it, assuming that he does get the money at some time between now and final hearing."

Thereafter, all parties indicated their consent to this proposal, and as a result an Order was signed and filed in this cause on February 18, 1954, which provided (1) that the aforesaid proceeds of the condemnation award should be paid to the Peoples Trust Company of Bergen County, Hackensack, New Jersey for deposit in an account designated "Walter G. Winne, Master of the United States District Court", and (2) for creating the lis pendens. A copy

of this order is annexed hereto and made a part hereof as Exhibit "A".

9. As appears by the "Notice of Payment of Condemnation Award Into the Superior Court of New Jersey, Chancery Division" in the aforesaid condemnation proceedings, the State Highway Commissioner, on March 5, 1954, caused to be paid into the Superior Court of New Jersey, Chancery Division, the sum of $776,459.41, the amount of the condemnation award. This was done without the prior knowledge or instigation of Mr. Marcus or his attorneys.

10. On June 4, 1954, an order was entered in the aforesaid condemnation proceedings in the Superior Court of New Jersey, Chancery Division, by the Hon. John Grimshaw, Judge of the Superior Court, upon consent of the attorneys for all of the parties hereto, including the defendant Milmar Estate, Inc., providing for the payment of the proceeds of the aforesaid condemnation award to Walter G. Winne, Master of the United States District Court, in accordance with the aforesaid order of this Court of February 18, 1954. A copy of this order is annexed hereto and made a part hereof as Exhibit "B". As a result of this order the said money was paid into the said account of Walter G. Winne.

/s/ JULES E. TEPPER
Jules Tepper

Sworn to and subscribed
before me this 12th day
of September, 1956.

/s/ ESTHER MC DEVITT
A Notary Public of New Jersey

• • •

Exhibit "B"

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
BERGEN COUNTY

DOCKET NO. C1313-53

Civil Action In Condemnation

STATE OF NEW JERSEY By the ACTING STATE HIGHWAY COMMISSIONER,

Plaintiff,

—VS.—

MILMAR ESTATE, INC., A Corporation of New Jersey, *et al.*,

Defendants.

ORDER DIRECTING PAYMENT OF FUNDS

IT APPEARING to the Court that there was paid into the Superior Court of New Jersey, Chancery Division, on or about March 10, 1954, the sum of Seven Hundred Seventy-six Thousand, Four Hundred Fifty-nine Dollars and Forty-one Cents ($776,459.41) as the result of an award made by Commissioners in Condemnation, to be paid by the Acting State Highway Commissioner, for the acquisition by condemnation for public use by the State of New Jersey, certain lands situate, lying and being in the Borough of Fort Lee in the County of Bergen and State of New Jersey, and more fully described in a certain Petition filed in the office of the Clerk of Bergen County and addressed to the Hon. H. Wallace Leyden, one of the Judges of the Superior Court of New Jersey.

Exhibit "B"

AND IT FURTHER APPEARING that the following parties appear by the Order of Payment dated March 5, 1954 and the Notice thereof dated March 10, 1954, to be the owner or owners and persons interested in said land and premises and the award therefor:

> Tessie Schlesinger; Julia Steinberger; Mary Miller, otherwise known as Anna Miller; Sarah Marcus; Al Bierman; William Miller; Eli Quain; Samuel Marcus; State of New Jersey; Borough of Fort Lee, in the County of Bergen, a municipal corporation of New Jersey; Milmar Estate, Inc., a corporation of New JJersey; Bill Miller's Riviera, Inc., a corporation of New Jersey.

AND IT FURTHER APPEARING that Tessie Schlesinger and Julia Steinberger are the holders of a mortgage which encumbered said premises, and have consented in writing to the entry of this judgment and that by the provisions of the Order of the United States District Court for the District of New Jersey, the amount of the mortgage held by them is to be paid to them from the fund in Court when it has been transferred pursuant to this Order.

AND IT APPEARING that Mary Miller, otherwise known as Anna Miller, conveyed and transferred all of her interest in the said premises to Milmar Estate, Inc. by deed dated August 6, 1949, duly executed and acknowledged, and recorded in the Bergen County Clerk's office on May 19, 1954 in Book 3536, page 195. And the grantor of said deed is Ann Miller of 176 Seeley Street, Brooklyn, N. Y., and former wife of William Miller, and that no other person named Mary Miller or Anna Miller has any interest in the award which was the subject of the above condemnation.

AND IT FURTHER APPEARING that Sarah Marcus conveyed and transferred all of her interest in the said real estate

which was the subject of said condemnation, to Milmar Estate, Inc., by deed dated October 16, 1951 and recorded October 25, 1951 in the Bergen County Clerk's office in Book of Deeds 3260, page 240, so that said Sarah Marcus has no interest in the said award.

AND IT APPEARING that Al Bierman and William Miller are Parties Plaintiffs in the action in the United States District Court for the District of New Jersey, hereinafter referred to, in which Samuel Marcus and Milmar Estate, Inc., are Parties Defendants, and that Al Bierman and William Miller, through their attorneys, Chazin & Chazin, have consented to the entry of this Order, and their interest, if any, in said fund will be preserved by deposit in the Peoples Trust Company of Bergen County, Hackensack, New Jersey, according to the terms of the Order heretofore made in said Court by the Hon. Alfred E. Modarelli.

AND IT FURTHER APPEARING that Eli Quain, heretofore on May 14, 1954, conveyed all of his interest in said land and premises, the subject of said condemnation proceedings, to the State of New Jersey by deed dated that date and duly acknowledged and recorded in the Bergen County Clerk's Office in Book 3536, page 246. Therefore said Eli Quain has no interest in said fund.

AND IT APPEARING that the State of New Jersey by letter dated May 27, 1954 from the Department of Law and Public safety, signed Stanley E. Rutkowski, Deputy Attorney General, certified as follows:

> Re: State of New Jersey, By the Acting State Highway Commissioner vs Milmar Estate, Inc., a corporation of New Jersey, et al
>
> Docket No. C1313–53

Exhibit "B"

I have been advised that application will be made to the Court in accordance with Rule 4:92-11 for an order directing the distribution of the fund deposited in the Court on March 5, 1954.

The payment of this fund was paid into Court in accordance with N. J. S. A. 20:1-15, subject to distribution upon application of any party in interest according to the statute and practice of the Court.

Please be advised that we have no further interest in the distribution of these monies.

AND IT FURTHER APPEARING by proof satisfactory to the Court, that the Borough of Fort Lee, in the County of Bergen, a municipal corporation, has received taxes in full for the year 1953 and the first quarter of 1954, and therefore has no interest in said award.

AND IT FURTHER APPEARING that Milmar Estate, Inc. through its attorney, Maurice C. Brigadier, has consented to the entry of this order and that its interest in said fund will attach to the deposit of said monies in the Peoples Trust Company of Bergen County, pursuant to the order of the United States District Court referred to herein.

AND IT FURTHER APPEARED that Bill Miller's Riviera, Inc., has executed a deed to the State of New Jersey of the premises which are the subject of said award, dated March 10, 1954 and acknowledged the same date and to be recorded in the Bergen County Clerk's office this 4th day of June 1954 and that the said Bill Miller's Riviera, Inc., through Francis A. McEntee, its attorney, has consented to the entry of this Order.

AND IT APPEARING to the Court that in the suit heretofore referred to in the United States District Court for the

Exhibit "B"

District of New Jersey, one of the Defendants is Samuel Marcus who has consented to the entry of this Order through his attorneys, Robert D. Grosman and Jules E. Tepper, and that in the said suit the interest of the parties thereto, viz. Al Bierman, William Miller, Samuel Marcus and Milmar Estates, Inc. were by United States District Court Judge Alfred E. Modarelli, by order dated February 15, 1954, consented to by all the parties of said action, ordered protected by the payment of the award in condemnation referred to herein in the following matter:

> The State Highway Commissioner of the State of New Jersey shall pay over the proceeds of the condemnation award made in favor of Milmar Estates, Inc. by the Commissioners in condemnation in the matter of the Petition of the State Highway Commissioners of the lands of Milmar Estates, Inc., a corporation of New Jersey before Honorable J. Wallace Leyden, Superior Court Judge, Bergen County, New Jersey, which premises are situated in Fort Lee, Bergen County, New Jersey, owned by Milmar Estates, Inc., and which premises are commonly known as "Bill Miller's Riviera" to Peoples Trust Company of Bergen County, 210 Main Street, Hackensack, New Jersey, which said bank shall receive said money and place the same upon deposit in an account designated "Walter G. Winne, Master of the United States District Court, District of New Jersey; and which said money shall not be disbursed by said banking institution or subject to withdrawal by any person except upon the express order of the United States District Court, District of New Jersey; no bond shall be required of the bank, Peoples Trust Company and Walter G. Winne, Master.

IT IS THEREUPON on this 4th day of June, 1954 ordered as follows:

Exhibit "B"

1. That Mary Miller, otherwise known as Anna Miller; Sarah Marcus; Eli Quain; State of New Jersey; Borough of Fort Lee, in the County of Bergen, a municipal corporation, have no interest in said award of Seven Hundred Seventy-six Thousand, Four Hundred Fifty-nine Dollars and Forty-one Cents ($776,459.41) heretofore paid into the Superior Court of New Jersey, Chancery Division.

2. That the interest of Tessie Schlesinger and Julia Steinberger, as mortgagees, will be protected by payment heretofore provided, pursuant to the consent of their Counsel, attached hereto.

3. That the interests of Al Bierman, William Miller, Samuel Marcus, Milmar Estates, Inc., and Bill Miller's Riviera, if any, in said award, shall attach to and be protected by payment of said funds as hereinafter ordered, and as consented to by their respective counsellors.

4. That the Clerk of this Court shall forthwith make out a check for said funds, less the statutory charges to Walter G. Winne, Master of the United States District Court, District of New Jersey, and transmit said check directly to the Peoples Trust Company of Bergen County, 210 Main Street, Hackensack, New Jersey, as provided in the Order of the United States District Court for the District of New Jersey hereinabove recited.

JOHN GRIMSHAW
J.S.C.

Exhibit "B"

RE: CONSENT TO THE ENTRY OF THE ABOVE ORDER

MAURICE C. BRIGADIER
MAURICE C. BRIGADIER
Attorney for Milmar Estates, Inc

CHAZIN & CHAZIN
CHAZIN & CHAZIN
Attorneys for Al Bierman and William Miller

By: Abraham Chazin
A Partner

WINNE & BANTA
Attorney for Bill Miller's Riviera

By W. G. Winne, a partner

ROBERT D. GROSMAN
ROBERT D. GROSMAN

and

JULES E. TEPPER
JULES E. TEPPER
Attorneys for Samuel Marcus

BARKAVE G. ELIAN
Atty for Tessie Schlesinger and Julia Steinberger

Affidavit in Support of Motion for Summary Judgment

STATE OF ,
COUNTY OF , *ss.*:

SAMUEL MARCUS, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am one of the defendants in the above entitled action.

Affidavit in Support of Motion for Summary Judgment

2. After the commencement of the within action in which I was made a defendant, I retained the late Robert D. Grosman and Mr. Jules Tepper as my attorneys. At the time when I retained them and in conferences subsequent thereto, but prior to October 20, 1952, I made a complete disclosure of the facts, including not only my own version of the facts, but also in detail the contentions of the other parties hereto, including the plaintiffs Al Bierman and William Miller and the defendant Milmar Estate, Inc. In particular I advised them of the conflicting claims of myself and the other parties hereto to the ownership of the Milmar stock, but I at no time claimed any direct or indirect interest personally in Milmar's real or personal property.

3. At no time did I have any discussion with my attorneys concerning a notice of lis pendens or the necessity, desirability, or advisability of filing such a notice. In fact, I neither knew what such a notice was, nor did I have any knowledge that such a notice had been filed on my behalf by my attorneys until long after the same was filed in this case. I first became aware that any such notice had been filed on my behalf when the crossclaim of the defendant Milmar Estate, Inc. was served upon my attorneys and brought to my attention in October, 1954.

/s/ Samuel Marcus
Samuel Marcus

Sworn to and subscribed
before me this 11th day
of September, 1956.

/s/ Max Leichtman
Max Leichtman
Notary Public of New York

Excerpts from Hearing of October 24, 1956

—21—

• • •

Mr. Schapira: Well, your Honor, we are appealing, of course, from the various points of your judgment. And

—22—

one of the points in your judgment is that there was five hundred and some-odd thousand dollars to be turned over to Milmar.

The Court: Nobody disputes that that belongs to Milmar.

Mr. Schapira: No, there is no dispute on that. But there is a dispute as to whether or not this contract, the original contract entered into, was a proper legal contract. If I recall correctly, there was an allegation made that it was nudum pactum, that there was no contract from the outset.

The Court: Of course, that was only said after the interpleader was filed. Before that nobody said there was no contract.

Mr. Schapira: Well, that wasn't even in controversy until the interpleader was filed. I mean there wasn't any question to be adjudicated until after the interpleader was filed, if your Honor please. As I see it, there wouldn't have been any controversy at all if the interpleader hadn't been filed, until the distribution of the assets of that corporation, because then—

The Court: Oh, my, my! How can you say that, after all of the time I put in that opinion; how can you make such a statement? At no time did Marcus ever claim that he owned any part of that, until the interpleader was

—23—

started. Then all of a sudden he said, "I own half of the stock"—he said, "I own all the stock," I understand he says now, "I only own half the stock." Maybe when he gets to the circuit he will make it three-quarters of the stock.

Mr. Schapira: I admit that that is what your opinion said, if your Honor please.

Excerpts from Hearing of October 24, 1956

The Court: And amply supported by the evidence. I was going to make a deadly parallel of all the conflicting statements made by one witness in the case, particularly the one who said, "I signed affidavits without reading them." I said, "Wait till the circuit reads that one, then they will know how you can rely on the sworn statements."

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The Court: Now hold it, please. This case has been characterized with this bickering from the first day it started. And the mistake that was made here—this is not criticism, you all meant well—you fellows yielded too often to the other side, for the sake of trying to expedite it at the end, for the sake of trying to get a little harmony out of it, not knowing that you were dealing with one who was not interested in harmony—and I don't mind saying he is not interested in justice, either, I think he is interested in spite and vengeance. He is a very wealthy man. He can hold out till the cows come home. And that I think he intends to do.

And maybe I can't look at this objectively any more, feeling as I do about the whole case, after hearing it for many, many days on end, after listening to more perjury in one trial than I have listened to in any other case I have heard

—37—

since I am on this bench, which is six years; maybe I can't be objective any more about it.

• • •

Memorandum

(Filed—October 26, 1956)

An application has been made by defendant Samuel Marcus for a stay of execution of the judgment dated and filed October 19, 1956, pursuant to the provision of Rule

73(d). Amongst the proposals submitted by the defendant Marcus is that the stay be limited to one-half of the balance of $569,674.70 now on deposit in the Peoples Trust Company of Bergen County, in the account of Walter G. Winne, Master, United States District Court, upon the posting by him of a supersedeas bond in the sum of $250.00 to cover alleged costs, interest, and damages.

Under paragraph 13 of the final judgment entered in this matter, defendant Marcus is entitled to receive from the Clerk of this Court the sum of $35,600.00, which is the total interpleaded fund less the award of a $500.00 counsel fee. He further proposed to leave this fund on deposit with the Clerk of the Court as security for any interest and damages for delay which the plaintiffs, Al Bierman and William Miller, the defendant, Milmar Estate, Inc., and the added third-party defendant, Al Kevelson, might be entitled to recover should the final judgment be affirmed. He further states that if the sum of $569,674.70 is left in the custody of the Master pending the appeal, his $35,600.00 award would be more than ample to cover interest for a full year.

After the interpleaded suit was filed, there was deposited in the Registry of this Court, the aforesaid sum of $35,600.00, which represented the balance due him for the sale of his stock pending the disposition of the interpleaded suit. Long after suit was instituted in this cause, some real estate belonging to Milmar Estate, Inc., was acquired and condemned by the New Jersey State Highway Commission, for which it received the $569,674.70. By stipulation of counsel, it was agreed that this sum be placed in the Master's account. Obviously, this sum was not in controversy because it did not exist when this suit was filed.

The defendant relies upon the following provision contained in Rule 73(d):

Memorandum

> " * * * When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay."

The defendant concedes and has always conceded throughout the entire litigation that the aforesaid sum received from the condemnation award and on deposit with the Master has never been the subject of any controversy; that the same has always been and is the sole property of Milmar Estate, Inc.; and that he has not and does not now assert any claim with respect to said fund. His claim is in respect to the ownership of the stock of Milmar Estate, Inc., which question has been disposed of by this court that he is not entitled to any of the stock of Milmar Estate, Inc., since he sold it. Since the said fund is not the property in controversy, and never was, the rule does not warrant the granting of any stay with respect to it; nor is there any provision in Rule 73 or Rule 62 of the Federal Rules of Civil Procedure, which empowers this court to grant a stay with respect to the condemnation fund.

The defendant Marcus would be entitled to a stay with respect to such portions of the judgment as deal with the declaration of the ownership of the stock and the requirement that he deliver up for cancellation the shares of stock in his possession; such stay, however, if desired, could only be obtained upon supplying a supersedeas bond for the damages that might be sustained by reason of such stay and the cost of appeal. There is no proof as to the value of the stock in question since Milmar Estate, Inc., is a

private corporation, and there is no demonstrative value on its stock.

The stay with respect to the condemnation fund is denied.

Order Denying Summary Judgment

(Filed—November 28, 1956)

This matter coming before the Court on motion of Maurice Schapira, attorney for defendant Samuel Marcus, for summary judgment in favor of Samuel Marcus and against Milmar Estate, Inc., dismissing the 4th, 5th, 6th and 7th counts of the cross-claim of the defendant, Milmar Estate, Inc., against the defendant, Samuel Marcus, Samuel M. Koenigsberg appearing for Maurice Schapira, in the presence of Maurice C. Brigadier, attorney for defendant Milmar Estate, Inc., and the Court having heard argument and having considered the pleadings, affidavits, prior proceedings in the cause and the briefs of the parties, and the Court finding that there are genuine issues as to material facts in dispute, and that the defendant, Samuel Marcus, is not entitled to a summary judgment as a matter of law,

It is, on this 28th day of November, 1956, ORDERED that the motion of Samuel Marcus for summary judgment against the defendant, Milmar Estate, Inc. dismissing the 4th, 5th, 6th and 7th counts of the cross claim of defendant, Milmar Estate, Inc. against the defendant, Samuel Marcus, be and hereby is in all things denied.

/s/ ALFRED E. MODARELLI
Alfred E. Modarelli
United States District Judge

Order Directing Payment Out of Funds

This matter coming before the Court on the application of Maurice C. Brigadier, Esq., attorney for defendant, Milmar Estate, Inc., and it appearing that all of the parties in interest consent to the granting and entry of the within order.

It is, on this 26th day of November, 1956 ORDERED that Walter G. Winne, Matser heretofore appointed by the United States District Court in the above cause be and is hereby permitted, authorized, directed and instructed to pay from the funds on deposit in his name as Master of this Court in the Peoples Trust Company of Bergen County, Hackensack, N. J., to the United States of America, Internal Revenue Service, forthwith the sum of $67,784.68 in satisfaction of liens asserted by the said Internal Revenue Service against Milmar Estate, Inc.

/s/ A. E. MODARELLI
J.

The undersigned, do each for his respective client hereby consent to the making of the above payment and to the entry of the within order.

/s/ MAURICE SCHAPIRA
Maurice Schapira
Attorney for defendant, Samuel Marcus

CHAZIN & CHAZIN
Attorneys for plaintiffs, Al Bierman and William Miller

By THEO. S. CHAZIN
A Member of the Firm

/s/ MAURICE C. BRIGADIER
Maurice C. Brigadier
Attorney for defendant, Milmar Estate, Inc.

/s/ GEORGE KESSELHAUT
George Kesselhaut
Attorney for Al Kevelson

Order Allowing Fee to Master

It appearing to the Court that Walter G. Winne, Esq. has had in an account with the Peoples Trust Company of Bergen County, the sum of $768,689.32 deposited on June 15, 1954, from which certain disbursements have been made, leaving in his possession as of this day the sum of $569,-674.70, including interest, and

It further appearing that various services have been rendered by said Walter G. Winne while these moneys have been in his possession, in reference to claims against the various parties, and he has been required to give attention in some degree to the proceedings before this court,

IT IS ON THIS 26th day of November, 1956, Ordered that there be allowed said Walter G. Winne, to be paid him herewith from the moneys in his hands, the sum of $3,500.00 for such services.

/s/ A. E. MODARELLI
Judge, United States District Court

We consent to the entry of the above Order.

CHAZIN & CHAZIN

By Theo. S. Chazin
Attorney for Al Bierman and William Miller

MAURICE SCHAPIRA
Attorney for Samuel Marcus

MAURICE C. BRIGADIER
Attorney for Milmar Estate, Inc.

Exhibit DM-2

(Photostat)

(See Opposite) ☞

MEMORANDUM OF AGREEMENT made in Fort Lee in State of New Jersey on this 23rd day of July, 1947 between SAMUEL MARCUS, residing at 685 West End Avenue, New York City, and WILLIAM MILLER, residing at Fort Lee, New Jersey.

WITNESSETH:

WHEREAS, there is a certain note in the sum of Fifty Thousand ($50,000) dollars which Miller has executed to Marcus, and which said note is in default, and

WHEREAS, Miller has pledged his shares of stock of MILMAR ESTATES, INC. with MARCUS as security for the payment of the said note of fifty thousand ($50,000) dollars, and

WHEREAS, both Miller and Marcus are desirous of entering into an agreement with respect to the said note and stock, and with respect to future purchase rights in the stock of MILMAR ESTATES, INC.

NOW THEREFORE, in consideration of One ($1.00) Dollar each to the other in hand paid and for good and valuable consideration, it is mutually agreed, as follows:

1. The fifty thousand ($50,000.00) dollar note, which is presently in default, will be destroyed, and a new note for fifty thousand ($50,000.00) dollars due June 1, 1948, payable $500 weekly thereafter every seven days, interest at 4%, acceleration and default clause, will be executed by Miller in favor of Marcus. This said note will be dated June 1, 1947. Upon payment of $50,000.00 and interest, note to be cancelled and Milmar stock turned over to Miller, Miller shall be liable on said note to Marcus only in the event of a foreclosure or of a forced sale of the Riviera property(forced sale to be

foreclosure or of a forced or the Riviera property(forced sale to be
a sale made after the property shall be vacant for ninety
and Miller shall be liable to Marcus in that event for his shares
sustained in proportion to shares held by Miller in Milmar

2. In accordance with the terms of the lease, between MILMAR ESTATES, INC. and BILL MILLER'S RIVIERA, INC., all monies advanced by Miller and Marcus for taxes, amortitation and interest will be considered as a loan toMILMAR ESTATES, INC., and MILMAR ESTATES, INC. will execute non-interest-bearing 5 year notes as evidence of indebtedness, repayable from surplus funds only.

In the event that either party to this agreement shall desire to sell Milmar's stock to a third party, it is herewith agreed that such stockholder shall first offer his stock to the other party by notice in writing, giving the other party thirty (30) days in which to acquire the stock of the dispossing stockholder. The notice of intention to sell shall state the sale price of the said stock, and the other stockholder, if he elects to acquire the said stock, may do so at the price stated in said notice.

Bill Marcus

Bill Miller

DM-2

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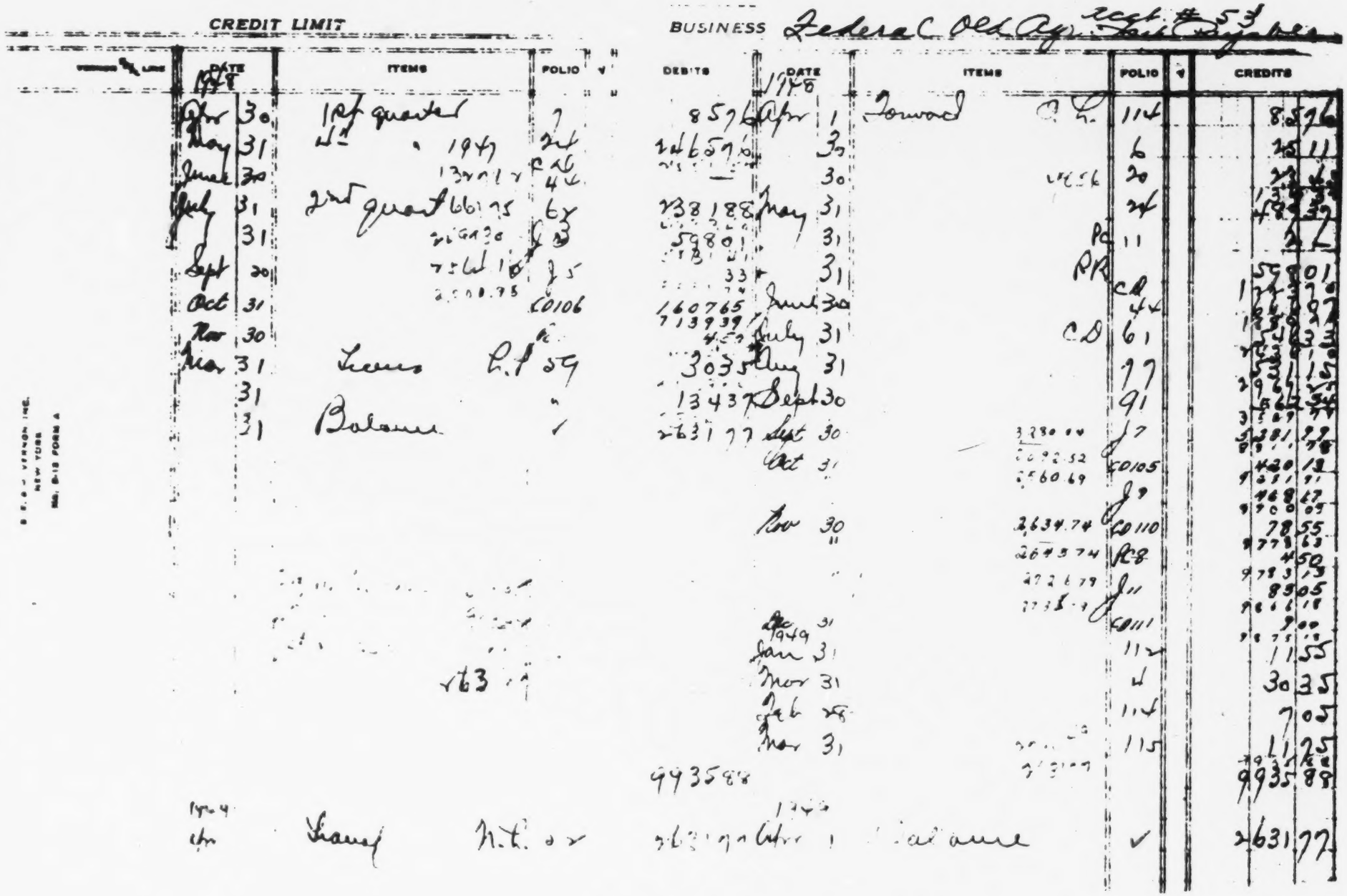
EXHIBIT DM-2

Exhibit DM-6

(Photostat)

(See Opposite) ☞

EXHIBIT DM-6(Cont'd)



CREDIT LIMIT

BUSINESS Federal Old Agr. Acct. # 53 [illegible]

DATE 1948		ITEMS		POLIO	DEBITS	DATE 1948		ITEMS		POLIO	CREDITS
Apr	30	1st quarter		7	8576	Apr	1	Forward	O.L.	114	8576
May	31	4th " 1947		24	246576		30			6	2511
June	30	13[illegible]		CD 44			30		[illegible]	20	[illegible]
July	31	2nd quart 66175		62	238188	May	31			24	[illegible]
	31	2[illegible]30		J3	59801		31			PC 11	[illegible]
Sept	20	7[illegible]		J5	33		31			RR	59801
Oct	31	2[illegible].75		CO106	160765	June	30			CD 44	[illegible]
Nov	30				713939	July	31			CD 61	[illegible]
Mar	31	Trans	L.P.	59	3035	Aug	31			77	[illegible]
	31			"	13437	Sept	30			91	[illegible]
	31	Balance		✓	263177	Sept	30		3280.04	J7	[illegible]
						Oct	31		2092.52	CO105	420.13
									2560.69	J9	468.67
						Nov	30		2634.74	CO110	7855
							"		2643.74	PC8	450
							"		2726.79	J11	8505
						Dec	31		[illegible]	CO111	900
						1949 Jan	31			112	1155
		263[illegible]				Mar	31			4	3035
						Feb	28			114	705
						Mar	31		[illegible]	115	1175
					993588				263177		993588
1949 Apr		Transf	N.L.	22	263177	1949 Apr	1	Balance		✓	263177

S.E.&J. VERNON INC. NEW YORK No. 8-13 FORM A

EXHIBIT DM-6(Cont'd)

State (New Jersey) Tax Payable Unemployment Acct. #54

CREDIT LIMIT

DATE 1948	ITEMS	FOLIO	DEBITS	DATE 1947	ITEMS	FOLIO	CREDITS
Apr 30		7	123597	Apr 1	Forward	112	158 66
30			158 66	1			6251 32
May 31		24	81327	30		6	25 11
June 30		CD 44	66607	30		20	23 45
30		44A	-	May 31		24	489 37
30				31	P.C	11	1 11
30		44A	100176	31	PR		597 12
July 31		CD 61	-	June 30		44	666 67
31		J3	597 12	30	CD		666 67
Aug 31	2nd quarter	CD 77	23714	July 31		61	546 33
Sept 30		J5	33	Aug 31		77	531 15
Oct 31		CO106	160765	Sept 30		91	9955 76
Nov 30			667229			J9	1
Mar 31	Trans	L.P 59	30838	Oct 31		CO105	420 18
31	Balance		9572 40			J9	1
				Nov 30		CO110	78 55
						PC8	1
						V11	1
				Dec 31		CO111	1
				Jan 31		112	11 55
				Mar 31		4	30 35
				Feb 28		114	7 05
				Mar 31		115	11 75
			18 2307				18553 07
1949 Apr 1	Trans	N.L. 5	9572 40	1949 Apr 1	Balance		9572 40

EXHIBIT DM-6(Cont'd)

RATING
CREDIT LIMIT

ADDRESS
BUSINESS Federal Unemployment Tax Payable Acct #55

VERNON LINE	DATE	ITEMS	FOLIO	✓	DEBITS	DATE	ITEMS	FOLIO	✓	CREDITS
	1948					1948				
	Oct 31				103189	Apr 1	Forward Bal. A.C.L.	114		1284 70
	1949 Mar 31	Balance	J9 ✓		2267 32	1	✓ 3 47 ✓	✓		1026 56
						Mar 31	1,279.37	19		3111 28
										987 95
					3299 21					3299 21
	1949 Apr 1	Trans	N.L. 54		2267 32	1949 Apr 1	Balance	✓		2267 32

EXHIBIT DM-6(Cont'd)

CREDIT LIMIT

BUSINESS Cabinet Tax Payable

VERNON LINE	DATE 1948	ITEMS	FOLIO	DEBITS	DATE 1948	ITEMS	FOLIO		CREDITS
	June 30		CD 44A 1	1719497	Apr 1	Forward OL	210		14[illegible]
	July 31	Jane	C-D 6r	1936193	May 31		6	1	[illegible]
	Aug 31	July	77	1432756	June 30	3359582	7		[illegible]
	Sept 30	Aug	92	1195140	July 31	2856165 CR	8		[illegible]
	Oct 31		CD106	600000	Aug 31	2618530	9		[illegible]
	1949 Mar 31	Balance	J9 ✓	59628	Sept 30	24715.28	11		[illegible]
				2707985	Oct 31	27676.13	CR N		[illegible]
				9651200		27079.85			9651200
	1949 Apr 1	Transf	NL 55	2707985	1949 Apr 1	Balance	✓		27079.85

EXHIBIT DM-6(Cont'd

CREDIT LIMIT

BUSINESS Withholding Tax Payable [illegible]

DATE		ITEMS	POLIO	DEBITS	DATE		ITEMS	POLIO	CREDITS
1948					1948				
Apr	30		7	124544	Apr	1	Forward O.K.	212	6642 19
	30	[illegible]	"	37260		30		6	215 20
May	31	4th quarter 1947	24	502415		30	[illegible]	20	189 50
June	30	CD	44A	277390	May	31		24	[illegible]
July	31	[illegible]	62	480155		31	PC	11	7 -
	31		J3	325640		31	PR		3256 40
Sept	30		95	262	June	30	72905 CD	4	[illegible]
	30	[illegible]	92	305880	July	31	532 [illegible]	61	[illegible]
	"	[illegible]	"	368660	Aug	31	1881 90	77	[illegible]
Oct	31		CD106	287480	Sept	30	1491 10	91	[illegible]
			J9	8390			3357 20	J7	[illegible]
Nov	30		J3	[illegible]	Oct	31	3190.90	CD105	2708 50
Mar	31	Transf L.P.	59	1920	Nov	30	3107.00		[illegible]
	31	Balance		418870			3733.90	CD110	652 90
		[illegible]					3785 90	PC8	[illegible]
					Dec	31	3837 90	CD111	[illegible]
					1949 Jan	31		112	68 20
					Mar	31		4	185 -
					Feb	28		114	43 80
					Mar	31	[illegible]	115	73 -
				31388 64			[illegible]		31388 64
1947					1949				
Apr	1	Transf N.L.	56	418870	Apr	1	Balance	✓	418870

S. E. & M. VERNON, INC. NEW YORK NO. 8-18 FORM A

EXHIBIT DM-6 (Cont'd)

CREDIT LIMIT

BUSINESS Legal and accounting Acc. #60

DATE		ITEMS		FOLIO	✓	DEBITS	DATE		ITEMS		FOLIO	✓	CREDITS
1948							1948						
June	30		CA	44A		1050-	Apr	1	J B Hoffman	O.L.	113		3900-
July	31		✓	6x		800-				2850-			
Aug	31		✓	77		1850				2050			
Sept	30			9✓		1000-				1050.00			
Oct	31			J9		4850	Sept	30	J B Hoffman	650.00	J7		2600.00
1949						40000				3250.00			6500.00
Mar	31	Balance		✓		3250.00	Oct	31	J B Hoffman	4000-	J9		4000.00
						4000-							4550.00
						7550-							7550.00
1949							1949						
Apr	1	Loans	NL	63			Apr	1	Balance		✓		4000-

S. E. & M. VERNON, INC. NEW YORK NO. 5-13 FORM A

CREDIT LIMIT

BUSINESS Accrued Rent Payable Acct # 608

DATE 1949	ITEMS	POLIO	✓	DEBITS	DATE 1949	ITEMS	POLIO	✓	CREDITS
[illegible]		[illegible]		[illegible]	Oct 31		[illegible]		[illegible]
Nov 31	Balance		✓	1000 —					
				4000 —					4000 —
1949 Apr 1	Lease	M.L.	65	1000 —	1949 Apr 1	Balance		✓	1000 —

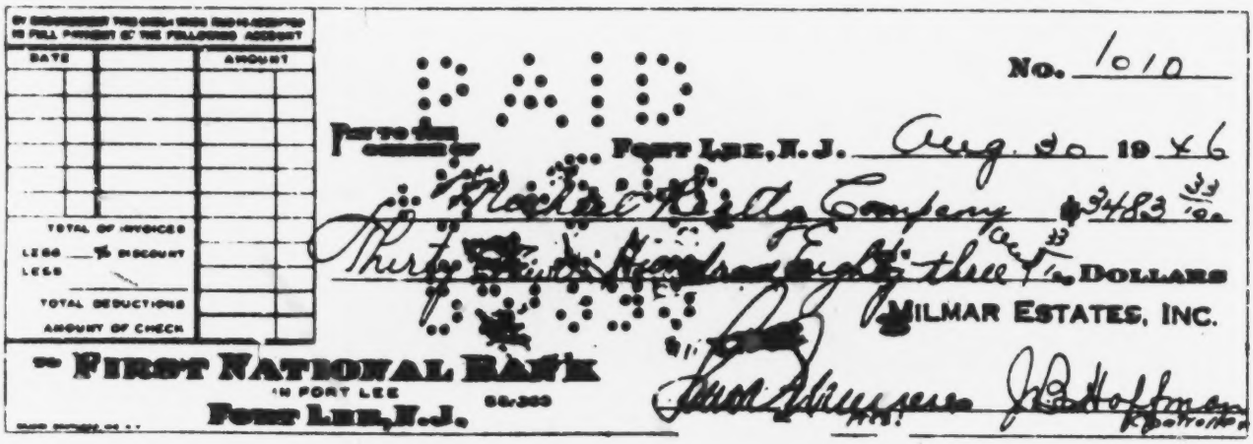
EXHIBIT DM-6(Cont'd

Exhibit DM-12

(Photostat)

(See Opposite) ☞

BY ENDORSEMENT THIS CHECK WHEN RUN IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT



DATE		AMOUNT
TOTAL OF INVOICES		
LESS ___% DISCOUNT		
LESS		
TOTAL DEDUCTIONS		
AMOUNT OF CHECK		

PAID

No. 1010

PAY TO THE ORDER OF FORT LEE, N.J. Aug. 30 1946

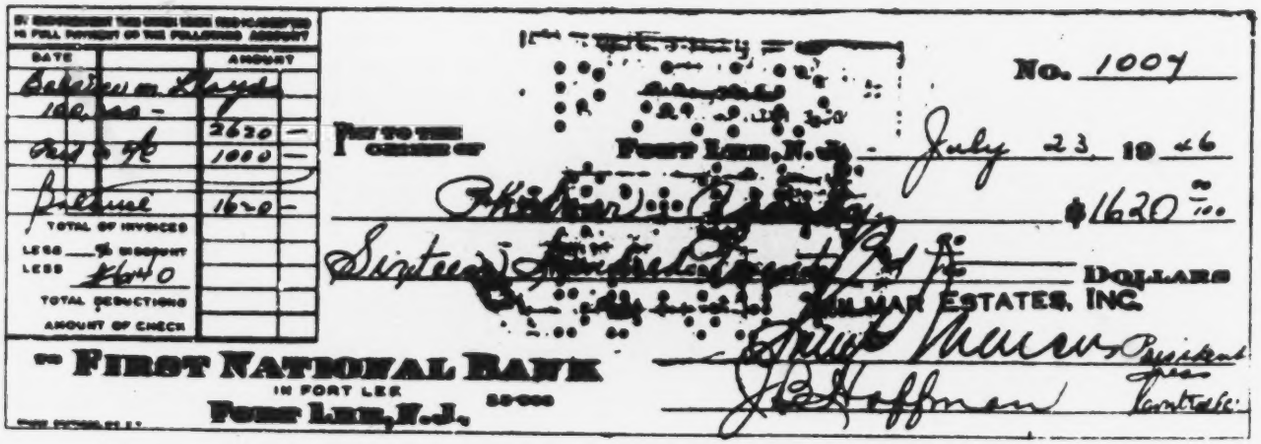
Mackel Realty Company $3483 33/100

Thirty Three Hundred Eighty three 33/100 DOLLARS

MILMAR ESTATES, INC.

THE FIRST NATIONAL BANK IN FORT LEE FORT LEE, N.J. 58-303

Louis Marcus Pres. J. B. Hoffman Controller



BY ENDORSEMENT THIS CHECK WHEN RUN IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

DATE		AMOUNT
Balance on Lloyds		
100 ss -		
	2620	—
Paid to 4/2	1000	—
Balance	1620	—
TOTAL OF INVOICES		
LESS ___% DISCOUNT		
LESS $640		
TOTAL DEDUCTIONS		
AMOUNT OF CHECK		

PAID

No. 1007

PAY TO THE ORDER OF FORT LEE, N.J. July 23 1946

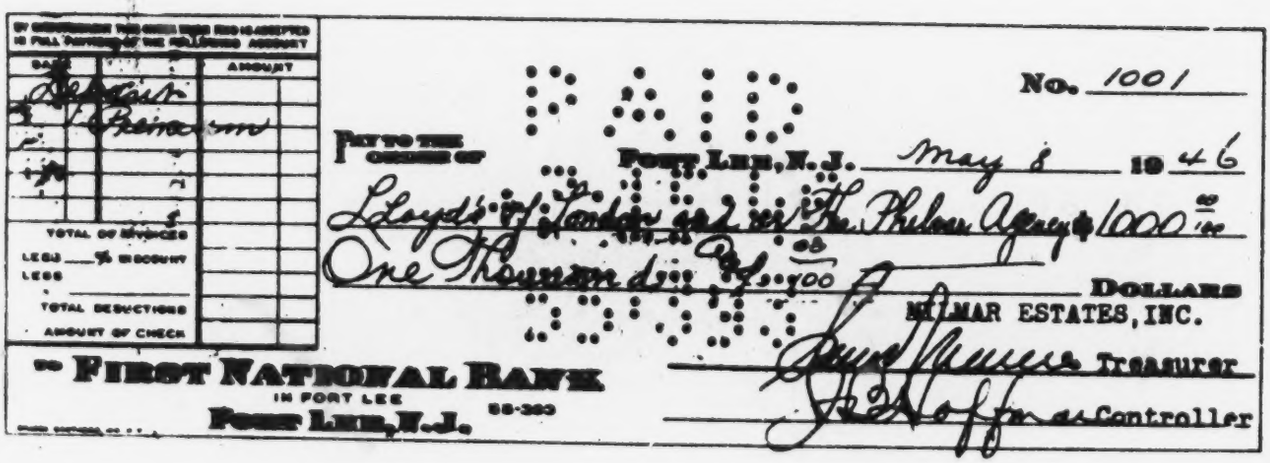
Philmar Agency $1620 00/100

Sixteen Hundred Twenty 00/100 DOLLARS

MILMAR ESTATES, INC.

THE FIRST NATIONAL BANK IN FORT LEE FORT LEE, N.J. 58-303

Louis Marcus President



J. B. Hoffman Controller

BY ENDORSEMENT THIS CHECK WHEN RUN IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

DATE		AMOUNT
Deposit		
Premium		
TOTAL OF INVOICES		
LESS ___% DISCOUNT		
LESS		
TOTAL DEDUCTIONS		
AMOUNT OF CHECK		

PAID

No. 1001

PAY TO THE ORDER OF FORT LEE, N.J. May 8 1946

Lloyd's of London and Mr. The Philmar Agency $1000 00/100

One Thousand and 00/100 DOLLARS

MILMAR ESTATES, INC.

THE FIRST NATIONAL BANK IN FORT LEE FORT LEE, N.J. 58-303

Louis Marcus Treasurer

J. B. Hoffman Controller

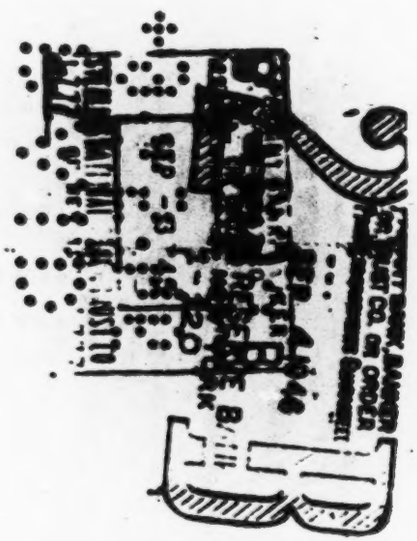
EXHIBIT DM-12(Cont'd)

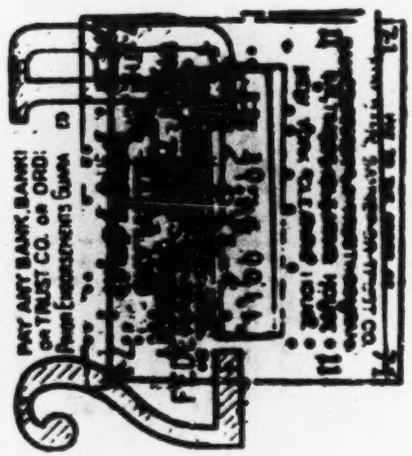
Michael Reilly Company

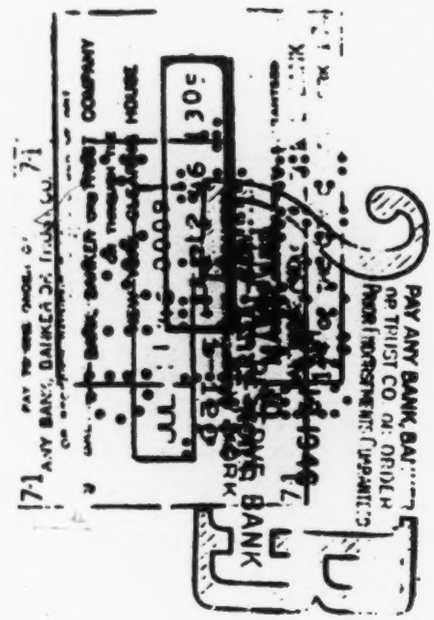
PART OF DM

039340

PAY TO THE ORDER OF
UNION TRUST COMPANY
OF MARYLAND
PHILVAR AGENCY







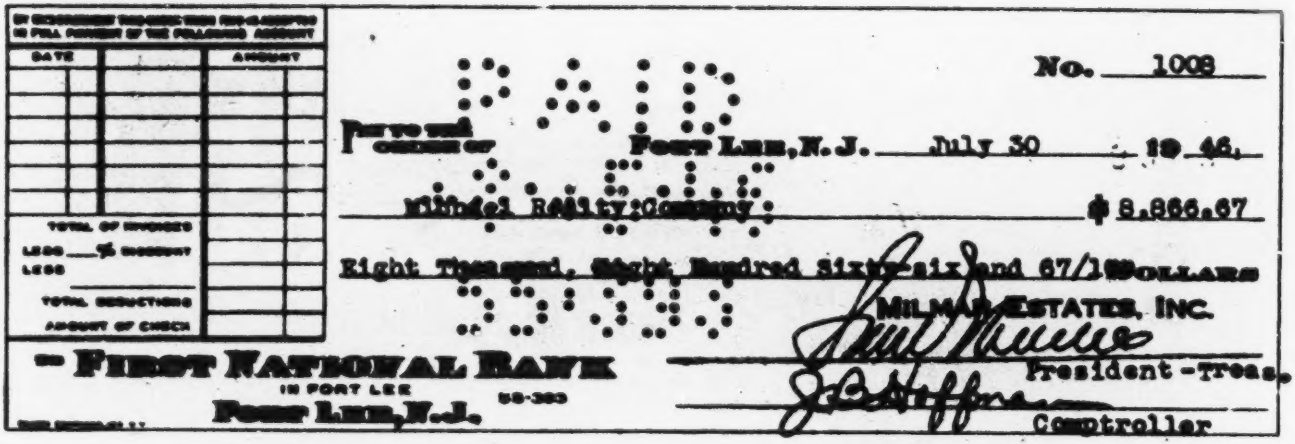
039306

PART OF DM 12

PART OF DM 12

EXHIBIT DM-12(Cont'd)

BY ENDORSEMENT THIS CHECK WHEN PAID IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT



DATE		AMOUNT
TOTAL OF INVOICES		
LESS ___% DISCOUNT		
LESS		
TOTAL DEDUCTIONS		
AMOUNT OF CHECK		

No. 1008

PAID

PAY TO THE ORDER OF FORT LEE, N.J. July 30 1946

Minnel Realty Company $ 8,866.67

Eight Thousand, Eight Hundred Sixty-six and 67/100 DOLLARS

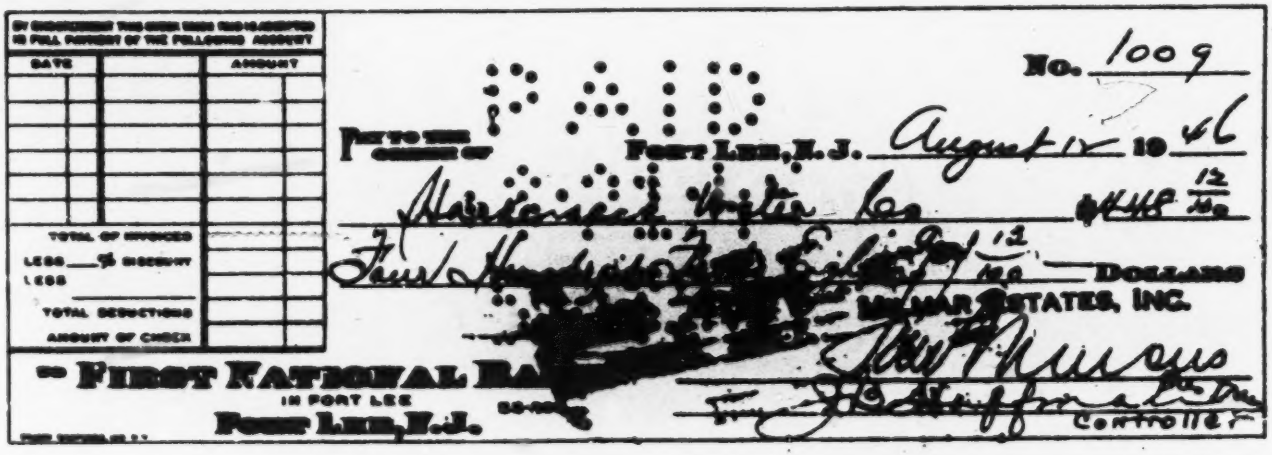
MILMAR ESTATES, INC.

President - Treas.

Comptroller

THE FIRST NATIONAL BANK IN FORT LEE FORT LEE, N.J. 58-303

BY ENDORSEMENT THIS CHECK WHEN PAID IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT



DATE		AMOUNT
TOTAL OF INVOICES		
LESS ___% DISCOUNT		
LESS		
TOTAL DEDUCTIONS		
AMOUNT OF CHECK		

No. 1009

PAID

PAY TO THE ORDER OF FORT LEE, N.J. August 12 1946

Hackensack Water Co $448 12/100

Four Hundred Forty Eight and 12/100 DOLLARS

MILMAR ESTATES, INC.

Controller

THE FIRST NATIONAL BANK IN FORT LEE FORT LEE, N.J. 58-303

ENGLEWOOD

0393-

PART OF LOT 12.

0393-

PART OF LOT 12.

60-40

BY ENDORSEMENT THIS CHECK WHEN PAID ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

DATE		AMOUNT
	Rent for	
	Week Ending	
	October 5, 1947	

IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

BILL MILLER'S RIVIERA, INC.
FORT LEE, N. J.

No. 6858

FORT LEE, N. J. October 10 1947

PAY TO THE ORDER Mikmen Estate $ 2000.00/100

Two Thousand DOLLARS

BILL MILLER'S RIVIERA, INC.

FORT LEE TRUST COMPANY
55-546 FORT LEE, N. J. 55-546

Will Miller
PRESIDENT

PAYMENT STOPPED

DM12

Mikmen Estate Inc

PAY ANY BANK BANKER OR TRUST COMPANY OR ORDER PRIOR ENDORSEMENT GUARANTEED

[redacted]

Returned by FORT LEE TRUST CO., Fort Lee, N. J.

REASON CHECKED

Account attached	Not countersigned
Account closed	Not dated
Alteration	Not drawn on us
Amount - discrepancy	Not properly drawn
Amount - guarantee of	NOT SUFFICIENT FUNDS
Bank restricted	Payment stopped
Dated ahead	Recalled
DO NOT SEND THROUGH AGAIN UNLESS CERTIFIED	Receipt to voucher not signed
Drawn against uncollected funds	Sent to us in error
Endorsement - not complete	Signature incomplete
Endorsement - not correct	Signature incorrect
Endorsement - not witnessed	Signature missing
Endorsement of Bank missing	Signature not authorized
Endorsement - guarantee of	Signature forged
Maker deceased	Witness to mark
NO ACCOUNT	SAVINGS ACCOUNT PASS BOOK MUST ACCOMPANY ORDER
No authority to pay	

No. _____ 10/22/47 19____

CHARGE YOUR ACCOUNT FOR UNPAID ITEM DESCRIBED BELOW

No. _____ 10/22/47 19____

WE CHARGE YOUR ACCOUNT FOR UNPAID ITEM DESCRIBED BELOW

☒ RETURNED HEREWITH ☐ REDEPOSITED, SUBJECT TO FINAL PAYMENT ☐ ENCLOSED FOR COLLECTION

MAKER	PAYABLE AT	REASON UNPAID	AMOUNT
Bill Miller's Riviera	Fort Lee Trust Co. Fort Lee, N.J.	payment stopped	2,000.00
		protest fee	2.52
		POSTAGE AND EXPENSE	.25
			2,002.77

Milmar Estates, Inc.
152 West 42nd Street
New York,18, New York

Prior Endorsements:

THE PUBLIC NATIONAL BANK AND TRUST COMPANY OF NEW YORK
Fifth Avenue OFFICE

FORM 2268 P.D.-329

No. 531

State of New Jersey
County of Bergen } ss.:

On the 20th day of October One Thousand Nine Hundred and 47 at the request of the FORT LEE TRUST COMPANY, I, J. U. ROSS Notary Public, duly commissioned and sworn, residing in the State of New Jersey, presented the original check, a copy hereunto annexed, made by Bill Miller's Riviera, Inc. dated October 10th 1947 payable after date to the order of Milmar Estates Inc. for $2000.00 at the FORT LEE TRUST COMPANY, and demanded payment thereof which was refused, they saying PAYMENT STOPPED Whereupon I, the said Notary, at the request of the aforesaid, did PROTEST, and by these presents do publicly and solemnly PROTEST against the Drawers and Endorsers of said check, and all others concerned, for all Costs, Charges, Damages, and Interest already incurred, and to be hereinafter incurred for want of payment of the same, and on the 20th day of October 19 47 I mailed at Fort Lee, N. J., notices of Protest for non-payment to the Endorsers of the said check, as directed as follows:

The Public Nat'l Bank & Trust Co. New York, New York
Milmar Estates Inc. C/O Public Nat'l Bank & Trust Co., New York, N.Y.
Federal Reserve Bank of New York, Fed. Reserve P.O. Station, N.Y. 45, N.Y.
Bill Miller's Riviera Inc. Hudson Terrace, Fort Lee, New Jersey

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Seal in the town of Fort Lee aforesaid.

J. U. ROSS, Notary Public.
My Commission Expires 12/28/48

(Seal)

EXHIBIT DM-12(Cont'd)

BILL MILLER'S RIVIERA, INC.
FORT LEE, N. J.

No. 6859

PAYMENT STOPPED

FORT LEE TRUST COMPANY
55-546 FORT LEE, N. J. 55-546

DOLLARS

BILL MILLER'S RIVIERA, INC.

Returned by FORT LEE TRUST CO., Fort Lee, N. J.

REASON CHECKED

Account attached	Not countersigned
Account closed	Not dated
Alteration	Not drawn on us
Amount - discrepancy	Not properly drawn
Amount - guarantee of	NOT SUFFICIENT FUNDS
Bank restricted	Payment stopped
Dated ahead	Recalled
DO NOT SEND THROUGH AGAIN UNLESS CERTIFIED	Receipt to voucher not signed
Drawn against uncollected items	Sent to us in error
Endorsement - not complete	Signature incomplete
Endorsement - not correct	Signature incorrect
Endorsement - not witnessed	Signature missing
Endorsement of Bank missing	Signature not authorized
Endorsement - guarantee of	Signature forged
Maker deceased	Witness to mark
NO ACCOUNT	SAVINGS ACCOUNT PASS BOOK MUST ACCOMPANY ORDER
No authority to pay	

No. _____ 10/22/47 19

WE CHARGE YOUR ACCOUNT FOR UNPAID ITEM DESCRIBED BELOW

No. _____ 10/22/47 19____

WE CHARGE YOUR ACCOUNT FOR UNPAID ITEM DESCRIBED BELOW

☒ RETURNED HEREWITH ☐ REDEPOSITED, SUBJECT TO FINAL PAYMENT ☐ ENTERED FOR COLLECTION

MAKER	PAYABLE AT	REASON UNPAID	AMOUNT
Bill Miller's Riviera	Fort Lee Trust Co. Fort Lee, N.J.	payment stopped protest fees	500.00 2.52
		POSTAGE AND EXPENSE	25
			502.77

E P-38-2 Int 12/26/51 M.W.

Milmar Estates, Inc.
152 West 42nd Street
New York 18, New York

Prior Endorsements:

THE PUBLIC NATIONAL BANK AND TRUST COMPANY OF NEW YORK
Fifth Avenue OFFICE

FORM 2388 P.D. 329

No. 532

State of New Jersey } ss.:
County of Bergen

On the 20th day of October One Thousand Nine Hundred and 47 at the request of the FORT LEE TRUST COMPANY, I, J. G. Ross, Notary Public, duly commissioned and sworn, residing in the State of New Jersey, presented the original check, ~~note~~ hereunto annexed, made by Bill Millers' Riviera Inc. dated October 10th 19 47 payable after date to the order of Milmar Estates Inc. for $ 500.00 at the FORT LEE TRUST COMPANY, and demanded payment thereof which was refused, they saying PAYMENT STOPPED Whereupon I, the said Notary, at the request of the aforesaid, did PROTEST, and by these presents do publicly and solemnly PROTEST against the Drawers and Endorsers of said check, ~~note~~ and all others concerned, for all Costs, Charges, Damages, and Interest already incurred, and to be hereinafter incurred for want of payment of the same, and on the 20th day of October 19 47 I mailed at Fort Lee, N. J., notices of Protest for non-payment to the Endorsers of the said check, ~~note~~ directed as follows:

Public Nat'l Bank & Trust Co. New York, New York
Milmar Estates Inc./C/O Public Nat'l Bank & Trust Co. New York, N.Y.
Federal Reserve Bank of New York, Fed. Reserve P.O. Station, N.Y. 45, N.Y.
Bill Miller's Riviera Inc. Hudson Terrace, Fort Lee, New Jersey

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Seal in the town of Fort Lee, aforesaid.

J. G. Ross, Notary Public.
My Commission Expires 12/28/48

EXHIBIT DM-12(Cont'd)

$6000/- 60%

New York Dec 4 1947

On Jan 3, 1948 after date we promise to pay

to the order of Milman Estate Inc

Six Thousand Dollars

Payable at Fort Lee Trust Co Ft Lee N.J.

Value received with int of BILL MILLERS RIVIERA INC

No. Due 1/5/49 Will Miller PRES

PAYMENT STOPPED

PAYMENT OF PM 12 [illegible]

Milman Estate Inc
Will Miller
Sam Newman

PAY TO THE ORDER OF
ANY BANK OR TRUST CO.
PRIOR ENDORSEMENT GUARANTEED
DEC 4 1947
FEDERAL RESERVE BANK
OF NEW YORK
COUNTRY [illegible]

PAY TO THE ORDER OF
BANK, BANKER OR TRUST CO.
OR
NEW YORK
PRIOR ENDORSEMENT GUARANTEED
RR-NOTE DEC 5 1947 MILLER-RR
THE PUBLIC [illegible] TRUST COMPANY
127 YORK 1-127

Returned by FORT LEE TRUST CO., Fort Lee, N. J.

REASON CHECKED.

Account attached	Not countersigned
Account closed	Not dated
Alteration	Not drawn on us
Amount - discrepancy	Not properly drawn
Amount - guarantee of	NOT SUFFICIENT FUNDS
Bank restricted	Payment stopped
Dated ahead	Recalled
DO NOT SEND THROUGH AGAIN UNLESS CERTIFIED	Receipt to voucher not signed
Drawn against uncollected stock	Sent to us in error
Endorsement - not complete	Signature incomplete
Endorsement - not correct	Signature incorrect
Endorsement - not witnessed	Signature missing
Endorsement of Bank missing	Signature not authorized
Endorsement - guarantee of	Signature forged
Maker deceased	Witness to mark
NO ACCOUNT	SAVINGS ACCOUNT PASS BOOK MUST ACCOMPANY ORDER
No authority to pay	

EXP 40 12-26-5 [illegible]

No. 569

No. [illegible]

State of New Jersey
County of Bergen } ss.:

On the 5th day of January One Thousand Nine Hundred and 1948
at the request of the FORT LEE TRUST COMPANY, I, G. W. Brown Notary Public, duly commissioned and sworn, residing in the State of New Jersey, presented the original check, ~~note~~ hereunto annexed, made by Bill Miller's Riviera Inc. dated December 4th 19 47 payable after date to the order of Milmar Estate & Inc.
for $ 6,026.67 at the FORT LEE TRUST COMPANY, and demanded payment thereof which was refused, they saying PAYMENT STOPPED Whereupon I, the said Notary, at the request of the aforesaid, did PROTEST, and by these presents do publicly and solemnly PROTEST against the Drawers and Endorsers of said ~~check~~, note and all others concerned, for all Costs, Charges, Damages, and Interest already incurred, and to be hereinafter incurred for want of payment of the same, and on the 5th day of January 19 48 mailed at Fort Lee, N. J., notices of Protest for non-payment to the Endorsers of the said ~~check~~, note directed as follows:

Federal Reserve Bank of N. Y. Fed. Res. P. O. Stat., N. Y. 45., N. Y.
The Public Nat'l. Bank & Trust Co of N. Y., New York, N. Y.
Milmar Estate & Inc., c/o The Public Nat'l. Bk. & Trust Co., N. Y., N. Y.
Bill Miller's Riviera, Inc. Hudson Terrace, Fort Lee, N. J.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Seal in the [illegible] of Fort Lee, aforesaid.

G. W. Brown Notary Public.
My Commission Expires

(Seal)

PROTEST

Bill Miller's Riviera

FOR THE
FORT LEE TRUST COMPANY
FORT LEE, N. J.

January 5th 19 48.

6,026.67

Interest - - - - -

Fee - - - - - - 2.00

Postage - - - - -

TOTAL $ 6,028.67

G. W. Brown, Notary Public.

EXHIBIT DM-12(Cont'd)

Exhibit DM-13

WINNE & BANTA
Counselors at Law
210 Main Street
Hackensack, N. J.

April 5, 1946

CLOSING ADJUSTMENTS on Transfer of Property at Fort Lee, New Jersey

From MICHAEL REALTY COMPANY — Seller

To WILLIAM MILLER and SAMUEL MARCUS — Purchaser

Buyer's Credits		*Seller's Credits*	
Paid on signing contract and closing in cash	$125,000.00	Purchase Price	$425,000.00
Purchase Money Mortgage	300,000.00	Plate glass insurance	470.00
		Boiler machine	26.57
		Seller's Total Credits	425,496.57
Buyer's Total Credits	425,000.00	Buyer's Total Credits	425,000.00
		Balance to Seller —	496.57

Exhibit DM-25

(Photostat)

(See Opposite) 7

Sept 14/48 P 45.

Rec'd from Sam Marcus note dated June 1/47 for $50,000 - payable to Sam Marcus made by Wellen Miller payable at Bill Miller's Minerva - Hudson Terrace, Fort Lee N.J. which note I am to hold in escrow as per agreement made Sept 14/48

[signature]

EXHIBIT DM-25

4° P-45 - Ident
12-26-51
M.W.

Exhibit DM-27

(Photostat)

(See Opposite) ☞

Hotel Charlotte *A Bland Hotel*

CHARLOTTE, NORTH CAROLINA

9/12/48

Dear Bill

THIS LETTER WILL AUTHORIZE YOU TO SIGN MY NAME TO ALL PAPERS FOR SALE OF MEMBER STOCK TO ME.

Al Bierman

Left Morris Ex. #302 - 2d.

Exhibit DM 27

Exhibit DM-28

(Photostat)

(See Opposite)

EXHIBIT DM-28

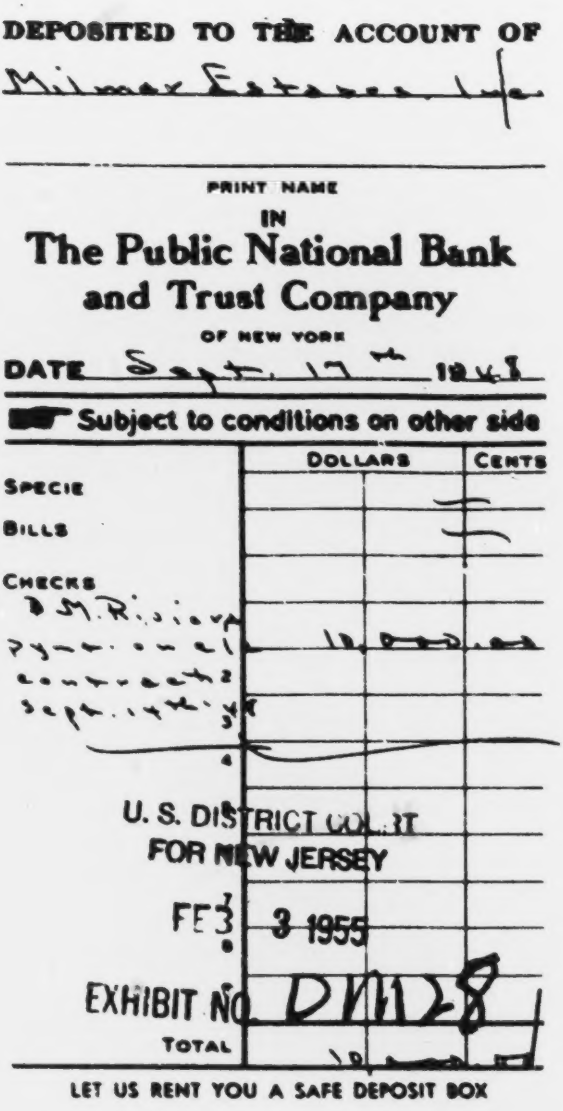
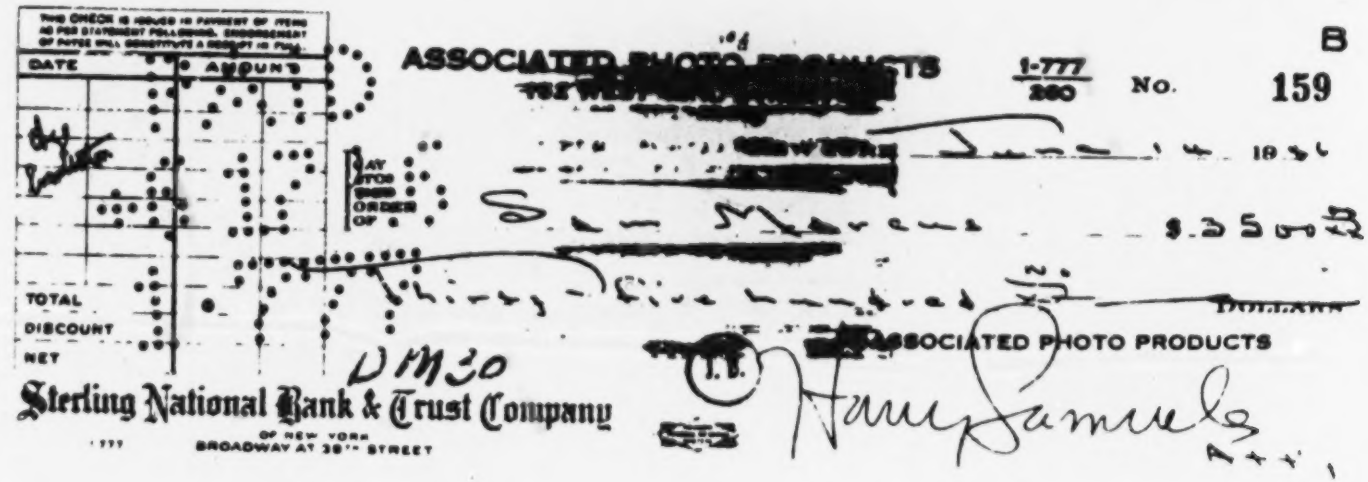


Exhibit DM-30

(Photostat)

(See Opposite) ☞



B

ASSOCIATED PHOTO PRODUCTS

1-777 / 280

No. 159

DATE | AMOUNT

PAY TO THE ORDER OF

TOTAL

DISCOUNT

NET

DOLLARS

ASSOCIATED PHOTO PRODUCTS

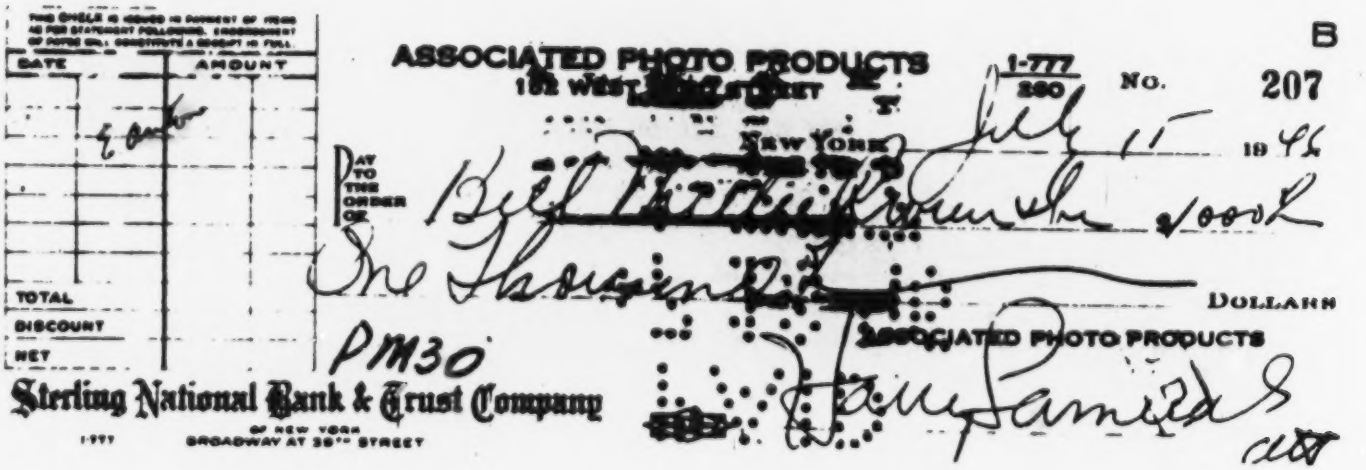
PM30

Sterling National Bank & Trust Company

OF NEW YORK

BROADWAY AT 38TH STREET

1777



B

ASSOCIATED PHOTO PRODUCTS

1-777 / 280

No. 207

DATE | AMOUNT

PAY TO THE ORDER OF

TOTAL

DISCOUNT

NET

DOLLARS

ASSOCIATED PHOTO PRODUCTS

PM30

Sterling National Bank & Trust Company

OF NEW YORK

BROADWAY AT 38TH STREET

1777

EXHIBIT DM-30

Exhibit DM-31

(Photostat)

(See Opposite)

EXHIBIT DM-31

IMPERIAL SIGNS CORPORATION

1545 INWOOD AVE. (BRONX) NEW YORK 52, N. Y. · TREMONT 8-7700

STRUCTURAL SIGNS & MARQUEES
COLD CATHODE LIGHTING
NEON SIGNS
LUCITE & PLEXIGLASS FLUORESCENT DISPLAYS

April 23, 1946

Bill Miller's Riviera Inc.
Fort Lee
New Jersey

Att: Mr. Samuel Marcus

Dear Sir:

This will acknowledge with thanks receipt of your order to remodel and supply the following sign work.

Furnish and install 6' metal letters reading OPENS MAY 25 illuminate them with your reflectors, we to furnish all other electrical equipment. Price for the above is $700.00.

Change 2 sets of channel neon letters now reading "Ben Hardens" to BILL MILLER'S. Repair whatever letters necessary reading RIVIERA and install whatever neon necessary so that they will function properly when completed. All of the letters to receive 2 coats of paint.

Repair where necessary the roof structures, red lead them, then finish in black.

Repaint a small bulletin copy to be BILL MILLER'S RIVIERA with ARROW copy inside JUST AHEAD. Also repair the reflectors thereon.

Furnish and install 4 oilcloth signs.

Agreed price for the above is $1500.00.

Please have copy signed where marked "Accepted" by proper officer of your corporation and also you sign where personal guarantee clause appears.

Very truly yours,

IMPERIAL SIGNS CORP.

By S. Blank

ACCEPTED:
Bill Miller's Riviera
By
I herewith guarantee payment of above account
By

IMPERIAL SIGNS CORPORATION

1565 [illegible] Ave., ([illegible]) NEW YORK 52, N. Y. • TREMONT 8-1700

Bill Miller's Riviera Inc.
Fort Lee
New Jersey

No 1000

Att'n: Mr. Samuel Marcus

OUR ORDER NO.

DATE	YOUR ORDER NO.	SHIPPED VIA	TERMS	REPRESENTATIVE
4-25-46			NET F. O. B. N. Y.	

QUANTITY ORDERED	QUANTITY SHIPPED	DESCRIPTION	PRICE	TOTAL
		Furnishing and installing 6' galvanized sheet steel temporary letters reading OPENS MAY 23	700.00	
				700.00

Paid 4/30/46
[illegible]

DM31

EXHIBIT DM-31(Cont'd)

STUYVESANT BUILDERS

GENERAL CONTRACTORS

STUYVESANT 9-1497

51 EAST 10TH STREET
NEW YORK, N. Y.

December 10th, 1946

[redacted]

To Bill Miller's RIVIERA

Fort Lee, New Jersey

Re: Work completed at premises of Riviera and as previously billed.				
Balance due of bill dated May 30th, 1946.....	$ 970	88	$ 970	88

DM 31

EXHIBIT DM-31(Cont'd)

IMPERIAL SIGNS CORPORATION

[redacted] AVE., ([redacted]) NEW YORK 52, N. Y. • TREMONT [redacted]

Bill Miller's Riviera Inc.
Fort Lee
New Jersey

№ 1010

Att: Mr. Samuel Meyers

OUR ORDER NO.

DATE	YOUR ORDER NO	SHIPPED VIA	TERMS		REPRESENTATIVE
5/24/46			NET:	F.O.B. N.Y.	

QUANTITY ORDERED	QUANTITY SHIPPED	DESCRIPTION	PRICE	TOTAL
		Change 2 sets of channel neon letters reading BEN MARDEN'S to BILL MILLER'S. Repaired letters reading RIVIERA and installed necessary neon in same. Painted sign with 2 coats of paint.		
		Repaired roof structure red lead and painted black. Repainted small bulletin, copy BILL MILLER'S RIVIERA with arrow, copy inside JUST AHEAD, and repaired reflectors.		
		Furnished and installed 4 oilcloth signs. AS AGREED	4500.00	
		1% C.S.T.	45.00	
			4545.00	
		Received On Acct.	2000.00	
				2545.00

DM31

EXHIBIT DM-31(Cont'd)

INDUSTRIAL
BANK OF COMMERCE
[illegible] STREET, NEW YORK

1-750
260

NEW YORK [illegible] 19[illegible]

PAY TO THE ORDER OF [illegible] $400.00

Four Hundred [illegible] DOLLARS

COLLECTIBLE AT PAR THROUGH THE FEDERAL RESERVE BANK OF NEW YORK

NO. DM31

[illegible]

BE STREET & ST. NICHOLAS AVE.

NEW YORK _____ 19 __ No. _____

1-45 CORN EXCHANGE BANK TRUST COMPANY J-25

181ST STREET BRANCH

PAY TO THE ORDER OF Imperial Sign Co $100.00

The [illegible] Dollars

final payment for Reverse DM31

SEVENTH AVE & 33RD STREET

NEW YORK _____ 19 __ No. _____

1-45 CORN EXCHANGE BANK TRUST COMPANY H-26

PENNSYLVANIA STATION BRANCH

PAY TO THE ORDER OF Imperial Sign Co $979.00

_____ Dollars

DM31

EXHIBIT DM-31 (Cont'd)

Imperial Lyon Co.

Endorsed Legal
Grant

Pd in full to date
Legal
Grant

EXHIBIT DM-31(Cont'd)

NO RECEIPT REQUIRED
RETURN IF NOT CORRECT
THIS CHECK PAYS IN FULL THE FOLLOWING ITEMS

DATE	AMOUNT	CREDITS & DISCOUNTS	NET

FOTOSHOP
136 WEST 32ND STREET

1-49
310

No 1951

NEW YORK May 17, 1946

PAY TO THE ORDER OF Imperial Sign Corp. $1,000 00/100

One Thousand 00/100 Dollars

TO CORN EXCHANGE BANK TRUST COMPANY
181ST STREET BRANCH J-25
NEW YORK

DM31

THIS CHECK IS ISSUED IN PAYMENT OF ITEMS AS PER STATEMENT FOLLOWING. ENDORSEMENT OF PAYEE WILL CONSTITUTE A RECEIPT IN FULL.

DATE	AMOUNT
TOTAL	
DISCOUNT	
NET	

42ND ST. FOTOSHOP, INC.
18 EAST 42ND STREET

No. 10801

B

NEW YORK June 7 1946

PAY TO THE ORDER OF Imperial Sign Corp $1000 00/100

One Thousand 00/100 DOLLARS

42ND ST. FOTOSHOP, INC.

DM31

Sterling National Bank & Trust Company
OF NEW YORK
BROADWAY AT 59TH STREET

1777

PRES.

Endorsement Sign Here

Bank

Endorsement signs here

EXHIBIT DM-31(Cont'd)

42nd St. Fotoshop INC.

Two Great Stores
In the Heart of New York

18 EAST 42nd STREET, NEW YORK 17, N. Y.
(Just off 5th Avenue)
Phone: VAnderbilt 6-2900

other . . . FOTOSHOP
130 WEST 32nd STREET

July 2, 1946

Received $400.00 on account

Bill Miller's Riviera Inc.

Imperial Signs Co.

S. Brank

Exhibit DM-34

(Photostat)

(See Opposite) ☞

Check Drawn

U. S. DISTRICT COURT
FOR NEW JERSEY
FEB 15 1955
EXHIBIT NO. D1134

1/21/47	3000	to Rev. Loan		
	3500	Sm. Ret Loans		
4/20	3444.19	Michael Realty		
4/10	1000 -	Modern Bank of Loan		
4/24	16.75	Int.		
7/28	3433.33	Michael Realty		
3/8	1000 -	Modern Int.	Mar	Michael ?
3/12	1500 -	Sm. Ret Loan	Apr	
"	27.60	Lackawanna	May	
4/8	16.75	"	3/10	500
5/12	76.57	Modern Int.	22	500
6/4	3408.33	Michael	29	500
6/19	16.75	Lackawanna	4/10	500
7/1	3400 -	Michael	13	500
7/18	2220.27	Phelan Agency Ins.	20	500
	85.75	N.J. State Franchise	27	500
7/20	3000.-	Sm. Ret Loan	4/3	500
7/20	500.-	Jack Hoff	10	500
8/1	5891.67	Michael	17	500
	28.70	Lackawanna	24	500
	45.-	Modern Int.	31	500
8/12	3500 -	Sm. - ~~[illegible]~~	8	500
	120.40	J.H., Tenclock	2	500

Marks

8/5 500
12 500

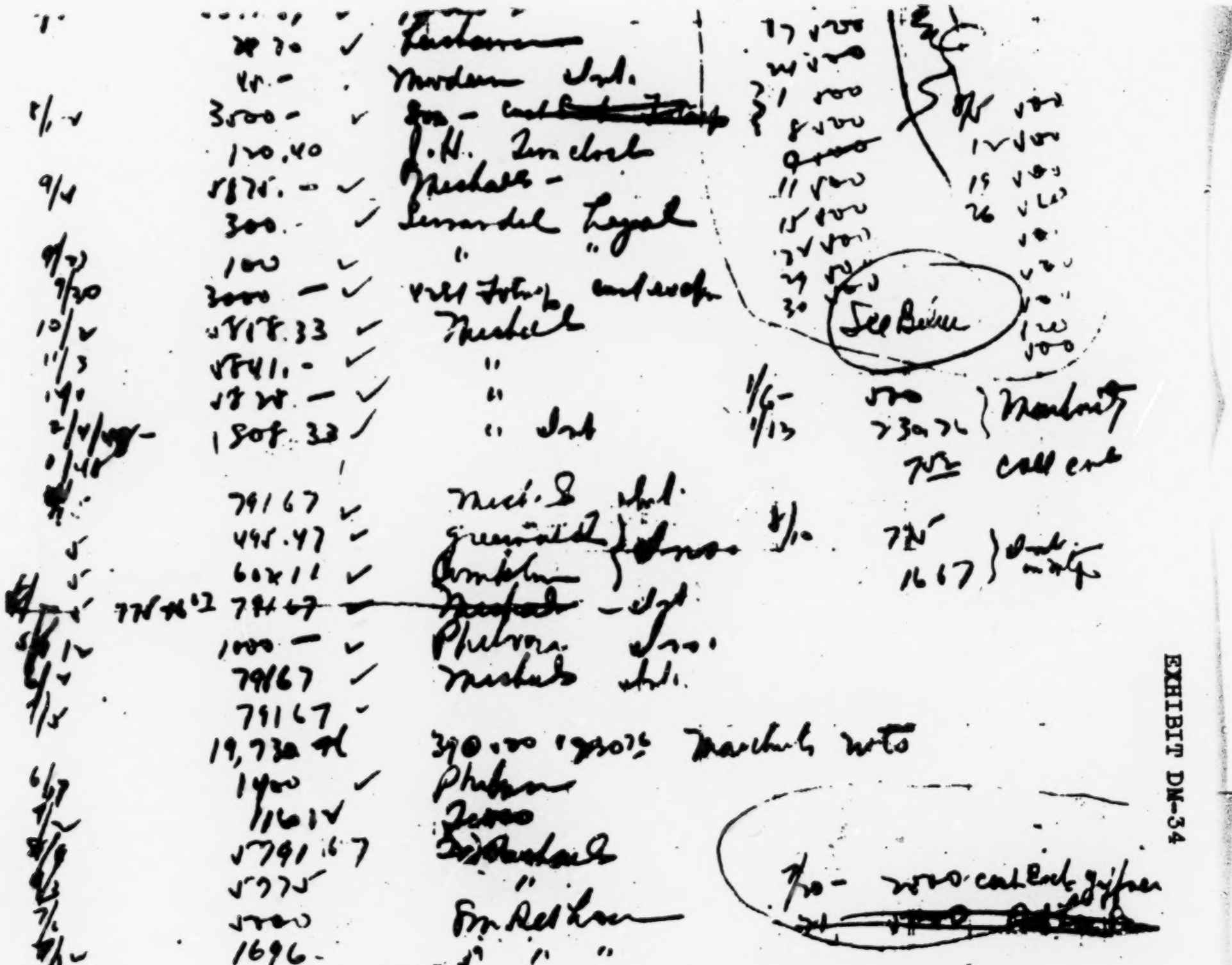


EXHIBIT DM-34

Exhibit DM-35

(Photostat)

(See Opposite) ☞

THE PUBLIC NATIONAL BANK
AND TRUST COMPANY
OF NEW YORK

[redacted] ESTATE, INC.
192 WEST 42ND STREET
NEW YORK 18, N.Y.

R R

DATE	DEBITS	DATE	DEPOSITS
	BALANCE FORWARD ☞	OCT 1 48	4453
TIEX	4453-		

TOTAL NUMBER OF VOUCHERS ( ) BALANCE $

C-SERVICE CHARGE
EX-EXCHANGES
EC-ERROR CORRECTED
CM-CREDIT MEMO
RT-RETURNED ITEM
CC-CERTIFIED CHECK
DM-DEBIT MEMO

(IF YOUR ADDRESS IS INCORRECT PLEASE ADVISE US

☞ All items and this account are subject to conditions on reverse side

EXHIBIT DM-36

Exhibit DM-41

(Photostat)

(See Opposite) ☞

AGREEMENT made this 15th day of January, 1948, by and between FACTORY SURPLUS MERCHANDISE INC., a New York corporation having its principal place of business at 152 West 42nd Street, Borough of Manhattan, City of New York, (hereinafter referred to as the "corporation",) and LOUIS DAVIS, residing at 120 West 57th Street, Borough of Manhattan, City of New York, (hereinafter referred to as "Davis.")

W I T N E S S E T H

WHEREAS, the Corporation desires to obtain financing for the purpose of conducting its business, and

WHEREAS, Davis is willing to aid the Corporation in such financing,

NOW, THEREFORE, in consideration of the sum of One ($1.00) Dollar, each to the other in hand this day paid, receipt whereof is hereby acknowledged, and in further consideration of the mutual covenants hereinafter contained it is agreed as follows:

FIRST: Davis agrees to advance to the Corporation the sum of Six Thousand Seven Hundred Fifty ($6,750.00) Dollars, less charges as hereinafter provided.

SECOND: The Corporation agrees to repay the said

One ($1.00) Dollar, each to the other in hand this day paid, receipt whereof is hereby acknowledged, and in further consideration of the mutual covenants hereinafter contained it is agreed as follows:

FIRST: Davis agrees to advance to the Corporation the sum of Six Thousand Seven Hundred Fifty ($6,750.00) Dollars, less charges as hereinafter provided.

SECOND: The Corporation agrees to repay the said sum of Six Thousand Seven Hundred Fifty ($6,750.00) Dollars, in two (2) installments each in the sum of Three Thousand Three Hundred Seventy-five ($3,375.00) Dollars due on May 15th, 1948 and June 15th, 1948 respectively, as evidenced by a series of two (2) promissory notes dated this date. It is understood and agreed that said notes shall contain an acceleration clause providing that in the event the Corporation fails to make any one of the aforementioned payments for a period of ~~five~~ ten (10) days, then at the option of Davis, the entire unpaid balance shall

DM - 41 —

immediately become due and payable.

THIRD: The corporation agrees to pay all charges in connection with this financing amounting to the sum of Seven Hundred Fifty Dollars, plus the attorney's fees in the amount of Seventy-five ($75.00) Dollars.

FOURTH: It is understood and agreed that the corporation will deliver to Davis a deed transferring the title to property located at 12 Duane Street, Borough of Manhattan, City of New York, which the corporation now owns in fee, which deed shall be held in escrow by Meyer Tobias, Attorney for Davis, with offices at 551 Fifth Avenue, Suite 522, Borough of Manhattan, City of New York, pending the payment of the monies due herein. In the event of payment of said monies, then the deed shall be returned to the corporation. In the event that the corporation shall default in the payments to be made as herein stipulated, then the said Meyer Tobias shall deliver said deed to Davis. The said Meyer Tobias, escrowee, upon delivery of the deed either to the corporation or to Davis as herein provided, shall be deemed released from any further responsibilities pursuant to this escrow agreement.

FIFTH: It is agreed that in the event the

of said monies, then the deed shall be returned to the corporation. In the event that the corporation shall default in the payments to be made as herein stipulated, then the said Meyer Tobias shall deliver said deed to Davis. The said Meyer Tobias, escrowee, upon delivery of the deed either to the corporation or to Davis as herein provided, shall be deemed released from any further responsibilities pursuant to this escrow agreement.

FIFTH: It is agreed that in the event the Corporation shall sell its business or in the event there shall be a transfer of present ownership of the stock of the Corporation by the present stockholders, then at the option of Davis, the entire unpaid balance of the notes shall immediately become due and payable. This clause shall not apply or be of any effect, if Marcus remains financially interested in the new corporation.

SIXTH: It is agreed that in the event the Corporation is levied upon or a judgment remains unpaid for ten (10) days pursuant to a judgment or lien or in the

DM-41-2

event that the Corporation becomes insolvent, files a petition in the Federal Court under a Chapter of the Bankruptcy Acts, whether voluntary or involuntary, or makes an assignment for the benefit of creditors or makes an act or takes any steps which will make the Corporation insolvent, then at the option of Davis, the entire unpaid balance shall immediately become due and payable.

It is agreed that in the event Davis is compelled to retain an attorney for the purpose of enforcing payment of the moneys due Davis, the Corporation hereby agrees to pay Davis' attorney his reasonable counsel fees in the amount of fifteen (15%) per cent of the unpaid balance, for services to be rendered by him in enforcing payment due Davis from the Corporation, provided such attorney brings suit. It is agreed that in the event of a sale of any of the assets of the Corporation, that the Corporation agrees to pay any deficiency that may result and in the event there shall be a surplus over and above the amount due Davis plus counsel fees plus expenses shall be paid to the Corporation.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals and caused these

the amount due Davis plus counsel fees plus expenses shall be paid to the Corporation.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals and caused these presents to be signed by its duly authorized officers to sign and execute this agreement and affix its seal the day and year first above written.

FACTORY SURPLUS MERCHANDISE INC.

By: _____
PRESIDENT

ATTESTED BY:

_____

_____ L.S.

STATE OF NEW YORK }
CITY OF NEW YORK } ss:
COUNTY OF NEW YORK }

On this 15th day of January, 1948, before me came

SAM MARCUS, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York; that he is the President of FACTORY SURPLUS MERCHANDISE INC., the corporation described in, and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal;—that it was so affixed by order of the Board of Directors of said corporation; that he signed his name thereto by like order.

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CORPORATE RESOLUTION

WE, ~~[illegible]~~ and HARRY SAMUELS President and Secretary respectively of FACTORY SURPLUS MERCHANDISE INC., a New York Corporation having its principal place of business at 152 West 42nd Street, Borough of Manhattan, City of New York, do hereby certify that at the joint meeting of the stockholders and Board of Directors of said corporation, duly held on the 14th day of January, 1948, adopted the following:

WHEREAS, the Corporation is in need of financing and

WHEREAS, Louis Davis has indicated his willingness to advance sums of money to the corporation, now be it

RESOLVED, that ~~[illegible]~~RCUS, the president of the corporation, be and he is hereby authorized and empowered to borrow the sum of Six Thousand Seven Hundred Fifty ($6,750.00) Dollars from Louis Davis and to issue or execute its corporate notes in the amount of Six Thousand ~~Seven Hundred~~ Fifty ($6,750.00) Dollars, bearing ~~interest at the rate of six (6%) per cent per annum, and~~ execute and delive to Davis a deed to certain real property located at 15 Duane Street, Borough of Manhattan, City of

WHEREAS, Louis Davis has indicated his willingness to advance sums of money to the corporation, now be it

RESOLVED, that ~~EMANUEL~~ Emanuel, the president of the corporation, be and he is hereby authorized and empowered to borrow the sum of Six Thousand Seven Hundred Fifty ($6,750.00) Dollars from Louis Davis and to issue or execute its corporate notes in the amount of Six Thousand ~~Seven Hundred~~ Fifty ($6,750.00) Dollars, bearing ~~interest at the rate of six (6%) per cent per annum, and~~ execute and deliver to Davis a deed to certain real property located at 13 Duane Street, Borough of Manhattan, City of New York, and to pay all other charges in connection with obtaining said financing, and it is

FURTHER RESOLVED, that the President of the corporation is hereby authorized and empowered to execute such other instruments as may be required or deemed necessary in connection with said financing.

WE do certify that said resolution is not in conflict with and is permissible under the Charter and By-Laws of the corporation and we individually guarantee that

DM-41-4

the Corporation duly adopted said resolution.

President

Secretary

Individually

Individually

STATE OF NEW YORK
CITY OF NEW YORK } ss:
COUNTY OF NEW YORK

[redacted] and HARRY SAMUELS, being severally sworn, each for himself, deposes and says: That he said Corporation is President and that he HARRY SAMUELS is Secretary of FACTORY SURPLUS MERCHANDISE INC. That they have read the foregoing resolution and each knows the contents thereof; that such resolution was duly adopted at a joint meeting of the Stockholder and Board of Directors on January 14th, 1946; and that each makes this affidavit knowing fully that Louis Davis parts with a substantial sum of money relying thereon.

Sworn to before me, this
15th day of January, 1946.

DM-41-5

Louis Davis
120 West 57th Street
New York City

Dear Sir:

FIRST: For the purpose of inducing you and in consideration of your advancing to FACTORY SURPLUS MERCHANDISE INC. the sum of Six Thousand Seven Hundred Fifty ($6,750.00) Dollars in cash for which the said corporation is issuing and executing its series of two (2) promissory notes, each dated January 15th, 1948, and due March 15th, 1948 and June 15th, 1948 respectively, each note bearing interest at the rate of six (6%) per cent per annum, I hereby agree to bind myself as follows:

(a) I, SAM MARCUS, represent that I am President and stockholder of FACTORY SURPLUS MERCHANDISE INC.

(b) I, SAM MARCUS, hereby agree to endorse the notes issued and executed by the said corporation to you which notes total the sum of Six Thousand Seven Hundred Fifty ($6,750.00) Dollars.

(c) I, SAM MARCUS, hereby agree to deliver and deposit with you as collateral security for the payment of the aforementioned series of corporate promissory notes

(1) a chattel mortgage duly executed by the East 57th Street Amusement Corp. of 149 East 57th Street, Borough of Manhattan, City of New York, to Samuel Marcus in the amount of Forty-seven Thousand Eight Hundred Twenty-eight and 95/100 ($47,828.95) Dollars, covering certain fixtures and chattels located in the restaurant known as the Embassy, at 151 East 51st Street, Borough of Manhattan, City, County and State of New York, executed to my order as mortgagee, together with the series of notes which it secures.

(2) An assignment of said mortgage to be made to your order to be made by the undersigned as mortgagee.

(d) You are to hold the securities described in Paragraph "c", as hereinafter provided in Paragraph "First" above, after which you shall return such securities to the persons in whose name they appear.

(e) In the event of any default in the

(c) I, SAM MARCUS, hereby agree to deliver and deposit with you as collateral security for the payment of the aforementioned series of corporate promissory notes

(1) a chattel mortgage duly executed by the East 57th Street Amusement Corp. of 149 East 57th Street, Borough of Manhattan, City of New York, to Samuel Marcus in the amount of Forty-seven Thousand Eight Hundred Twenty-eight and 95/100 ($47,828.95) Dollars, covering certain fixtures and chattels located in the restaurant known as the Embassy, at 151 East 51st Street, Borough of Manhattan, City, County and State of New York, executed to my order as mortgagee, together with the series of notes which it secures.

(2) An assignment of said mortgage to be made to your order to be made by the undersigned as mortgagee.

(d) You are to hold the securities described in Paragraph "c", as hereinafter provided in Paragraph "First" above, after which you shall return such securities to the persons in whose name they appear.

(e) In the event of any default in the payment of any of the aforementioned notes described in Paragraph "First" above, you shall have the right to pursue each and every remedy which you may be allowed under law. However, such remedies shall be cumulative and not alternative.

(f) In the event that you are compelled to employ an attorney for the purpose of enforcing payment of the monies, I hereby agree to pay his reasonable counsel fees in the amount of fifteen (15%) per cent of the unpaid balance.

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SECOND: I hereby consent to any extension of time or any other arrangements that you may make with the FACTORY SURPLUS MERCHANDISE INC. in respect to the payment of said notes and any such arrangement shall be deemed binding upon me and I shall not be deemed released.

THIRD: It is understood and agreed that my endorsement on the notes issued by the FACTORY SURPLUS MERCHANDISE INC. shall be deemed as a surety and that you shall have the right to proceed against me for the enforcement of the indebtedness hereinabove mentioned in the same manner as if I were the principal and without first attempting to collect or against the corporation.

FOURTH: In the event you receive any payments on the chattel mortgage covering the fixtures in the Embassy Restaurant, such payment shall be paid over to the undersigned except in the event of a default, then all such payments shall be applied on the amount due you.

Kindly indicate your assent by endorsement below.

Very truly yours,

AGREED:

STATE OF NEW YORK)
CITY OF NEW YORK) SS:
COUNTY OF NEW YORK)

On this 5th day of January, 1943, before me came TOM MARCUS, to me known and known to me to be the individual described in, and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DM-41-7

Exhibit DM-43

(Photostat)

(See Opposite) ☞

EXHIBIT NO. DM43

		TOTAL	RIVIERA	3 RIVERS
1946	May	10000	10000	
	June			
	July	108667	108667 98667	10000
	August	500	500	
	September	3500	3500	
	October	7000		7000
	November	700	700	100
	December	12100		12100
1947	January	344419		344419
	February	343333		343333
	March			

	November	700	700	700
	December	12100		12100
947	January	344419		344419
	February	343333		343333
	March			
	April	3500	3500	
	May	5100	3500 1600	
	June H. 1947	4000	4000	
	TOTAL	6414419	3816667	[illegible]

EXHIBIT DM-43

1946 [illegible] 14 [illegible] Schedule [illegible]

Dep ~~[illegible]~~ 21,800

1/18/47 - 7868 33 - (Loan on [illegible])

1/22 ✓ 3000 - (Rec Loan from Rev)

~~1/2 3500 (Pers) Repl~~

2/6 ✓ 700 (Pers.) -

2/24 ✓ 1727 33 " - ✓

27 ✓ 3000 - " ✓

3/5 1100 - " - ✓

4/11 - ✓ 1500 (500) (1000 - on a/c Mark - 500 Dev in [illegible])

5/8 500 BM

4/29 ✓ 500 SW

5/15 500

5/26 500

27 2000 - Cash

6/3 ✓ 2500

11 ✓ 2500

18 ✓ 2500

6/20 ✓ 3000 (Pers) Repl

7/7 ✓ 500

8/15 3500 Repl

8/14 - ✓ 2500 ✓

22 ✓ 2500 ✓

9/5 3000 ✓ 2500 BM

✓ 1000 Pers

9/8 ✓ 2600 (100) Repl

12 ✓ 2542 23

23 ✓ 2500 -

9/30 ✓ 4000 (1500 Pers)

10/7 ✓ 2500 -

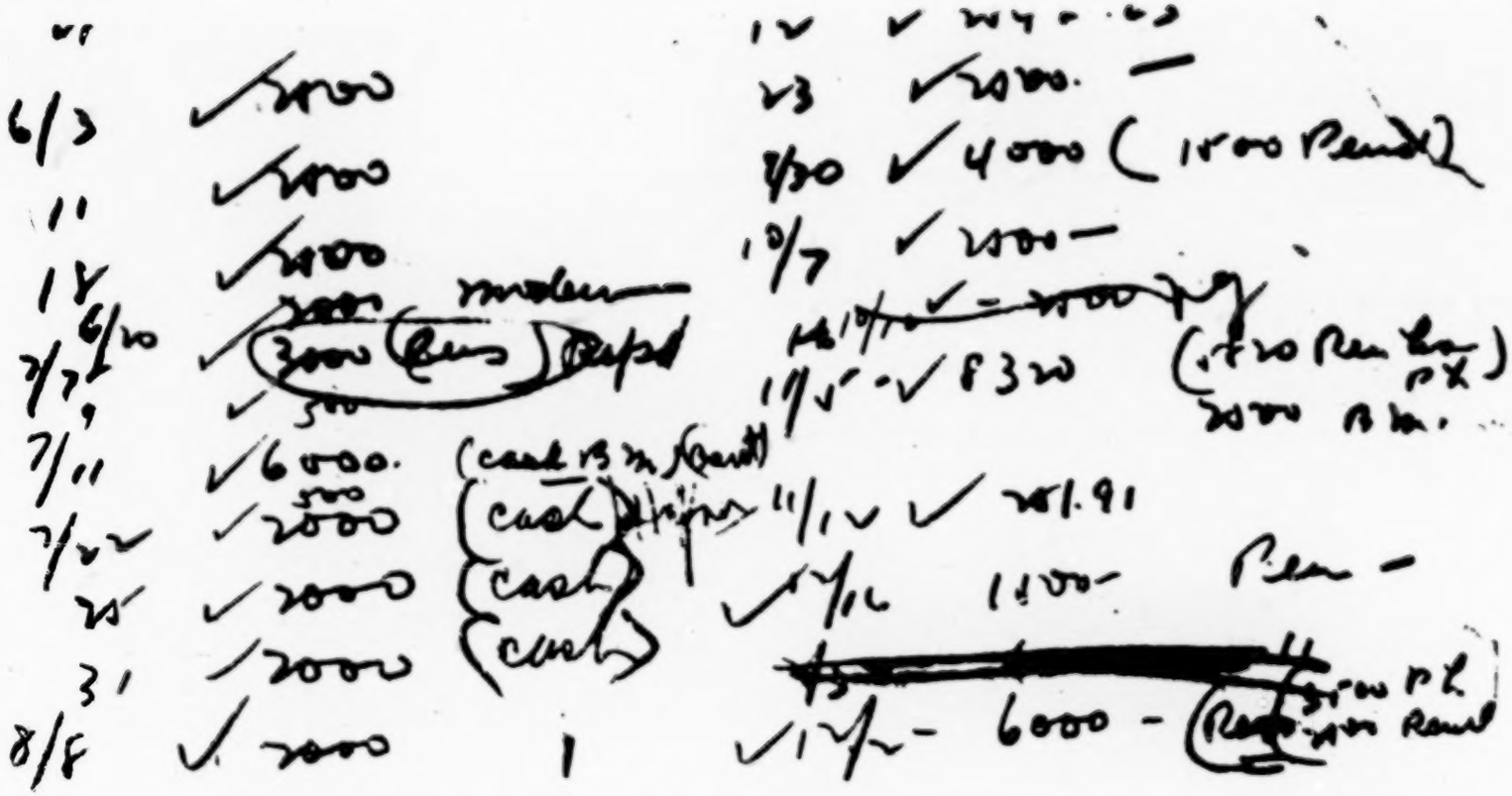
~~10/10 ✓ - 2500 [illegible]~~

11/5 - ✓ 8320 (1820 Rec Loan PX) 2500 BM.

U. S. DISTRICT COURT
FOR NEW JERSEY

FEB 17 1955

EXHIBIT NO DM48



4/5 Greenwald 495.47

4/5 Conklin 602.11

5/2 Michael ~~[illegible]~~

791 67

5/12 Phelan 1000 —

6/11 791.67

6/17 Phelan 1400 —

7/2 Stat. N.J. 1162

7/6 Michael 791 67

7/12 S.M. 1696. —

1/6 808.33
3/3 791 67 } 9600 [illegible]

7/20 (Cash Exch 2000)

7/20 SM - Ben Mandel Note 2/1 2000 } - 5000 [illegible]
6/11 2000 }

8/3 Michael - 5791.67

9/3 " 5775. —

11864

9/20 10,000 —

9/15 Note 6 P.Y. 1000

EXHIB IT DM-48

Exhibit DM-48

(Photostat)

(See Opposite)

Exhibit DM-63

(Photostat)

(See Opposite) 25

EXHIBIT DM-63

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN

1948

For calendar year 1948 or fiscal year beginning ....., 1948, and ending ....., 1949

Do not write in these spaces
File Code
Serial No.
(Cashier's Stamp)

DUPLICATE

EMPLOYEES: Instead of this form, you may use Form 1040A if your total income was less than $5,000, consisting wholly of wages shown on Forms W-2, or of such wages and not more than $100 of other wages, dividends, and interest.

Name SAMUEL MARCUS
(PLEASE PRINT. If this is a joint return of husband and wife, use first names of both)

HOME ADDRESS 685 West End Avenue
(PLEASE PRINT. Street and number or rural route)

New York (City, town, or post office) 25 (Postal zone number) New York (State)

Occupation Corp. Officer Social Security No. 119-22-6577

Your exemptions

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

List names of other close relatives (as defined in instructions) with 1948 incomes of less than $500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

Name (please print)	Check below whether you (or your wife) were at the end of your taxable year— 65 OR OVER	BLIND	On lines a and b below— Write 1 if neither 65 nor blind; Write 2 if either 65 or blind; Write 3 if both 65 and blind.
Your name Samuel Marcus	Yes ☐ No ☒	Yes ☐ No ☒	a. Number of exemptions for you 1
Wife's (or husband's name)	Yes ☐ No ☐	Yes ☐ No ☐	b. Number of her (his) exemptions

Name of Other Dependent Relative	Relationship	Address—If different from yours

Enter here total number of exemptions claimed (yours and your wife's plus one for each dependent listed above) → 1

Your income

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1948, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Also enter amount of income tax withheld. Members of armed forces and persons claiming traveling or reimbursed expenses, see instructions.

Print Employer's Name	Where Employed (City and State)	Amount of Income Tax Withheld	Total Wages
Fotoshop, Inc.	New York, N. Y.	$ 901 70	$ 6,800 00
42nd Street Fotoshop, Inc.	New York, N. Y.	1,125 70	8,400 00
	Enter totals	$ 2,027 40	$ 15,200 00

3. Enter here the total amount of your dividends .....
4. Enter here the total amount of your interest (including interest from Government obligations unless wholly exempt from taxation) .....
5. If you received any other income, give details on page 2 and enter the total here 25,700 00
6. Add items entered in items 2, 3, 4, and 5, and enter the total here ..... $ [illegible]

Enter here total number of exemptions claimed (yours and your wife's plus one for each dependent listed above) → 1

Your Income

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1948, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Also enter amount of income tax withheld. Members of armed forces and persons claiming traveling or reimbursed expenses, see instructions.

Print Employer's Name	Where Employed (City and State)	Amount of Income Tax Withheld	Total Wages
Fotoshop, Inc.	New York, N. Y.	$ 901 70	$ 6,800 00
42nd Street Fotoshop, Inc.	New York, N. Y.	1,125 70	8,400 00
	Enter totals	$ 2,027 40	$ 15,200 00

3. Enter here the total amount of your dividends
4. Enter here the total amount of your interest (including interest from Government obligations unless wholly exempt from taxation)
5. If you received any other income, give details on page 2 and enter the total here — 25,700 52
6. Add income shown in items 2, 3, 4, and 5, and enter the total here — $ 40,900 52

How to figure your tax

IF YOUR INCOME WAS LESS THAN $5,000. —You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.

IF YOUR INCOME WAS $5,000 OR MORE.—Disregard the tax table and compute your tax on page 3. You may either take a standard deduction or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.- To obtain benefits of split-income provisions, husband and wife must file a joint return. If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

Tax due or refund

7. Enter your tax from table on page 4, or from line 18, page 3 — $ None
8. How much have you paid on your 1948 income tax?
   (A) Total tax in item 2, above (attach Original Forms W-2) — $ 2,027 40
   (B) By payments on 1948 Declaration of Estimated Tax
   Enter total here → 2,027 40
9. If your tax (item 7) is larger than payments (item 8), enter BALANCE OF TAX DUE here — $
   This balance of tax due must be paid in full with return.
10. If your payments (item 8) are larger than your tax (item 7), enter the OVERPAYMENT here. — $ 2,027 40
    Check (X) whether you want this overpayment: Refunded to you [X]; or Credited on your 1949 estimated tax [ ]

If you filed a return for a prior year, what was the latest year? 1947

To which Collector's office was it sent? 3rd, New York

To which Collector's office did you pay amount claimed in item 8 (B), above?

Is your wife (or husband) making a separate return for 1948? YES (Yes or No)

If "Yes," write her (or his) name — Sarah Marcus

Collector's office to which sent — U. S. DISTRICT COURT, SOUTHERN DISTRICT, New York

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

[illegible]

(Signature of person, other than taxpayer, preparing this return) (Date)

(Name of firm or employer, if any)

APR 26 1955

(Signature of taxpayer) (Date)

EXHIBIT NO. DM-63

(Signature of taxpayer's wife or husband if this is a joint return) (Date)

To assure any benefits of split-income provisions, husband and wife must include all their income, and BOTH MUST SIGN, even though only one has income.

Do not use this page if your income is wholly from salaries, wages, dividends, and interest

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in)		4. Total amount received this year	
2. Amount received tax-free in prior years		5. Excess, if any, of line 4 over line 3	
3. Remainder of cost (line 1 less line 2)		6. Enter line 5, or 3 percent of line 1, whichever is greater (but do not enter more than line 4)	

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind and location of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (itemize in Schedule G)	
136 W. 32nd St. (3/1/48-12/31/48)	$ 19,123 56	$ 644 72	$	$ 15,866 39	
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)	$ 19,123 56	$ 644 72	$	$ 15,866 39	2,612 45

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

State (1) nature of business Retail Photogr.Suppl. (2) business name Fotoshop

(3) business address 136 West 32nd Street, N.Y.C.

Do NOT include in this schedule cost of goods withdrawn for personal use or deductions not connected with business or profession.

1. Total receipts			$ 115840 02	
COST OF GOODS SOLD (To be used where inventories are an income-determining factor) (Enter the letters "C" or "C or M" on lines 2 and 8 if inventories are valued at either cost, or cost or market, whichever is lower)		OTHER BUSINESS DEDUCTIONS		
2. Inventory at beginning of year	$ 67721 37	11. Salaries and wages not in line 4	$ 18244 48	
3. Merchandise bought for sale	87918 94	12. Interest on business indebtedness	89 75	
4. Labor		13. Taxes on business and business property	850 56	
5. Material and supplies		14. Losses (explain in Schedule G)		
6. Other costs (explain in Schedule G)		15. Bad debts arising from sales or services		
7. Total of lines 2 to 6	155640 31	16. Depreciation, obsolescence, and depletion (explain in Schedule F)	669 56	
8. Less inventory at end of year	77947 51	17. Rent, repairs, and other expenses (explain in Schedule G)	10442 70	
9. Net cost of goods sold (line 7 less line 8)	$ 77692 80	18. Amortization of emergency facilities (attach statement)		
		19. Net operating loss deduction (attach statement)		
		20. Total of lines 11 to 19	$ 30297 05	
		21. Total of lines 9 and 20	$ 107989 85	
10. Gross profit (line 1 less line 9)	$ 38147 22	22. Net profit (or loss) (line 1 less line 21)		7,850 17

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D)	13,855 85
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)	

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

1. Name and address of partnership, syndicate, etc. Central Photoprint Serv.	Amount,	$ 1,382 05
2. [redacted] vice, 18 E. 42 Sts. NYC	Amount	

3. Merchandise bought for sale	81940	84	15. Bad debts arising from sales or services				
4. Labor			16. Depreciation, obsolescence, and depletion (explain in Schedule F)	669	56		
5. Material and supplies			17. Rent, repairs, and other expenses (explain in Schedule G)	10442	70		
6. Other costs (explain in Schedule G)			18. Amortization of emergency facilities (attach statement)				
7. Total of lines 2 to 6	155640	31	19. Net operating loss deduction (attach statement)				
8. Less inventory at end of year	77947	51	20. Total of lines 11 to 19	$ 30297	05		
9. Net cost of goods sold (line 7 less line 8)	$ 77692	80	21. Total of lines 9 and 20	$107989	85		
10. Gross profit (line 1 less line 9)	$ 38147	22	22. Net profit (or loss) (line 1 less line 21)			7,850	17

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D)	13,855	85
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)		

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

1. Name and address of partnership, syndicate, etc. Central Photoprint Serv.	Amount,	$	
2. [redacted]vice, 18 E. 42 St., NYC	Amount,	1,382	05
3. Other sources (state nature)	Amount,		
4. Total		1,382	05
Total income from above sources (Enter as item 5, page 1)		$ 25,700	52

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

SCH.	1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
C	Furn. & Fixts.	Var.	13860 00	--	8316 00	5544 00	10 yrs		$ 346.50
C	Air Cond. Unit	1-'47	6461 10	--	1292 22	5168 88	5 yrs		323.06
B	Bldg. 136 W. 32 St.	3/1/48	19341 53	--			25 yrs		644.72

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 6, 14, AND 17 OF SCHEDULE C

1. Column or Line No.	2. Explanation	3. Amount	1. Column or Line No.	2. Explanation	3. Amount
B-5	Schedule Attached	$5,866 39			$
C-17	Schedule Attached	$10,442 70			

Dm 63-2

16-[illegible]-3

Schedule D (File with Form 1040)

TREASURY DEPARTMENT
Internal Revenue Service

1948

SCHEDULE OF GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY

For Calendar Year 1948 or fiscal year beginning ....., 1948, and ending ....., 19...

NAME AND ADDRESS SAMUEL MARCUS, 685 West End Avenue, New York, N. Y.

(1) CAPITAL ASSETS

1. Kind of property (if necessary, attach statement of descriptive details not shown below)	2. Date acquired (Mo. Day Year)	3. Date sold (Mo. Day Year)	4. Gross sales price (contract price)	5. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	6. Cost or other basis (If not purchased, attach explanation)	7. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 6 MONTHS						
			$	$	$	$
1. Totals			$	$	$	$
2. Net short-term gain or loss other than from partnerships and common trust funds (column 4 plus column 5 minus the sum of columns 6 and 7, of line 1)						$
3. Enter your share of the net short-term gain or loss from partnerships and common trust funds						
4. Enter here the sum of gains or losses, or difference between gain and loss, shown in lines 2 and 3						$
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTH						
Stock-136 W. 32 Corp.	1945	2/29/48	$ 43526 79		$ 3000 00	$
Stock-Hillmar Estates, Inc.	1946	10-48	125000 00		101200 00	
Stock-Duane Products, Inc.	1947	8/1048	-0-		25609 08	
Stock-E.57 St. Amusement Corp.	1947	12/1/48	8000 00		17000 00	
5. Totals			$ 176520 79		$ 146809 08	$
6. Net long-term gain or loss other than from partnerships and common trust funds (column 4 plus column 5 minus the sum of columns 6 and 7, of line 5)						$ 27,711 71
7. Enter the full amount of your share of the net long-term gain or loss from partnerships and common trust funds						
8. Enter here the sum of gains or losses, or difference between gain and loss, shown in lines 6 and 7						$ 27,711 71
9. Enter 50 percent of line 8. This is the amount to be taken into account in summary below						$ 13,855 85
10. Summary of Capital Gains (use only if gains exceed losses in lines 4 and 9):						
(a) Net gain for 1948 (either the sum of gains or difference between gains and losses in lines 4 and 9)						13,855 85
(b) Capital loss carry-over, 1943-1947 inclusive						$
(c) If line (a) exceeds line (b), enter this excess here and on line 1, Schedule D, page 2, Form 1040						13,855 85
(d) If line (b) exceeds line (a), enter the excess here and use line (e) to determine allowable loss						$
(e) Enter here and on line 1, Schedule D, page 2, Form 1040, the smallest of the following: (1) the amount on line (d); (2) net income (adjusted gross income if tax table is used) computed without regard to capital gains or losses; or (3) $1,000						$
(f) Enter here the amount on line (e) plus any capital loss carry-over from 1943 which was not used against line (a) or in line (e)						$
(g) Subtract line (f) from line (c)						

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	
Stock-Millmar Estates, Inc.	1946	10-48	125000 00	101200 00	$
Stock-Duane Products, Inc.	1947	8/10/48	-0-	25609 08	
Stock-E.57 St. Amusement Corp.	1947	12/31/48	8000 00	17000 00	
5. Totals			176520 79	148809 08	$

6. Net long-term gain or loss other than from partnerships and common trust funds (column 4 plus column 5 minus the sum of columns 6 and 7, of line 5) $ 27,711 71

7. Enter the full amount of your share of the net long-term gain or loss from partnerships and common trust funds

8. Enter here the sum of gains or losses, or difference between gain and loss, shown in lines 6 and 7 $ 27,711 71

9. Enter 50 percent of line 8. This is the amount to be taken into account in summary below $ 13,855 85

10. Summary of Capital Gains (use only if gains exceed losses in lines 4 and 9):

(a) Net gain for 1948 (either the sum of gains or difference between gains and losses in lines 4 and 9) $ 13,855 85

(b) Capital loss carry-over, 1943-1947 inclusive

(c) If line (a) exceeds line (b), enter this excess here and on line 1, Schedule D, page 2, Form 1040 $ 13,855 85

(d) If line (b) exceeds line (a), enter the excess here and use line (e) to determine allowable loss $

(e) Enter here and on line 1, Schedule D, page 2, Form 1040, the smallest of the following: (1) the amount on line (d); (2) net income (adjusted gross income if tax table is used) computed without regard to capital gains or losses; or (3) $1,000 $

(f) Enter here the amount on line (e) plus any capital loss carry-over from 1943 which was not used against line (a) or in line (e) $

(g) Subtract line (f) from line (d) and enter the remainder here. This is your capital loss carry-over to 1949 $

11. Summary of Capital Losses (use only if losses exceed gains in lines 4 and 9):

(a) Net loss for 1948 (either the sum of losses or difference between losses and gains in lines 4 and 9) $

(b) Capital loss carry-over, 1943-1947 inclusive

(c) Total of lines (a) and (b) $

(d) Enter here and on line 1, Schedule D, page 2, Form 1040, the smallest of the following: (1) the amount on line (c); (2) net income (adjusted gross income if tax table is used) computed without regard to capital gains or losses; or (3) $1,000 $

(e) Enter here the amount on line (d) plus the amount of any 1943 capital loss carry-over not used in line (d) $

(f) Subtract line (e) from line (c) and enter the remainder here. This is your capital loss carry-over to 1949 $

(2) PROPERTY OTHER THAN CAPITAL ASSETS

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	5. Cost or other basis (If not purchased, attach explanation)	6. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913
		$	$	$	$
1. Totals		$	$	$	$

2. Total net gain or loss (columns 3 plus 4 minus the sum of columns 5 and 6). Enter on line 2, Schedule D, page 2, Form 1040 $

See other side for Instructions and Computation of Alternative Tax

DM 63-3

SAMUEL MARCUS

685 West End Avenue
New York 25, N.Y.

OTHER EXPENSES

YEAR 1948

ITEM # 5 - SCHEDULE B

Wages	$ 6,574.19
Real Estate Taxes	2,772.71
Interest on Mortgage	1,847.71
Water	967.65
Fuel	737.91
Management Fees	513.02
Insurance	507.60
Commission - Renting	423.57
Gas and Electric	369.04
Repairs and Supplies	320.36
Legal and Accounting	298.00
Plumbing	208.62
Uniforms	99.92
Payroll Taxes	65.78
Rubbish Removal	60.00
Elevator Maintenance	41.30
Exterminating	24.75
Miscellaneous	34.26
	$15,866.39

DM63-4

[redacted]

685 West End Avenue
New York 25, N.Y.

RENT, REPAIRS, and OTHER EXPENSES

YEAR 1948

ITEM # 23 -- SCHEDULE A

Rent		$ 1,225.00
Advertising		3,427.46
Commissions		32.34
Auto Expense		80.38
Travelling Expense		36.77
Shipping Expense		312.09
Postage and Parcel Post		939.97
Heat, Light and Power		638.06
Telephone and Telegraph		718.04
Insurance		424.41
Leasehold Maintenance and Repairs		534.73
Stationery and Printing		406.13
Legal and Accounting Fees		810.48
General Expense		1,122.36
Fares		56.62
Contributions		26.50
		10,791.34
LESS: OTHER INCOME:		
Unemployment Insurance Tax Credit	313.06	
Miscellaneous	35.58	348.64
		$10,442.70

DM 63-5

ITEMIZED DEDUCTIONS—FOR PERSONS NOT USING TAX TABLE ON PAGE 4 OR STANDARD DEDUCTION ON LINE 2 BELOW—
If husband and wife are legally separated, file separate returns and one itemizes deductions, the other must also itemize

Describe deductions and state to whom paid. If more space is needed, list deductions on separate sheet of paper and attach to this return.			Amount	
Contributions	$			
Allowable Contributions (not in excess of 15 percent of item 6, page 1)			$	
Interest	$			
Total Interest				
Taxes	$			
Total Taxes				
Losses from fire, storm, or other casualty, or theft.	$			
Total Allowable Losses (not compensated by insurance or otherwise)				
Medical and dental expenses	$			
Net Expenses (not compensated by insurance or otherwise)	$			
Enter 5 percent of item 6, page 1, and subtract from Net Expenses				
Allowable Medical and Dental Expenses. See Instructions for limitation				
Miscellaneous (See Instructions) Loan Receivable from East 57th St.Amusement Corp.-Corp. unable to meet obligations	$ 38408	35		
Addl. items spent as guarantor personally for East 57th St.Amusement Corp.	18567	52		
Total Miscellaneous Deductions			56,975	87
TOTAL DEDUCTIONS			$ 56,975	87

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 4

1. Enter amount shown in item 6, page 1. This is your Adjusted Gross Income	$ 40,900	52
2. Enter DEDUCTIONS (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is $5,000 or more and deductions are not itemized, enter the standard deduction of $1,000 or 10 percent of line 1, above, whichever is the lesser, or $500 if this is the separate return of a married person)	56,975	87
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income	$ None	
4. Multiply $600 by total number of exemptions claimed in item 1, page 1. Enter total here	600	00
5. Subtract line 4 from line 3. Enter difference here	$ None	

Lines 6, 7, and 8 should be filled in ONLY by a single person or a married person making a separate return

6. Use the tax rates shown in Instructions to figure your tentative tax on amount shown in line 5 (if item 3, above, includes

Medical and dental expenses

Net Expenses (not compensated by insurance or otherwise) $

Enter 5 percent of item 6, page 1, and subtract from Net Expenses

Allowable Medical and Dental Expenses. See Instructions for limitation

Miscellaneous (See Instructions)

Loan Receivable from East 57th St.Amusement Corp.-Corp. unable to meet obligations 38408 35

Addl. items spent as guarantor personally for East 57th St.Amusement Corp. 18567 52

Total Miscellaneous Deductions 56,975 87

TOTAL DEDUCTIONS $ 56,975 87

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 4

1. Enter amount shown in item 6, page 1. This is your Adjusted Gross Income $ 40,900 52
2. Enter DEDUCTIONS (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is $5,000 or more and deductions are not itemized, enter the standard deduction of $1,000 or 10 percent of line 1, above, whichever is the lesser, or $500 if this is the separate return of a married person) 56,975 87
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income $ None
4. Multiply $600 by total number of exemptions claimed in item 1, page 1. Enter total here 600 00
5. Subtract line 4 from line 3. Enter difference here $ None

Lines 6, 7, and 8 should be filled in ONLY by a single person or a married person making a separate return

6. Use the tax rates shown in Instructions to figure your tentative tax on amount shown in line 5 (if item 3, above, includes partially tax-exempt interest, see Instructions). Enter the tentative tax here $
7. If line 6 is (a) not over $400, enter 17% of amount on line 6
   (b) over $400 but not over $100,000, enter $68 plus 12% of the excess over $400
   (c) over $100,000, enter $12,020 plus 9.75% of the excess over $100,000
8. Subtract line 7 from line 6. Enter the difference here. This is your combined normal tax and surtax $

Lines 9 to 13 should be filled in ONLY if this is a joint return of husband and wife

9. Enter here one-half of amount on line 5, above $
10. Use the tax rates shown in Instructions to figure your tentative tax on amount shown in line 9 (if item 3, above, includes partially tax-exempt interest, see Instructions). Enter the tentative tax here $
11. If line 10 is (a) not over $400, enter 17% of amount on line 10
    (b) over $400 but not over $100,000, enter $68 plus 12% of the excess over $400
    (c) over $100,000, enter $12,020 plus 9.75% of the excess over $100,000
12. Subtract line 11 from line 10. Enter the difference here $
13. Multiply amount on line 12 by 2. Enter this tax here. This is your combined normal tax and surtax $
14. If alternative tax computation is made on separate Schedule D, enter here tax from line 12 on back of Schedule D $ None

If you used the standard deduction in line 2, disregard lines 15, 16, and 17, and copy on line 18 the same figure you entered on line 8, 13, or 14, whichever is applicable

15. Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116) $
16. Enter here any income tax paid at source on tax free covenant bond interest
17. Add the figures on lines 15 and 16 and enter the total here $
18. Subtract line 17 from line 8, 13, or 14, whichever is applicable. Enter difference here and in item 7, page 1. This is your tax. $

16—83083-2

DM 63-6

Exhibit DME-2

(Photostat)

(See Opposite) ☞

EXHIBIT DME-2

August 26th 1948.

Mr. Sam Greene,
18 E. 42nd St.,
New York City.

Dear Sir:

The undersigned, Al Sherman, does hereby offer to purchase all of your shares in Milner Estates, Inc., consisting of approximately 62 1/2% of the outstanding shares (described as all those shares not held by Bill Miller or Al Sherman) for the sum of $125,000. payable as follows:

	execution
$19,000.	on account of this agreement, receipt whereof is hereby acknowledged.
$11,000.	upon execution of the necessary papers called for in this agreement.
$ 3,000.	each month on the first day of each and every month that the Riviera (or successor).
$ 1500.	each month of the first day of each and every month that the Riviera is closed; and for the purpose of this clause, the question of whether or not the Riviera is open or closed, shall be the state of affairs that prevail on the 1st day of each month.

The shares in question shall not be transferred until the sum of $125,000 shall have been paid in full, plus interest at 4% on the unpaid balance of $95,000.

All security and escrow agreements now in existence between the Landlord and the tenant shall remain in force until the entire amount called for in this agreement is paid.

In the event of default in the terms of this agreement, you may, at your option, cancel this agreement by ~~notifying~~ registered mail addressed to the undersigned, retaining all payments received as liquidated damages.

The undersigned acknowledges that no representations whatsoever have been made by us, and further acknowledges that he has read each and every contract, lease, deed etc, involving the property owned by the corporation. You are authorized to pay all outstanding loans, obligations, taxes, etc, of the corporations and to turn over any surplus at the time of transfer when the $125,000 shall have been paid in full. Adjustments of the corporation shall be computed at the time of transfer of title.

Your attorney shall be permitted to prepare (within 30 days) a formal agreement containing usual clauses, at your option.

Exhibit DME-3

(Photostat)

(See Opposite) ☞

August 18, 1968

Agreement made this day between William (Bill) Miller hereinafter called party of the first part also known as the buyer and Sam Marcus hereinafter called party of the second part also known as the seller. The party of the first part agrees to purchase all right title and and interest including all outstanding stocks, notes, I.O.U.'s options, agreements and any other transactions that the party of the second part has participated in with the party of the first part including the agreements in the following company's and corporations.

1. William (Bill) Miller

2. Miller Realty Corp.

3. Bill Miller's Riviera, Inc.

The party of the second part herewith agrees to sell all of the above mentioned assetts which he now claims he is the sole owner and agrees to the following terms of payment for all of the above mentioned items.

The purchase price for all of the items herein mentioned is One Hundred and Twenty five Thousand Dollars ($125,000.00) to be paid as follows:

The party of the first part agrees to pay $5000.00 to the party of the second part upon the signing of this agreement.

Dollars to be paid by the party of the first part to the party of the second part upon final signing of all papers releases and whatever other documents that will be necessary to be signed to release Bill Miller and all of the other companies and corporations herein

[illegible] party of the first part to the party of the second part upon final signing of all papers releases and whatever other documents that will be necessary to be signed to release Bill Miller and all of the other companies and corporations herein mentioned.

The balance of Dollars to be paid as follow.

First payment of Three Thousand Dollars shall to paid one Month from date the final documents shall be signed and delivered. Thereafter a payment of Three Thousand Dollars shall be made each month that Bill Miller's Riviera shall be open for business.

-2-

In the period that Bill Miller's Riviera shall be closed and not open for business a payment shall be made each month of One Thousand Five Hundred Dollars.

Upon the signing of this agreement it shall be a legal and irrevocable contract.

L.S._____

L.S._____

Witness_____

Date _____

EXHIB IT DME-3

Exhibit DME-4

(Photostat)

(See Opposite) 247

Class of Service

This is a fullrate Telegram or Cablegram, unless its deferred character is indicated by a suitable symbol above or preceding the address.

WESTERN UNION

JOSEPH L. EGAN
PRESIDENT

SYMBOLS

DL=Day Letter
NL=Night Letter
LC=Deferred Cable
NLT=Cable Night Letter
Ship Radiogram

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

W. U. 5. 11.50 P. M. SEPT. 12/48 CHARLOTTE,N.C.

BILL MILLER,
BILL MILLER'S REVIERA, FORT LEE,N.J.

THIS TELEGRAM WILL AUTHORIZE YOU TO SIGN MY NAME TO ALL PAPERS LEGALIZING SALE OF MILMAR CORPORATION TO ME.

AL. BIERMAN/

EXHIBIT DME-4

225b

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

Exhibit DME-19A

(Photostat)

(See Opposite) ☞

EXHIBIT DME-19A

Number 17 INCORPORATED UNDER THE LAWS OF THE STATE OF NEW JERSEY 500 Shares

MILMAR ESTATE, INC.

CAPITAL STOCK $1,000,000 PAR VALUE $100.

FULL PAID AND NON-ASSESSABLE

~~This Certificate~~ SAMUEL MARCUS is the owner of 500 Shares of the Capital Stock of

MILMAR ESTATE, INC.

transferable on the books of the Corporation by the holder hereof in person or by duly authorized Attorney, upon surrender of this Certificate properly endorsed.

Witness the Seal of the Corporation and the signatures of its duly authorized Officers affixed this 14th day of September 19 48

Robt J Schwartz
SECRETARY-TREASURER

[signature]
PRESIDENT

[illegible]

Exhibit DME-19B

(Photostat)

(See Opposite) ☞

EXHIBIT DME-19B

Number 19 INCORPORATED UNDER THE LAWS OF THE STATE OF NEW JERSEY 125 Shares

MILMAR ESTATE, INC.

CAPITAL STOCK $1,000,000 PAR VALUE $100.

FULL PAID AND NON-ASSESSABLE

[redacted] SAMUEL MARCUS is the owner of 125 Shares of the Capital Stock of

MILMAR ESTATE, INC.

transferable on the books of the Corporation by the holder hereof in person or by duly authorized Attorney, upon surrender of this Certificate properly endorsed.

Witness the Seal of the Corporation and the signatures of its duly authorized Officers affixed this 14th day of Sept 1944

Robt. Edmonds
SECRETARY-TREASURER

[signature]
PRESIDENT

[redacted]

Exhibit DME-20A

(Photostat)

(See Opposite) ☞

EXHIBIT DME-20A

Number 18 DME INCORPORATED UNDER THE LAWS OF THE STATE OF NEW JERSEY 500 Shares

MILMAR ESTATE, INC.

CAPITAL STOCK $1,000,000 PAR VALUE $100.

FULL PAID AND NON-ASSESSABLE

This Certifies that SAMUEL MARCUS is the owner of 500 Shares of the Capital Stock of

MILMAR ESTATE, INC.

transferable on the books of the Corporation by the holder hereof in person or by duly authorized Attorney, upon surrender of this Certificate properly endorsed.

Witness the Seal of the Corporation and the signatures of its duly authorized Officers affixed this 14th day of September 1942

Robt J. Schwartz
SECRETARY-TREASURER

Samuel Marcus
PRESIDENT

For value received _____ hereby sell, assign and transfer unto

_____

_____

_____ shares

of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint

_____ Attorney to

transfer the said stock on the books of the within named Corporation with full power of substitution in the premises.

Dated _____

In presence of

Samuel Marcus

Exhibit DME-20B

(Photostat)

(See Opposite) ☞

EXHIBIT DME-20B

Number 20 CORPORATED . THE LAWS OF THE STATE OF NEW JERSEY 125 Shares

MILMAR ESTATE, INC.

CAPITAL STOCK $1,000,000 PAR VALUE $100.

FULL PAID AND NON-ASSESSABLE

[redacted] SAMUEL MARCUS is the owner of 125 Shares of the Capital Stock of

MILMAR ESTATE, INC.

transferable on the books of the Corporation by the holder hereof in person or by duly authorized Attorney, upon surrender of this Certificate properly endorsed.

Witness the Seal of the Corporation and the signatures of its duly authorized Officers affixed this 1st day of September 1948

Robt J. Schwartz
SECRETARY-TREASURER

[signature]
PRESIDENT

For value received _____ hereby sell, assign and transfer unto _____ shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint _____ Attorney to transfer the said stock on the books of the within named corporation with full power of substitution in the premises.

Dated _____

In presence of _____

[signature]

Exhibit DME-21

(Photostat)

(See Opposite) ☞

Certificate No. 1

For

9 Shares

Issued to

William Miller

Hudson Terrace, Fort Lee N.J.

Dated

April 15 19[illegible]

Transferred from

Original

Date of Transfer

19

No. Original Certificate	No. Original Shares	No. of Shares Transferred

Paste Revenue Tax Stamp Here
(on Original issue only)

Received
Certificate No.
For

Shares

19

Certificate No. 2

For 4 Shares

Issued to

Sam Marcus

Dated

April 15 19 46

Transferred from

Original

Date of Transfer

19

No. Original Certificate	No. Original Shares	No. of Shares Transferred

Affix Revenue Tax Stamp Here
(on Original Issue only)

Received
Certificate No.
For

Shares

19

Certificate No. 3

For

2 Shares

Issued to

Marguerite K. Kane

52 Lafayette Ave

Grantwood, N.J.

Dated

April 15 1946

Transferred from

Original

Dated Transfer

19__

No. Original Certificate	No. Original Shares	No. of Shares Transferred

Paste Federal Tax Stamp Here
(on Original Issue only)

Received
Certificate No.
For

Shares

19__

EXHIBIT DME-21(Cont'd

EXHIBIT DME-21(Cont'd)

Certificate No. 4

For 491 Shares

Issued to William Muller

Dated June 7 19 46

Transferred from

Date of Transfer 19

Original Certificate	No. Original Shares	No. of Shares Transferred

Paste Federal Tax Stamp Here
(on Original Issue only)

Received
Certificate No.
For
Shares
19

Number 4

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW JERSEY

491 Shares

MILMAR ESTATE, INC.

CAPITAL STOCK $1,000,000 PAR VALUE $100.

FULL PAID AND NON-ASSESSABLE

This Certifies that William Muller is the owner of Four Hundred Ninety-One Shares of the Capital Stock of

MILMAR ESTATE, INC.

transferable on the books of the Corporation by the holder hereof in person or by duly authorized Attorney, upon surrender of this Certificate properly endorsed.

WITNESS the Seal of the Corporation and the signatures of its duly authorized Officers affixed this Seventh day of June 1946

SECRETARY-TREASURER

PRESIDENT

EXHIBIT DME-21(Cont'd)

Certificate No. 5

For 491 Shares

Issued to Sam Marcus

Dated June 4 1946

Transferred from Original

Date of Transfer 19

No. Original Certificate	No. Original Shares	No. of Shares Transferred

Affix Federal Tax Stamp Here (on Original Issue only)

Received Certificate No.

For Shares

19

Number 5

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW JERSEY

491 Shares

MILMAR ESTATE, INC.

CAPITAL STOCK $1,000,000 PAR VALUE $100.

FULL PAID AND NON-ASSESSABLE

This Certificate that Sam Marcus is the owner of Four Hundred Ninety-One Shares of the Capital Stock of

MILMAR ESTATE, INC.

transferable on the books of the Corporation by the holder hereof in person or by duly authorized Attorney upon surrender of this Certificate properly endorsed.

WITNESS the Seal of the Corporation and the signatures of its duly authorized Officers affixed this Seventh day of June 1946

SECRETARY-TREASURER

PRESIDENT

Certificate No. 6

For

125 Shares

Issued to

Sam Marcus

Dated

June 7 19 46

Transferred from

Original

Date of Transfer

19

No. Original Certificate	No. Original Shares	No. of Shares Transferred

Paste Federal Tax Stamp Here
(on Original Issue only)

Received
Certificate No.
For

Shares

19

Certificate No. 7

For

71 Shares

Issued to

Sam Maiello

Dated

June 7 19 46

Transferred from

Original

Date of Transfer

19

Original Certificate	No. Original Shares	No. of Shares Transferred
1		

Paste Federal Tax Stamp Here
(on Original Issue only)

Received
Certificate No.
For

Shares

19

Certificate No. 8

For

300 Shares

Issued to

Sam Marcus

Dated

June 4 19 46

Transferred from

Date of Transfer

19

Original Certificate	No. Original Shares	No. of Shares Transferred

Paste Federal Tax Stamp Here
(on Original Issue only)

Received
Certificate No.
For

Shares

19

Certificate No. 9

For

100 Shares

Issued to

Sam Marcus

Dated

June 7 1946

Transferred from

Original

Date of Transfer

19

No. Original Certificate	No. Original Shares	No. of Shares Transferred

Paste Federal Tax Stamp Here
(on Original Issue only)

Received

Certificate No.

For

Shares

19

Certificate No. 10

For

116 Shares

Issued to

William Miller

Dated

June 7 19 46

Transferred from

Date of Transfer

19

No. Original Certificate	No. Original Shares	No. of Shares Transferred
2	2	

Paste Federal Tax Stamp Here
(on Original Issue only)

Received
Certificate No.
For

Shares

19

Certificate No. 10

For

116 Shares

Issued to

William Miller

Dated

June 7 19 46

Transferred from

Date of Transfer

19

No. Original Certificate	No. Original Shares	No. of Shares Transferred
2	2	

Paste Federal Tax Stamp Here
(on Original Issue only)

Received
Certificate No.
For

Shares

19

Certificate No. 11

For

125 Shares

Issued to

William Miller

Dated

June 7 1946

Transferred from

Original

Date of Transfer

19

No. Original Certificate	No. Original Shares	No. of Shares Transferred

Paste Federal Tax Stamp Here
(on Original issue only)

Received

Certificate No.

For

Shares

19

Certificate No. 12

For

125 Shares

Issued to

William Miller

Dated

June 7 19 41

Transferred from

Original

Date of Transfer

19

Original Certificate	No. Original Shares	No. of Shares Transferred

Paste Federal Tax Stamp Here
(On Original Issue only)

Received
Certificate No.
For

Shares

19

Certificate No. 13

For

250 175 Shares

Issued to

William Miller

Dated

June 7 19 40

Transferred from

Original

Date of Transfer

19

Original Certificate	No. Original Shares	No. of Shares Transferred

Paste Federal Tax Stamp Here
(on Original Issue only)

Received
Certificate No.
For

Shares

19

Certificate No. 14

For

32

Shares

Issued to

Robert Schwartz

Dated

June 7 19 46

Transferred from

Original

Date of Transfer

19

No. Original Certificate	No. Original Shares	No. of Shares Transferred

Paste Federal Tax Stamp Here
(on Original Issue only)

Received
Certificate No.
For

Shares

19

Certificate No. 15

For 93 Shares

Issued to Robert Schwartz

Dated June 7 19 VI

Transferred from. Original

Date of Transfer

19

No. Original Certificate	No. Original Shares	No. of Shares Transferred
1	1	

Paste Federal Tax Stamp Here (on Original Issue only)

Received Certificate No.

For

Shares

19

Certificate No. 16

For

20 Shares

Issued to

Ab M. Burman

June 7, 947

Dated

19 4

Transferred from

Date of Transfer

19

No. Original Certificate	No. Original Shares	No. of Shares Transferred

Paste Federal Tax Stamp Here
(on Original Issue only)

Received
Certificate No.
For

Shares

19

Certificate No. 17

For

500 Shares

Issued to

Samuel Downs

Sept 14/48

Dated

19

Transferred from

Date of Transfer

19

No. Original Certificate	No. Original Shares	No. of Shares Transferred

Paste Federal Tax Stamp Here
(on Original Issue only)

Received

Certificate No.

For

Shares

19

Certificate No. 18

For

500 Shares

Issued to

Samuel Mann

Sept 14/48

Dated

19__

Transferred from

Date of Transfer

19__

No. Original Certificate	No. Original Shares	No. of Shares Transferred

Paste Federal Tax Stamp Here
(on Original Issue only)

Received
Certificate No.
For

Shares

19__

Certificate No. 19

For

125 Shares

Issued to

Samuel Moreno

Sept 14 1948

Dated

19__

Transferred from

Date of Transfer

19__

No. Original Certificate	No. Original Shares	No. of Shares Transferred

Paste Federal Tax Stamp Here
(on Original Issue only)

Received
Certificate No.

For

Shares

19__

Certificate No. 20

For

125 Shares

Issued to

Samuel Francis

Sept 14/46

Dated

19__

Transferred from

Date of Transfer

19__

No. Original Certificate	No. Original Shares	No. of Shares Transferred

Paste Federal Tax Stamp Here
(on Original Issue only)

Received
Certificate No.
For

Shares

19__

EXHIBIT DME-21(Cont'd

Certificate No. 21
For

_____ Shares
Issued to

_____
Dated

_____ 19 _
Transferred from

_____
Date of Transfer

_____ 19

No. Original Certificate	No. Original Shares	No. of Shares Transferred

Paste Federal Tax Stamp Here
(on Original Issue only)

_____
Received
Certificate No. ____
For

_____ Shares

_____ 19

Number 21

INCORPORATED UNDER THE LAWS OF
THE STATE OF NEW JERSEY

_____ Shares

MILMAR ESTATE, INC.

CAPITAL STOCK $1,000,000 PAR VALUE $100.

FULL PAID AND NON-ASSESSABLE

[redacted] is the owner of _____ Shares of the Capital Stock of

MILMAR ESTATE, INC.

transferable on the books of the Corporation by the holder hereof in person or by duly authorized Attorney, upon surrender of this Certificate properly endorsed.

Witness the Seal of the Corporation and the signatures of its duly authorized Officers affixed this _____ day of _____ 19__

_____ SECRETARY-TREASURER

_____ PRESIDENT

Excerpts from Exhibit DME-28

THIS AGREEMENT BETWEEN

MILMAR ESTATES INC., a New Jersey Corporation,

as Landlord

and

BILL MILLER'S RIVIERA INC., a New Jersey Corporation,

as Tenant

WITNESSETH: The Landlord hereby leases to the Tenant the following premises: located in the Borough of Fort Lee, in the County of Bergen, State of New Jersey, as is more fully described in Schedule "A" attached hereto, together with the chattels more fully described in Schedule "B" attached hereto, both of which schedules describing the property and chattels leased respectively are made a part hereof, which inventory is to be taken mutually within three weeks, as a condition of this lease.

for the term of five years commencing May 19, 1957 to commence from the 19th day of May one thousand nine hundred and forty-seven and to end on the 30th day of December one thousand nine hundred and fifty-one to be used and occupied only for a high class restaurant and cabaret and for no other purpose.

upon the conditions and covenants following:

1st. That the Tenant shall pay the annual rent for the years 1947, 1948 of forty thousand dollars ($40,000) per annum, payable two thousand dollars ($2,000) each week for twenty weeks commencing with the first Monday after the opening of each season's operation in any year and each subsequent Monday thereafter until the sum of forty

thousand dollars ($40,000) shall have been paid with due allowance to the Tenant for all payments made during February of each year as hereinafter mentioned; and for the years 1949, 1950 and 1951, the tenant shall pay the sum of sixty thousand ($60,000) dollars per annum, payable three thousand dollars ($3,000) each week for twenty weeks commencing with the first Monday after the opening of each season's operation in any year and each subsequent Monday thereafter until the sum of sixty thousand dollars ($60,000) shall have been paid, with due allowance to the Tenant for all payments made during Feb. of each year.

2nd. That the Tenant shall take good care of the premises and shall at the Tenant's own cost and expense make all repairs and replacements for lost or damaged chattels rented hereunder as well as to the property leased and improvements thereon,

and at the end or other expiration of the term, shall deliver up the demised premises and chattels in good order or condition, damages by the elements excepted.

• • •

35th. If in any proceeding of whatsoever nature a receiver or trustee be appointed for the Tenant's property or if this lease or the estate of the Tenant be transferred or pass to or devolve upon any other person or corporation except with the express prior written consent of the landlord, this lease shall thereby at the option of the landlord be cancelled and in that case neither the Tenant nor anybody claiming under the Tenant shall be entitled to go into possession of the demised premises and the landlord shall be under no further obligation hereunder.

• • •

40th. Any additional monies necessary for the payment of interest and amortization on the first mortgage covering the premises herein described, and real estate taxes and insurance charges over and above the amount paid as rent

to the Landlord, is to be paid for by the Tenant out of its profits provided, however, that the Tenant shall make such payments as aforesaid only if available out of the profits of its operation in each year. If there are insufficient profits, then the Tenant shall pay all of its profits towards the said obligations; and in any event even if there shall be no profits, the Tenant shall be required to pay 50% of all monies needed for the above mentioned purpose. For the purpose of this paragraph, the salary of Bill Miller shall be limited to $375; per week and no other officer of the Tenant corporation is to draw salaries for the purposes of this computation. For the purposes of this paragraph, profits shall be described as of income less expenses and before depreciation and taxes.

43rd. The Tenant shall be entitled to file a claim for the value of the unexpired term of its lease in the event of a condemnation, against the condemning authorities.

44th. The Landlord shall have an absolute right to check any and all receipts, computations, cash registers, guest checks, billings and each and every book of entry and book of account maintained by the Tenant.

45th. It is a condition of this lease that the Tenant shall comply with the terms of a stipulation dated May , 1947 entered into with Oscar Marcowitz for the payment of $19,000.; and it is a further condition of this lease that the Tenant shall meet each and every installment and the principal due to Flo Barlyn, Inc.

* * *

47th. Commencing with JaJnuary 1, 1949 and annually thereafter, the Landlord herein shall have the right at its sole option and at any time during each of the said years, to require the Tenant herein to purchase from Samuel Marcus, or associates, (a stockholder of the Landlord) one-seventh of Marcus' original stock in Milmar Estates, Inc. (approximately 62% of Milmar Estates, Inc.) for the sum of $30,000 for each one-seventh portion of Marcus' (or associates)

original shares. It is a condition of this lease that the Tenant shall comply with such payment on the part of the Corporation within thirty days of the making of such demand. The shares of stock to be sold to the Tenant herein shall be free and clear of any encumbrances.

48th. The tenant is to be given a sixty day written first refusal in the event of a bona fide offer on a proposed sale of the premises; such notice not to be given before December 1, 1948. Thereafter, the Landlord shall give written notice of such proposed sale to the Tenant, and the Tenant shall have sixty days to meet such offer; in the event that the Tenant fails to meet such offer, then the Landlord may sell the said premises to such bona fide purchaser and this lease shall be cancelled, provided however that the Landlord will pay to the Tenant the sum of twenty thousand dollars ($20,000) in order to cancel this lease. In the event that at the time of the cancellation of the lease as called for under this clause, the Tenant shall be obligated to any acts contracted for in writing, then the Landlord will assume the Tenant's obligations under the terms of such contracts, provided, however, that the Tenant will promptly notify the Landlord in writing of the terms of such contract.

* * *

IN WITNESS WHEREOF, the parties have interchangeably set their hands and seals (or caused these presents to be signed by their proper corporate officers and caused their proper corporate seal to be hereto affixed) this 23rd day of July 1947.

MILMAR ESTATES, INC.,
by SAMUEL MARCUS, *Pres.* *L. S.*

BILL MILLER'S RIVIERA, INC., *L. S.*
WILL. MILLER, *Pres.* *L. S.*

Signed, sealed and delivered
in the presence of

J. B. HOFFMAN

Exhibit DME-33

(Photostat)

(See Opposite) ☞

Exhibit DME-31

(Photostat)

(See Opposite) ☞

EXHIBIT DME-31

Aug 8, 1948
Received from Al Kelverson
Five Thousand Dollars
(5000.00)
Bill Spiller

D-ME-31

Exhibit DME-32

(Photostat)

(See Opposite) ☞

No. 2 BROOKLYN, N. Y. Oct 1 1948 D

THE PUBLIC NATIONAL BANK AND TRUST COMPANY 1-127

OF NEW YORK

PITKIN AVE. AND WATKINS ST.

PAY TO THE ORDER OF Sam Marcus $3000 00/100

Three Thousand 00/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

MILMAR ESTATE INC

A. E. Elson Pres

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE			AMOUNT	
Oct.	1	Int.	316	66
Nov.	1	Int.	306	66
		Prin.	1500	—
TOTAL OF INVOICES			2123	32
TOTAL DEDUCTIONS				
AMOUNT OF CHECK			2123	32

MILMAR ESTATE, Inc. 2

Brooklyn, N. Y. Nov 4 1948 1-127/210

PAY TO THE ORDER OF Sam Marcus $2123. 32/xx

Twenty One Hundred Twenty Three 32/xx DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

A. E. Elson PRESIDENT SECRETARY

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE			AMOUNT	
Principal			1500	—
1000	Int.		301	66
			1801	66
TOTAL OF INVOICES				
TOTAL DEDUCTIONS				
AMOUNT OF CHECK				

MILMAR ESTATE, Inc. 4

Brooklyn, N. Y. Dec 1 1948 1-127/210

PAY TO THE ORDER OF Sam Marcus $1801 66/100

Eighteen hundred and one 66/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY

MILMAR ESTATE, Inc.

TOTAL OF INVOICES		
TOTAL DEDUCTIONS		
AMOUNT OF CHECK		

PAY TO THE ORDER OF [illegible] $1801 66/100

Eighteen hundred and one 66/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

A L Kevelson PRESIDENT SECRETARY

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE		AMOUNT	
Int		296	66
o/c Prin.		1500	-
		1,796	66
TOTAL OF INVOICES			
TOTAL DEDUCTIONS			
AMOUNT OF CHECK			

MILMAR ESTATE, Inc. 6

Brooklyn, N. Y. Jan 4 1949 1-127/210

PAY TO THE ORDER OF Sam Marcus $1796 66/100

Seventeen hundred ninety-six 66/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

A L Kevelson PRESIDENT SECRETARY

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE		AMOUNT	
Principal		1500	-
Interest		291	65
TOTAL OF INVOICES			
TOTAL DEDUCTIONS			
AMOUNT OF CHECK		1791	65

MILMAR ESTATE, Inc. 8

Brooklyn, N. Y. Feb 1 1949 1-127/210

PAY TO THE ORDER OF Samuel Marcus $1791 65/100

Seventeen hundred ninety one 65/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

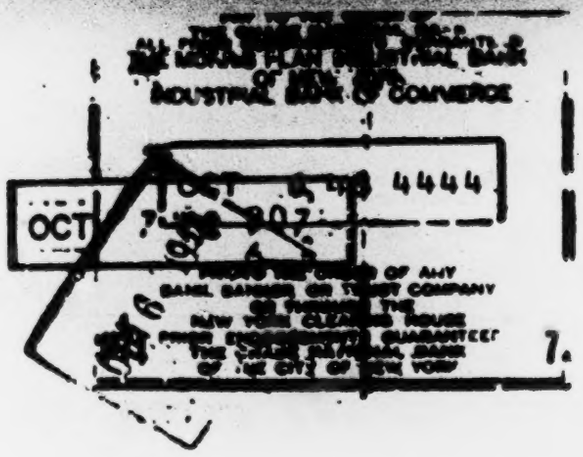
PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

A L Kevelson PRESIDENT ~~SECRETARY~~

EXHIBIT DME-32(Cont'd)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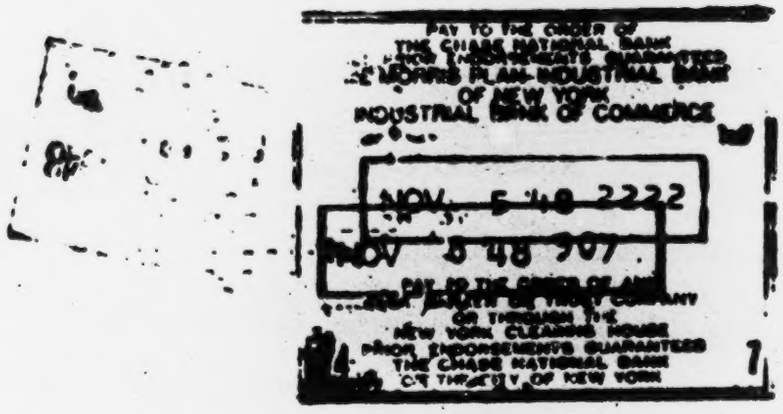
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NOV 5 48 2222
NOV 5 48 907
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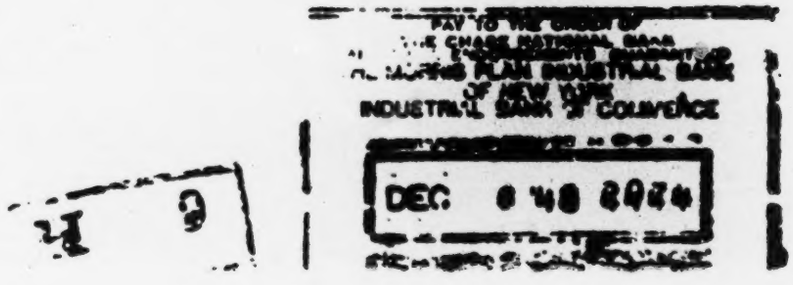

INDUSTRIAL BANK OF COMMERCE
DEC 6 48 2424

Samuel Quinn

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE	AMOUNT
Principal 15 00	
Int	28 66
TOTAL OF INVOICES	1786 66
TOTAL DEDUCTIONS	
AMOUNT OF CHECK	

MILMAR ESTATE, Inc. 10

Brooklyn, N. Y. March 2 1949 L-127 210

PAY TO THE ORDER OF [redacted] Mairas $1786 66/100

Seventeen Hundred Eighty Six 66/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

PRESIDENT

SECRETARY

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE	AMOUNT
4th Int	
1/4 Int	
Prin	281 66
Prin	1500
TOTAL OF INVOICES	
TOTAL DEDUCTIONS	
AMOUNT OF CHECK	1781 66

MILMAR ESTATE, Inc. 12

Brooklyn, N. Y. April 1st 1949 L-127 210

PAY TO THE ORDER OF Sam Mairas $1781 66/100

Seventeen Hundred Eighty One 66/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

PRESIDENT

SECRETARY

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE	AMOUNT
4% Int	81 500
	271 66
Prin	3000 —
TOTAL OF INVOICES	3 271 66
TOTAL DEDUCTIONS	
AMOUNT OF CHECK	

MILMAR ESTATE, Inc. 16

Brooklyn, N. Y. May 5, 1949 L-127 210

PAY TO THE ORDER OF Sam Mairas $3,271 66/100

Thirty-two hundred seventy-one 66/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK

MILMAR ESTATE Inc.

TOTAL OF INVOICES	3 271	66		
TOTAL DEDUCTIONS				
AMOUNT OF CHECK				

PAY TO THE ORDER OF Sam Marcus $3,271 66/100

Thirty-two hundred & seventy-one 66/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

Al Revelson PRESIDENT SECRETARY

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE		AMOUNT	
Prin.		3000	-
Int.		261	66
TOTAL OF INVOICES		3261	66
TOTAL DEDUCTIONS			
AMOUNT OF CHECK			

MILMAR ESTATE, Inc. 19

Brooklyn, N. Y. May 31, 1949 1-127/210

PAY TO THE ORDER OF Sam Marcus $3,261 66/100

Thirty-two hundred & sixty-one 66/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

Al Revelson PRESIDENT SECRETARY

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE		AMOUNT	
Prin.		3000	-
Int.		251	67
TOTAL OF INVOICES			
TOTAL DEDUCTIONS			
AMOUNT OF CHECK		3251	67

MILMAR ESTATE, Inc. 26

Brooklyn, N. Y. June 30, 1949 1-127/210

PAY TO THE ORDER OF Sam Marcus $3251 67/100

Thirty-two hundred & fifty-one 67/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

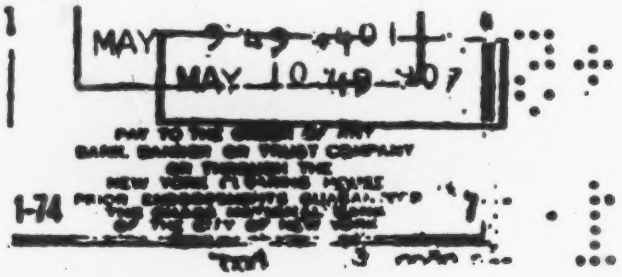
PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

William Myers PRESIDENT SECRETARY

EXHIBIT DME-32(Cont'd)


MAY
MAY 10
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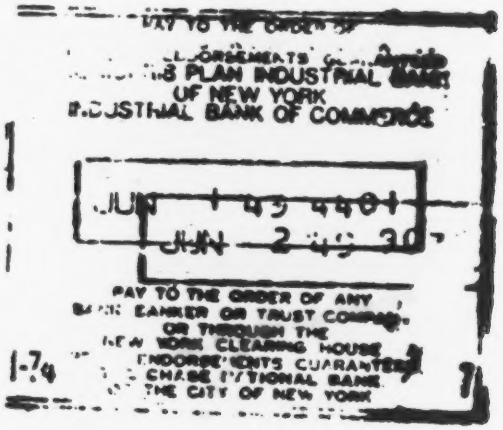
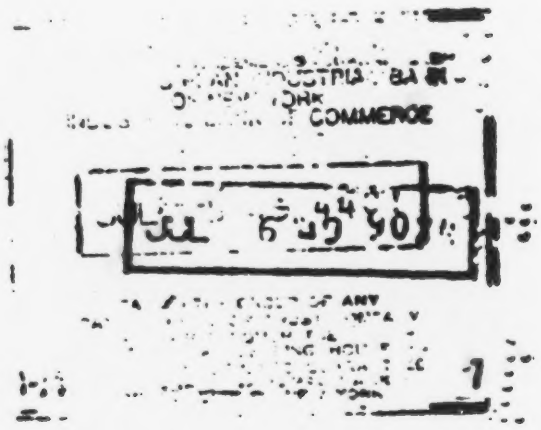

PAY TO THE ORDER OF ANY
BANK BANKER OR TRUST COMPANY
OR THROUGH THE
NEW YORK CLEARING HOUSE
ENDORSEMENTS GUARANTEED
CHASE NATIONAL BANK
THE CITY OF NEW YORK
JUN
JUN
1-74


COMMERCE

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE		AMOUNT	
August 1st 1942		Payment	
		3000	00
Hold			
Tax 4 Years		241	66
TOTAL DEDUCTIONS			
AMOUNT OF CHECK		3241	66

MILMAR ESTATE, Inc. 35

Brooklyn, N. Y. July 31 1942 — 1-187 / 212

PAY TO THE ORDER OF Sam Marcus $3241.66

Three thousand two hundred forty-one 66/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

MILMAR ESTATE, Inc.

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE		AMOUNT	
Note due		9/1/42	
		3000	-
4% Int.			
on 66,500			
for 1942-31		231	66
TOTAL OF INVOICES			
TOTAL DEDUCTIONS			
AMOUNT OF CHECK		3231	66

MILMAR ESTATE Inc. 41

Brooklyn N Y Sept 1 1942 — 1-187 / 212

PAY TO THE ORDER OF Sam Marcus $3231.66

Three thousand two hundred thirty-one 66/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

MILMAR ESTATE, Inc.

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE		AMOUNT	
Note due		9/1/42	
		3000	-
4% Int.			
on 66,500			
for 1942-31		221	66
TOTAL OF INVOICES			
TOTAL DEDUCTIONS			
AMOUNT OF CHECK		3221	66

MILMAR ESTATE Inc. 67

Brooklyn, N. Y. Oct. 1 1942 — 1-187 / 212

PAY TO THE ORDER OF Sam Marcus $3221.66

Three thousand two hundred twenty-one 66/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

MILMAR ESTATE, Inc.

TO THE PUBLIC NATIONAL BANK

For 10/4-31	221	66
TOTAL OF INVOICES		
TOTAL DEDUCTIONS		
AMOUNT OF CHECK	3221	66

PAY TO THE ORDER OF Sam Marcus $3221.66

Thirty-two hundred & twenty-one 66/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

Wilbur Miller PRESIDENT SECRETARY

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE	AMOUNT
Note due	11/1/49
	1500 —
Interest	216 69
TOTAL OF INVOICES	1,716 69
TOTAL DEDUCTIONS	
AMOUNT OF CHECK	

MILMAR ESTATE Inc. 52

Brooklyn, N. Y. Nov. 1 1949 1-127/210

PAY TO THE ORDER OF Sam Marcus $1716 69/100

Seventeen hundred & sixteen 69/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

Wilbur Miller PRESIDENT SECRETARY

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE	AMOUNT
4 Mo Int	
04 63500	211 69
	1500 —
TOTAL OF INVOICES	
TOTAL DEDUCTIONS	
AMOUNT OF CHECK	1711 69

MILMAR ESTATE, Inc. 54

Brooklyn, N. Y. Dec 1 1949 1-127/210

PAY TO THE ORDER OF Sam Marcus $1711 69/100

Seventeen Hundred Eleven 69/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

[signature] PRESIDENT SECRETARY

EXHIBIT DME-32(Cont'd)

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE		AMOUNT	
Nov. 4			
11/30		15	00
Dec. 1st		1681	67
TOTAL OF INVOICES		1796	67
TOTAL DEDUCTIONS			67
AMOUNT OF CHECK			

MILMAR ESTATE, Inc. 57

Brooklyn, N. Y., Jan. 1 1950 L-127/210

PAY TO THE ORDER OF Sam Marcus $1706 67/100

Seventeen hundred & six 67/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

PRESIDENT
SECRETARY

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE		AMOUNT	
		60	50
Dec. 7th		150	
Dec. 15		59	00
Dec. 27 - 30			
TOTAL OF INVOICES		291	67
TOTAL DEDUCTIONS			
AMOUNT OF CHECK			

MILMAR ESTATE, Inc. 59

Brooklyn, N. Y., Jan. 3 1950 L-127/210

PAY TO THE ORDER OF Sam Marcus $1701 67/100

Seventeen hundred & one 67/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

PRESIDENT
SECRETARY

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE		AMOUNT	
Dec. 21 - 31		146	67
Nov.		150	
		1696	67
TOTAL OF INVOICES			
TOTAL DEDUCTIONS			
AMOUNT OF CHECK			

MILMAR ESTATE, Inc. 61

Brooklyn, N. Y., March 1 1950 L-127/210

PAY TO THE ORDER OF Sam Marcus $1696 67/100

Sixteen hundred & ninety-six 67/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY

MILMAR ESTATE, Inc.

TOTAL OF INVOICES				
TOTAL DEDUCTIONS				
AMOUNT OF CHECK				

PAY TO THE ORDER OF [illegible] $1696 [illegible]

Sixteen Hundred & Ninety-six [illegible] DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

MILMAR ESTATE, Inc.

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

[signature] PRESIDENT

SECRETARY

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE		AMOUNT	
TOTAL OF INVOICES			
TOTAL DEDUCTIONS			
AMOUNT OF CHECK			

MILMAR ESTATE, Inc. 65

Brooklyn, N. Y. March 30 19 56 1-127 210

PAY TO THE ORDER OF [illegible] $1692 56 XX

**1692 DOLLARS 50 CTS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

MILMAR ESTATE, Inc.

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

[signature] PRESIDENT

SECRETARY

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES. IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE		AMOUNT	
[illegible]		134	67
[illegible]			
Paid [illegible]			83
		185	84
Note		3000	—
TOTAL OF INVOICES			
TOTAL DEDUCTIONS			
AMOUNT OF CHECK		3185	84

MILMAR ESTATE, Inc. 67

Brooklyn, N. Y. April 29 19 56 1-127 210

PAY TO THE ORDER OF [illegible] $3185. 84 XX

Thirty One Hundred Eighty Five 84/XX DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

MILMAR ESTATE, Inc.

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

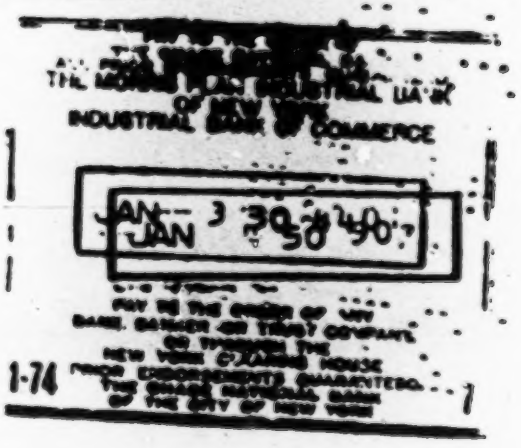
PITKIN AVENUE AND WATKINS STREET

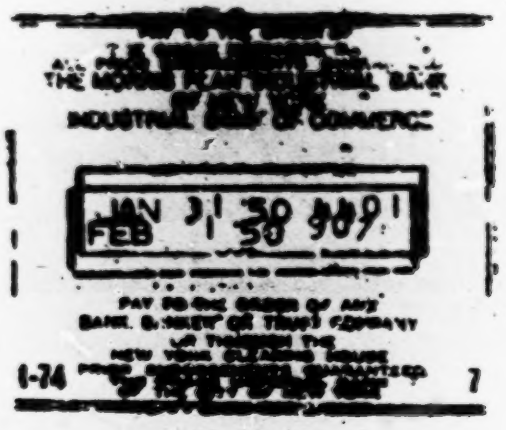
D

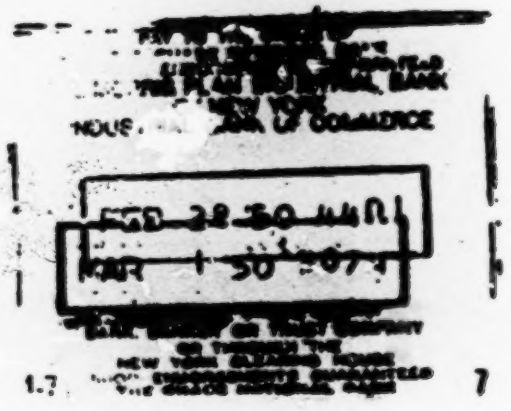
[signature] PRESIDENT

SECRETARY

EXHIBIT DME-32


INDUSTRIAL BANK OF COMMERCE
JAN 3 30 940
JAN 1 50 90
1-74


INDUSTRIAL BANK OF COMMERCE
JAN 31 30 940
FEB 1 50 909
1-74


FEB 28 30 1141
MAR 1 50 907
1-74

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE			AMOUNT	
4% Sept 1st			3000	—
			176	67
Thirty			3000	—
			3176	67
Bal Due				
TOTAL OF INVOICES			3176	67
TOTAL DEDUCTIONS				
AMOUNT OF CHECK				

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

72

Brooklyn, N. Y., June 1, 1950 L-127 210

PAY TO THE ORDER OF Sam Marcus $3,176 67/100

Thirty-one hundred & seventy-six 67/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

MILMAR ESTATE, Inc.

Will Fuller PRESIDENT SECRETARY

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE			AMOUNT	
Quarterly at rate 9/1/50				
			3000	—
Sept 1st				
Bal.			166	67
TOTAL OF INVOICES				
TOTAL DEDUCTIONS				
AMOUNT OF CHECK			3166	67

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

80

Brooklyn, N. Y., July 1, 1950 L-127 210

PAY TO THE ORDER OF Sam Marcus $3166 67/100

Thirty-one hundred & sixty-six 67/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

MILMAR ESTATE, Inc.

Will Fuller PRESIDENT SECRETARY

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE			AMOUNT	
Quarterly			3000	—
Sept 1st			156	67
TOTAL OF INVOICES				
TOTAL DEDUCTIONS				
AMOUNT OF CHECK			3156	67

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY

MILMAR ESTATE, Inc.

87

Brooklyn, N. Y., August 1, 1950 L-127 210

PAY TO THE ORDER OF Sam Marcus $3156 67/100

Thirty-one hundred & fifty-six 67/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

MILMAR ESTATE, Inc.

TOTAL OF INVOICES		
TOTAL DEDUCTIONS		
AMOUNT OF CHECK	3156	67

PAY TO THE ORDER OF Sam Marcus $3156 67/100

Thirty-one hundred & fifty-six 67/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

PRESIDENT

SECRETARY

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE		AMOUNT	
Comm. Note Payment due 9/15/50			
		44 000	—
this ck.		3 000	—
Balance		41 000	—
TOTAL OF INVOICES			
TOTAL DEDUCTIONS		146	67
AMOUNT OF CHECK		3146	67

MILMAR ESTATE, Inc. 97

Brooklyn, N. Y. Sept 1 1950 L-127 210

PAY TO THE ORDER OF Sam Marcus $3146 67/100

Thirty-one hundred - forty-six 67/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

PRESIDENT

SECRETARY

THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE		AMOUNT	
Comm. Note			
		3000	—
Int		136	69
		3136	69
TOTAL OF INVOICES			
TOTAL DEDUCTIONS			
AMOUNT OF CHECK		3136	69

MILMAR ESTATE Inc. 103

Brooklyn, N. Y. October 2, 1950 L-127 210

PAY TO THE ORDER OF Sam Marcus $3136 69/100

Thirty-one hundred - thirty-six 69/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

PRESIDENT

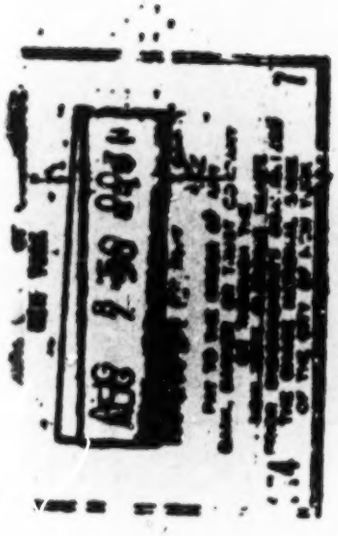
SECRETARY

EXHIBIT DME-52(Contid)

Dear Diane

Dear Diane

Dear Diane



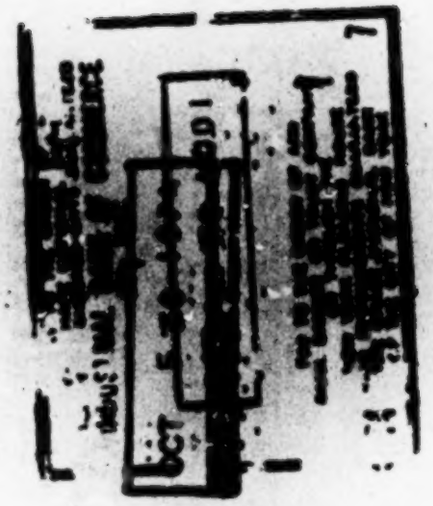
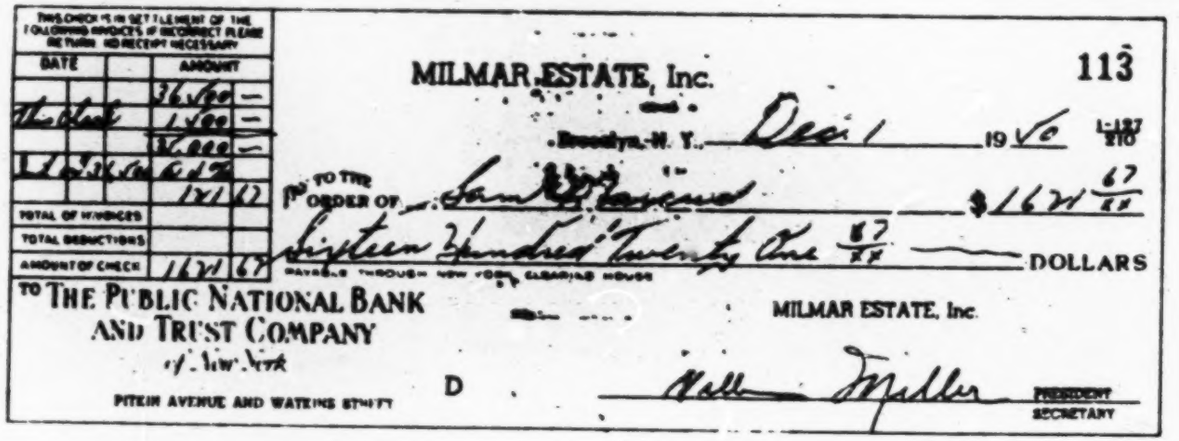


EXHIBIT DME-32(Cont'd)



THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE		AMOUNT	
		36,500	—
This check		1,500	—
		35,000	—
[illegible]		[illegible]	
		121	67
TOTAL OF INVOICES			
TOTAL DEDUCTIONS			
AMOUNT OF CHECK		1621	67

MILMAR ESTATE, Inc. 113

Brooklyn, N. Y. Dec. 1 1950 1-127/210

PAY TO THE ORDER OF Sam Marcus $1621 67/xx

Sixteen Hundred Twenty One 67/xx DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

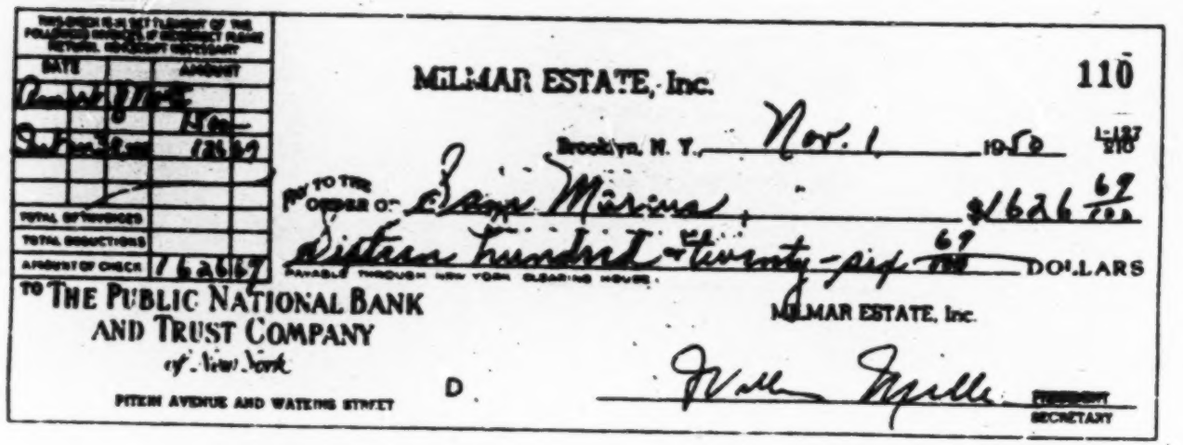
TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

Walter Miller PRESIDENT SECRETARY



THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

DATE		AMOUNT	
[illegible]			
		1500	—
[illegible]		126	69
TOTAL OF INVOICES			
TOTAL DEDUCTIONS			
AMOUNT OF CHECK		1626	69

MILMAR ESTATE, Inc. 110

Brooklyn, N. Y. Nov. 1 1950 1-127/210

PAY TO THE ORDER OF Sam Marcus $1626 69/100

Sixteen Hundred & Twenty-six 69/100 DOLLARS

PAYABLE THROUGH NEW YORK CLEARING HOUSE

TO THE PUBLIC NATIONAL BANK AND TRUST COMPANY of New York

PITKIN AVENUE AND WATKINS STREET

D

MILMAR ESTATE, Inc.

Walter Miller PRESIDENT SECRETARY

this contract? A. Frankly, I don't know. I haven't the slightest idea or the reasons for it at all.

• • •

Q. Did you give Mr. Robert Schwartz instructions for drawing this contract? A. I told Mr. Schwartz what my intentions were.

Q. That is, in advance of the drawing of this contract you told Mr. Robert Schwartz what your intentions were? A. At the time of the drawing or in advance. At the time I don't recall just exactly when it was, but Mr. Robert Schwartz had knowledge of my intentions of what transpired.

Q. Well, how did he get knowledge of your intentions? Well, I told him what I intended doing.

Q. Well, was Mr. Miller and was Mr. Bierman present at that time, when you gace Mr. Robert Schwartz instructions as to what were your intentions? A. Well, frankly, I don't think so. No, I don't have any sharp recollections of whether I told him the day before the signing of the contract or two days before, but all I do know was I conveyed my intentions to Mr. Schwartz in the selling of my stock.

• • •

Q. Now, do you have any claims for money against Milmar Estates, Inc.? A. I don't know who I have claims for money from.

Q. Well, now, you are a business man, aren't you? A. I am a business man, yes

Q. I am asking you whether you have any claims for money against Milmar Estates, Inc.? A. I don't know to whom I have claims for money.

Q. I am not asking you about other people. I am asking you specifically whether you have any claims for money against Milmar Estates, Inc.? A. I do not know to whom I have to look for money for claims.

Excerpts from Deposition of Samuel Marcus

Mr. Chazin: Will you please read the question again, Mr. Waxman.

Mr. Grosman: He has answered it.

[The pending question was read by the stenographer.]

Q. What is your answer? A. My answer is I do not know to whom I have claims for money.

Q. Mr. Marcus, you are an intelligent man. You understand the question. I am asking you specifically: Do you have any claims for money against Milmar Estates, Inc.? A. And I am answering just as specifically: I don't know to whom I have to look for redress on money.

Q. Then you do not know whether you have any money claim against Milmar Estates, Inc.? A. That's right, I don't know definitely to whom I have to look for money.

Q. Do you have any other claims against Milmar Estates, Inc.? A. I don't know at this time.

Q. Do you have any claims for money against Bill Miller's Riviera? A. I don't know at this time.

Q. Do you have any other claims against Bill Miller's Riviera? A. I don't know at this time.

Q. Do you have any money claim against Al Bierman? A. I can't say at this time.

Q. Do you know at this time? A. I don't know. I don't know definitely at this time.

Q. Well, tell us to the extent of your knowledge? A. I can't. Everything seems to be in such a muddle here that I refuse to make a definite statement as to who owes me money and who does not owe me money until things get clarified.

Q. Do you have claims for money against Al Bierman? A. I don't care to make a definite statement at this time.

Q. It is not your privilege to care or not to care to make a statement at this time. You are being examined pur-

suant to the rules of the court, and you are required to answer questions, whether you care to or not.

Mr. Grosman: He is answering the question. He is not required to give you the kind of answer that you want.

Mr. Chazin: I am not asking for answers that I want. I just want answers to the questions.

Q. Do you have money claims against Al Bierman? A. I may have and I may not have. Things will have to shape itself up when things get clarified.

Q. Do you know whether you have any claim for money against Al Bierman? A. I don't know for definite. I cannot make a definite answer at this time.

Q. Do you know if you have any claim for money against Al Bierman; do you or don't you know? A. I don't know at this time.

Q. Do you have any other claims against Al Bierman? A. I don't know at this time.

Q. Do you know of any claims for money against Al Kevelson? A. I don't know at this time.

Q. Do you know of any other claims against Al Kevelson? A. I don't know at this time.

Q. Do you have any claims for money against William Miller? A. I don't know at this time.

Q. Do you have any other claims against William Miller? A. I don't know at this time.

Q. Do you have any money claims against Michael Realty Company? A. I don't know at this time.

Q. Do you have any other claims against Michael Realty Company? A. I don't know at this time.

Q. Do you have any money claims against Abraham Lieberman? A. I don't know at this time.

Q. Do you have any other claims against Abraham Lieberman? A. I don't know at this time.

Excerpts from Deposition of Samuel Marcus

Q. Do you have any money claims against Jacob Hoffman? A. Yes, I do.

Q. Are they in any way related to Milmar Estates, Inc., or Bill Miller's Riviera, Inc., or William Miller, or Al Kevelson, or Al Bierman? A. No, they are not.

Q. Do you have any other claims against Jacob Hoffman relating to Milmar Estates, Inc., or Bill Miller's Riviera, Inc., or Bill Miller, or Al Kevelson, or Al Bierman? A. I don't know at this time.

Q. Do you know approximately how long this case is pending? A. No. Frankly, I don't know definitely.

Q. Well, is it closer to a week than to a year? A. Well, by pending do you mean when I was first served?

Q. Yes. A. No. I would say it is about a year, probably more. I don't know the exact dates at all.

Q. Have you made any effort during the period of time to find out whether you have any claims against the people and the corporations that I have mentioned? A. Yes, I did make an effort.

Q. As a result of those efforts have you ascertained any information? A. Yes.

Q. What is the information you have ascertained? A. The information is that the situation is in such a muddle that no one could give me any advice until things were more clarified.

Q. So that as a result of all the efforts that you have made up to this time during this period of one year you do not know whether you have any claims against the persons mentioned? A. We do not know—what is your question again, please?

Q. Following one year of inquiry you still do not know whether you have any claims against the persons mentioned? A. I don't know against which person I may have my claims. We do have claims.

Q. Now, what are your claims? A. It is something I cannot determine until this muddle is straightened out.

Excerpts from Deposition of Samuel Marcus

Q. What are the claims that you do have? A. I don't know what the claims are at this time.

Q. Have you any idea at all what the claims are? A. All I was advised by my attorneys is to the effect that things were in such a hopeless muddle that they could give me no definite advice until matters were clarified.

Q. Do you at the present time know of any claims that you may have against any of these persons mentioned? A. [There was no response.]

• • •

Q. Now, on September 14, 1948 did you as an officer of Milmar Estates, Inc: sign certificates of stocks for 1250 shares of stock of Milmar Estates, Inc., made out to Samuel Marcus? A. I don't understand that.

Mr. Chazin: Will you repeat the question, please, Mr. Waxman.

(The pending question was read by the Stenographer.)

A. I don't recall signing any such papers.

Q. Did you on September 14, 1948 sign any certificates of stock of Milmar Estates, Inc.? A. I believe I endorsed over my 625 shares of stock, which I owned outright, you might say, without any strings attached to it. I signed those, and those were the shares of stock I was selling, and those were the shares of stock turned over to Mr. Lieberman but held in escrow, subject to that agreement of that date.

Q. Now, you did not sign as an officer of Milmar Estates, Inc. any new certificates of stock on that date, did you? A. I don't recall signing any new certificates of stock.

Q. Well, you would remember if you signed any new certificates of stock, would you? A. That is very difficult to say, what I would remember, something that happened

Excerpts from Deposition of Samuel Marcus

three years ago. I know I signed an awful lot of papers that day.

Q. Do you recall whether or not you signed new certificates o. stock on that day? A. I am fairly certain there was no new certificates of stock signed that day.

Q. There were no new certificates of stock signed that day? A. There were no new certificates of stock signed that day.

Q. Was the stock book present at this conference on September 14, 1948? A. I really don't recall whether it was or not.

Q. Do you recall whether or not all the stock certificates issued prior to September 14, 1948 were marked "Cancelled" on the stubs on that date? A. I really don't know what was done on tha date.

Q. Do you remember seeing any one of the four parties, being yourself, Mr. Schwartz, Judge Lieberman, or Mr. Miller mark the stubs in the stock book "Cancelled"? A. I don't believe that the stock book was at that meeting as of that date.

Q. When to the best of your recollection was the last certificate of stock of Milmar Estates, Inc. issued? A. The last certificate of stock was issued to Mr. Al Bierman for 20 shares of stock.

Q. Do you remember when that was? A. I don't recall the exact date. I can't recall the exact date that was. The date would appear possibly on Mr. Bierman's stock.

Q. You do not recall any stock being issued after that? A. There was definitely no stock issued after that.

* * *

Q. Now, will you tell us what shares of stock you delivered to Judge Lieberman on September 14, 1948. A. I delivered to him 625 shares of stock made out to my name.

Q. Do you know the certificate numbers? A. I don't know the numbers at this time, no.

Excerpts from Deposition of Samuel Marcus

Mr. Grosman: We have a receipt for what was delivered to Lieberman.

Mr. Chazin: I would like to see that receipt then.

Mr. Tepper: You furnished us with a copy.

Mr. Chazin: All right, I will withdraw that question.

Q. Referring to Exhibit P-10, for identification, would you tell us what certificates of stock you delivered to Judge Lieberman in escrow on September 14, 1948. A. According to this slip it would be numbers 6, 7, 8, 9, and number 2 would make up the 625 shares.

Q. Now number 6 is what certificate and how many shares? A. Number 6 is 125 shares.

Q. Issued to whom? A. Issued to Sam Marcus.

Q. And number 7? A. Number 7 is 91 shares.

Q. Issued to whom? A. Sam Marcus.

Q. How about number 8? A. 300 shares.

Q. Issued to whom? A. Sam Marcus.

Q. And 9? A. 100 shares, issued to Sam Marcus.

Q. And number 2? A. 9 shares, issued to Sam Marcus.

Q. And these are the shares that you endorsed and turned over to Judge Lieberman on September 14, 1948? A. I believe these were the shares that were turned over.

Q. And there weren't any other certificates that you delivered to Judge Lieberman on that date? A. I don't believe there were any other certificates. All I do know, there was a total of 625 shares of stock, which I endorsed and turned over to Mr. Lieberman as of that date. The numbers of the stocks I do not know.

Q. But they were certificates of stock issued prior to September 14, 1948? A. That's correct.

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Q. Now, the money that you received after September 14, 1948, what was it for? A. That was in payment for the stock, for my stock which I sold to Mr. Kevelson.

Excerpts from Deposition of Samuel Marcus

Q. Do you make any claim to the moneys deposited in Court in this case? A. I do not know how to answer that question. I will leave that to my attorneys to answer that.

Q. I am asking you, not your attorneys, whether you make any claim to those moneys?

Mr. Grosman: He has answered.

A. All I know is that I have coming to me an additional amount of money for the payment of my stock.

Q. How much more is coming to you? A. Oh, in rough figures I would say somewheres between thirty-five and forty thousand dollars.

Q. Do you know that money has been deposited in Court in this suit? A. I have been so told.

Q. Do you make a claim to those moneys? A. As I said before, I do not know whether I make claim to those moneys or not. All I do know, there is money coming to me.

Q. Do you make a claim to the moneys which were deposited in Court?

Mr. Grosman: Now, he has answered that question three times, that he does not know. You are not entitled to the kind of answer you want.

Mr. Chazin: I am entitled to an answer.

Mr. Grosman: You have gotten an answer.

Mr. Chazin: I have gotten an answer from him that he does not know whether he makes a claim or not. Now, I want to find out whether that is his answer.

Mr. Grosman: Keep repeating the answer.

A. I don't know.

Mr. Brigadier: You are instructing the witness what answer he should give, Judge.

Q. Do you make a claim to the moneys deposited in Court in this case? A. I don't know whether I have claim

to that money or not. All I do know, there is moneys coming to me for the sale of my stock.

Q. From whom is the money coming to you? A. I don't know from whom that money is coming to me.

Q. Have you made any effort to ascertain from whom that money is coming to you? A. My attorneys are making an effort to ascertain that.

Q. Have you ascertained from whom moneys to the extent of thirty-five to forty thousand dollars are due to you? A. My attorneys are handling that.

Mr. Tepper: Just a moment. Mr. Chazin, do you know as a lawyer that there is pending in this case a counterclaim to your suit.

Mr. Brigadier: No, there is not.

Mr. Tepper: This witness has testified time and time again that he does not know whether he has a legal claim to that money or whether his attorneys or going to advise him otherwise.

Mr. Chazin: Mr. Tepper, I do not know as a lawyer that a counterclaim is pending. So far as I know, no counterclaim is pending. Secondly, as a lawyer I believe that a witness cannot hide behind saying, "You will have to ask my lawyer." He is the witness. The lawyers are not the witnesses.

Mr. Tepper: But you can't ask a witness to give you a legal opinion. That is what you are trying to have this witness give you, a legal opinion.

Mr. Chazin: No, I am asking him for facts.

Q. I want to know who owes you the thirty-five or forty thousand dollar unpaid balance?

Mr. Grosman: He has answered that.

Excerpts from Deposition of Samuel Marcus

Q. (Continuing) —for the stock? A. I don't know who owes me that money. The entire situation is in a muddle, and until my attorneys advise me who owes me the money I cannot tell you who owes me the money.

Q. Have you made an attempt to ascertain who owes you the money? A. My attorneys have advised me that they cannot tell me who owes me the money until this thing has gone further and the matter cleared up.

Q. So you do not know who owes you that money? A. That's correct.

Q. Now, that is for the stock of Milmar Estates, Inc. sold on September 14, 1948? A. That's for the stock of Milmar, 625 shares of my stock sold on September 14, 1948.

Q. Yes. You do not know who owes you that money? A. That's correct.

Q. Now, I want to ask you whether you have any claims of any nature against Milmar Estates, Inc.? A. I don't know at this time to whom I must look for my claims.

Q. Well, do you have any claims against Milmar Estates, Inc.? A. I don't know at this time whether I have claims against Milmar Estates or not.

Q. Have you attempted to ascertain whether you have such claims?

Mr. Tepper: Mr. Chazin, this almost amounts to badgering the witness. The witness stated to you that he does not know what his legal rights are, that he has retained counsel for that purpose, and that counsel is acting.

Mr. Chazin: Mr. Tepper, I appreciate the feeling with which you are speaking, but this witness has been a very evasive witness and is deliberately trying to avoid committing himself. The purpose of this type of examination is to compel a party to state his position, which this party is seeking to

avoid to do, which under the procedure of the Court he is not permitted to do. The very purpose of the examination is to find out what purpose he has. It is entirely proper.

Mr. Tepper: I don't think you are properly characterizing the witness, Mr. Chazin. You are making a searching investigation and examination, and I think he has been most cooperative.

Mr. Chazin: Well, that is a matter of opinion, sir.

Mr. Tepper: All right.

(The pending question was read by the Stenographer.)

A. I have attempted to ascertain that.

Q. But you have not ascertained? A. The best advice my attorneys can give me is that they can give me no definite answer at this time.

Q. Independent of any advice that your attorneys may give you, do you have any claims against Milmar Estates, Inc.?

Mr. Tepper: That is objected to as being an improper question, in the light of the witness' answer.

Mr. Chazin: Will you repeat the question, please, Mr. Waxman.

(The pending question was read by the Stenographer.)

A. I do not have enough legal knowledge to know who the person or persons are that I am to turn to for my money, and therefore I cannot make any type of statement as to whom I must turn to for my money without my attorney's advice.

Excerpts from Deposition of Samuel Marcus

Q. When you say your money, what do you refer to? A. The money that is coming to me for the sale of my 625 shares of stock, as per agreement of September 14.

Q. Do you have any other claim against Milmar Estates, Inc. independent of what your attorneys may tell you?

Mr. Grosman: He has already answered that.

Mr. Chazin: No, he has not answered that.

Mr. Grosman: Maybe not to your satisfaction.

Mr. Chazin: No, he has not. He is referring only to the claim of the balance of the purchase price of the stock. I am going beyond that.

Mr. Grossman: He has answered that repeatedly, and I object to him being asked the same question over and over again.

Mr. Chazin: That is not the same question.

Mr. Grosman: You asked him before whether he had any claim against Milmar Estates. He has told you.

Mr. Chazin: He says he has a claim for the balance of the purchase price. I am asking him whether aside from that claim he has any other claims against Milmar Estates. What is your answer to that?

Mr. Grosman: He has given you an answer. He does not know.

The Witness: I do not know at this time to whom I have claims against.

Q. What claims do you refer to when you say you do not know against whom you have these claims.

Mr. Grosman: I object to that. He says he does not know what claims he has until he gets his attorneys' advice.

Mr. Chazin: I object to counsel helping the witness.

Excerpts from Deposition of Samuel Marcus

Mr. Brigadier: If he will make the statement that the Judge made, that is what I think Mr. Chazin is trying to get at. He has never said he does not know what claims he has.

Mr. Grosman: He said he does not know until he is advised by his attorney, before whom he has laid all the facts.

Mr. Brigadier: We could expedite this by going off the record.

(Discussion between counsel off the record.)

A. My answer is I do not know what my full claims are until I have been advised by my attorneys.

Q. You say you do not know what your full claims are. Do you know any partial claims? A. I believe there has been a fraud perpetrated on me and until we dig to the bottom and get all the facts I will have to await my attorneys' advice to tell me what my claims are for justice.

Q. Now, will you tell us what the facts are about the fraud? A. I don't know any facts. The facts will have to be unearthed with your witnesses.

Q. Do you at the present time know any facts about an alleged fraud perpetrated upon you? A. Those facts will have to be brought out by some of your witnesses.

Mr. Chazin: Will you repeat the question, please, Mr. Waxman.

(The pending question was read by the Stenographer.)

A. I don't know any definite facts other than what I have told my attorneys. They advised me they cannot help me or advise me until this examination has gone further and they have all the facts on hand.

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Excerpts from Deposition of Samuel Marcus

Q. Now, on September 14, 1948 did Robert Schwartz, as secretary of Milmar Estates, Inc., sign any new certificates of stock? A. I don't know what Mr. Robert Schwartz signed.

Q. You did not sign any certificate of stock? A. I don't recall signing any certificates.

Mr. Tepper: You mean after a certain date?

Mr. Chazin: No. I am saying on September 14, 1948.

Mr. Tepper: I presume that the witness' answer is that he does not recall signing any on September 14, 1948, just for the purpose of clarification.

Mr. Chazin: Well, I will ask the question again.

Q. Did you on September 14, 1948 sign any certificates of stock? A. I don't recall signing any.

Q. I did not finish my question. Did you at any time during the month of September, 1948, sign certificates of stock of Milmar Estates, Inc.? A. I don't recall signing any certificates of stock.

Q. Did you at any time during the month of August, 1948, sign any certificates of stock of Milmar Estates, Inc.? A. I don't recall signing any certificates of stock.

Q. Did you at any time during the year 1948 sign certificates of stock of Milmar Estates, Inc.? A. I can't place the last day, but all I do know the last shares of stock which I did sign was the 20 shares of stock given to Al Bierman.

Q. And after you signed the certificate for 20 shares to Al Bierman you signed no further certificates of stock of Milmar Estates, Inc.? A. To the best of my recollection, I did not.

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Q. Did you sign certificate No. 17 for 500 shares to Samuel Marcus? A. I don't recall signing that certificate.

Excerpts from Deposition of Samuel Marcus

Q. Do you believe that you did or did not sign it? A. I don't recall signing any such certificate.

Q. I am asking you whether you believe you did or did not sign such a certificate?

Mr. Grosman: He answered that.

A. I don't recall signing any such certificate.

Q. What is your best recollection?

Mr. Grosman: You are asking him to guess now.

Q. What is your best recollection?

Mr. Grosman: He says he has no recollection.

Mr. Chazin: That is what you say.

Q. Did you sign certificate No. 17 for 500 shares to Samuel Marcus? A. I do not have any recollection on the signing of this certificate.

Q. You have no recollection one way or the other as to whether or not you signed certificate No. 17?

Mr. Tepper: I object to that. The witness did not so state.

Mr. Brigadier: Well, he is asking the question.

A. I say I have no recollection of signing this certificate.

Q. Mr. Marcus, you have been shown a stub in the stock book of Milmar Estates, Inc. for certificate No. 17, purporting to be for 500 shares issued to Samuel Marcus, dated September 14, 1948. Does that in anyway at all refresh your recollection as to whether or not such a certificate was ever issued? A. It does not.

Q. Does that in any way at all refresh your recollection

as to whether or not you signed such a certificate? A. It does not.

Q. As president or officer of Milmar Estates, Inc.? A. I have no recollection about the signing of this certificate.

Q. Did you ever endorse certificate No. 17 in blank? A. I don't recall ever signing certificate No. 17.

Q. Did you ever endorse certificate No. 17 in blank? A. I don't recall ever seeing certificate No. 17.

Q. Did you ever endorse certificate No. 17 in blank? A. I have no recollections of signing certificate 17 in any fashion.

Q. Front or back? A. Front or back.

Q. Now, certificate No. 17 does not appear on your list, Exhibit P-10, does it? A. That's right.

Q. I show you a stub for certificate No. 18 for 500 shares, issued to Samuel Marcus, dated September 14, 1948, appearing in Exhibit P-78.

For the record, I want to state that all these questions are addressed to stubs in Exhibit P-78.

Mr. Tepper: I object to the form of the question. It should be "purport to be issued" rather than "issued".

Q. I show you a stub for certificate No. 18 for 500 shares, purporting to be issued to Samuel Marcus, dated September 14, 1948. Is the writing on this stub in your hand? A. It is not.

Q. Is it in the hand of Robert Schwartz? A. I don't know.

Q. Do you know whose writing it is? A. I do not.

Q. Did you ever see the writing on this stub before? A. I cannot recall it.

Q. Well, do you have any recollection of ever having seen the writing on this stub before? A. I cannot recall this signature. I have nothing to compare it with, and I wouldn't know.

Excerpts from Deposition of Samuel Marcus

Mr. Tepper: Let the record show that this entry on stub No. 18 in this Exhibit P-78 bears only the language, "500 shares, Samuel Marcus, September 14, 1948," and is otherwise blank with respect to the person from whom the alleged stock was transferred, place of transfer, number of original shares, and the number of shares transferred, and there is no revenue stamp, Federal tax stamp, on the stub. There is no Federal tax stamp on any of them.

Mr. Chazin: On any of the stubs in the book?

Mr. Tepper: On any of the stubs in the book.

Mr. Chazin: Mr. Tepper, I presume you mean that the only written matter on the stub is the number 500, the words Samuel Marcus and September 14, 1948.

Mr. Tepper: Nor is there any other filled in printed matter on this stub.

Mr. Brigadier: It is in evidence. I think both of you are wasting a lot of time.

Q. Mr. Marcus, did you sign as an officer of Milmar Estates, Inc. certificate No. 18? A. I have no recollections of signing certificate No. 18.

Q. Did you endorse certificate No. 18 in blank? A. I do not have any recollections of endorsing certificate No. 18 in blank.

Q. Can you recollect any reason why you should have signed or might have signed certificate No. 18? A. I have no recollections on that whatsoever.

Q. Now, isn't your recollection that you testified last week that no certificates were signed by you after certificate No. 16? A. That is the best of my recollection, yes, sir.

Q. And that is still your recollection? A. That is the best of my recollection, yes.

Excerpts from Deposition of Samuel Marcus

Q. Now, I show you stub for certificate No. 19, 125 shares, purporting to be issued to Samuel Marcus, dated September 14, 1948. Is the writing on this stub in your handwriting? A. It is not.

Q. Is it in the handwriting of Robert Schwartz? A. I don't know.

Q. Do you know whose handwriting it is? A. I do not.

Q. Did you sign certificate No. 19? A. I have no recollections of signing certificate No. 19.

Q. Did you endorse certificate 19 in blank? A. I have no recollections of signing certificate 19 in blank.

Q. I show you a stub for certificate No. 20, for 125 shares, purporting to have been issued to Samuel Marcus, dated September 14, 1948. Is the writing on this stub in your hand? A. It is not.

Q. Is it in the hand of Robert Schwartz? A. I don't know.

Q. Do you know whose writing that is? A. I do not.

Q. Did you sign certificate No. 20? A. I have no recollection of signing certificate 20.

Q. Did you endorse certificate No. 20 in blank? A. I have no recollection of endorsing certificate 20 in blank.

Q. What is your best recollection as to whether or not you signed certificates Nos. 17, 18, 19 and 20? A. I have no recollections of signing any of those certificates at this time.

Q. You testified at the last hearing that you signed no certificates after certificate No. 16? A. To the best of my recollection I signed no certificates after.

Q. To the best of your recollection you signed no certificates after certificate No. 16? A. That's right.

Q. I would like you to sign your name on that paper, which I want to put in evidence. A. (Witness complies.)

Mr. Chazin: I would like this put in evidence as the signature of Samuel Marcus written today.

Excerpts from Deposition of Samuel Marcus

(The paper above referred to was marked Exhibit P-79, in evidence.)

Q. Have you ever seen Robert Schwartz sign his name? A. I have seen his name on papers, but I don't recall seeing him sign his name.

Q. You do not recall ever seeing Robert Schwartz sign his name? A. I cannot recall actually seeing him sign his name.

Q. Now, as a matter of fact, was not Robert Schwartz secretary of Milmar Estates, Inc.? A. He was.

Q. And didn't he sign many papers as secretary of Milmar Estates, Inc.? A. Not many. He signed the stock certificates. I don't know what other papers he may have signed. There wasn't any other transaction but possibly a bank resolution. That's all I know of offhand.

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Q. Prior to September 14, 1948 did you have certificate No. 2 in your possession? A. I did.

Q. What happened to that certificate? A. I believe that was turned over—now, let me see again here. I believe that must have been turned over in escrow as a total number of 625 shares of stock. That was turned over in escrow to Judge Lieberman.

Q. In other words, on September 14, 1948 you delivered certificate No. 2 to Judge Lieberman in escrow? A. I delivered 625 shares of stock to Judge Lieberman to be held in escrow. Just what the certificate numbers were I am not prepared to state, but a total of 625 shares of stock was delivered to Judge Lieberman.

Q. On what date was that? A. On September 14.

Q. What year? A. 1948.

Q. Now, you said that you have in your possession certificates 1, 10, 11, 12, 13, 14, and 15.

Excerpts from Deposition of Samuel Marcus

Mr. Grosman: No, he did not say that.
Mr. Brigadier: He said he "believed".
The Witness: I said I should have in my possession 14 and 15.

Q. You should have in your possession 14 and 15? A. Yes, that's right.

Q. What is the total number of shares represented by 1, 10, 11, 12 and 13? A. They should be 500.

Q. And what is the total of 14 and 15? A. 125.

Q. Did you prior to September 14, 1948, in the month of September, 1948 have in your possession certificates for 1250 shares of Milmar stock? A. I did not.

Q. Did you have in your possession immediately prior to September 14, 1948 certificates for 1125 shares, being 1250 shares less certificates 14 and 15 for 125 shares? A. Prior to September 14 I had in my possession certificates 1, 2, 6, 7, 8, 9, 10, 11, 12 and 13.

Q. Now, which of those certificates did you deliver to Judge Lieberman on September 14, 1948? A. I believe I delivered to him 2, 6, 7, 8, and 9, which makes a total of 625 shares.

Q. Did you endorse those shares in blank when you turned them over to Judge Lieberman? A. To the best of my recollections I think I did, but I am not definitely positive.

Q. You are positive that you did not retain possession of any of these certificates, 2, 6, 7, 8 and 9? A. I did not retain possession of any of those certificates.

Q. Those are the only certificates of Milmar stock that you endorsed and delivered to Judge Lieberman on September 14, 1948? A. That's the only stocks that I can recall at this time that I endorsed and delivered.

Q. To Judge Lieberman on September 14, 1948? A. That's correct.

Excerpts from Deposition of Samuel Marcus

Q. Did you endorse any other certificates of stock of Milmar Estates, Inc. on September 14, 1948? A. I have no recollections of endorsing any other stock on that date.

Q. Did you deliver any other stock of Milmar to Judge Lieberman on September 14, 1948? A. I have no recollection of delivering any other stock to Judge Lieberman.

Q. Have you searched your memory to try to recollect everything that took place on that date? A. I have tried to the best of my ability.

Q. You have tried to the best of your ability to search and probe your memory? A. That's right.

Q. And you have no recollection at all of having endorsed any other certificate of stock of Milmar Estates, Inc. on or about September 14, 1948? A. I have no recollections of endorsing any other stock.

Q. And does the same answer stand for the month of August and the month of September, 1948? A. That's true.

Q. Now, have you also searched and probed your memory as to whether or not you signed as an officer of Milmar Estates, Inc. any new certificates of stock on September 14, 1948? A. I have no recollection of signing any new certificates on that date.

Q. Have you searched and probed your memory? A. I have done so to the best of my ability.

Q. You have made every effort to try to recollect whether or not you signed such stock? A. I did.

Q. And your recollection is that you did not sign such stock? A. To the best of my recollection I cannot recall signing any such stock.

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Excerpts from Deposition of Samuel Marcus

SAMUEL MARCUS, resumed the stand, and testified further as follows:

Direct Examination by Mr. Chazin [Continued]:

Q. Mr. Marcus, have you since the last hearing looked for more records relative to this matter? A. I have made some searches.

Q. Have you found additional records? A. I found certain things, yes.

Q. Do you have with you any shares of stock? A. I have.

Q. In Bill Miller's Riviera, Inc.? A. Riviera, no.

Q. Rather in Milmar Estates? A. I have.

Q. May I see them, please. A. [Witness hands papers to Mr. Chazin.]

Mr. Chazin: Mr. Marcus produced certificate No. 1 of Milmar Estates, Inc., 9 shares, dated April 15, 1946, made to William Miller, and bearing the endorsement in blank of William Miller.

[The certificate above referred to was marked Exhibit P-81, in evidence.]

Mr. Chazin: Next is certificate No. 10, the same corporation, 116 shares, dated June 7, 1946, made to William Miller, bearing the endorsement in blank of William Miller.

[The certificate above referred to was marked Exhibit P-82, in evidence.]

Mr. Chazin: Also certificate No. 11, Milmar Estates, Inc., 125 shares, made to William Miller, dated June 7, 1946, bearing the endorsement of William Miller in blank.

Excerpts from Deposition of Samuel Marcus

[The certificate above referred to was marked Exhibit P-83, in evidence.]

Mr. Chazin: Certificate No. 12, Milmar Estates, Inc., 125 shares, dated June 7, 1946, made to William Miller, and bearing the endorsement of William Miller in blank.

[The certificate above referred to was marked Exhibit P-84, in evidence.]

Mr. Chazin: Certificate No. 13, of Milmar Estates, Inc., 125 shares, dated June 7, 1946, made to William Miller, bearing the endorsement of William Miller in blank.

[The certificate above referred to was marked Exhibit P-85, in evidence.]

Mr. Chazin: All these five certificates on the face thereof are signed by Sam Marcus, President, and Robert J. Schwartz.

Mr. Tepper: Robert J. Schwartz, Secretary-Treasurer, right?

Mr. Chazin: Yes.

Q. Now, Mr. Marcus, do you have with you any other certificates of stock of Milmar Estates, Inc.? A. I do not.

Q. Have you looked through all your records for additional certificates? A. I have made a search.

Q. And you have not found any additional certificates? A. I have not.

Q. Referring to certificate Nos. 2, 6, 7, 8 and 9 originally issued to Sam Marcus, you do not have those certificates here with you? A. 2, 6, 7, 8 and 9?

Q. Yes. Referring to the numbers of the certificates as

they appear on Exhibit P-10, for identification. A. Let me see what they are.

Oh, 2, 6, 7, 8 and 9? No, I don't have those. No, I don't have those, no.

Q. Do you know where those certificates are? A. Yes, they are in Mr. Lieberman's possession.

Q. They were endorsed by you and turned over to Mr. Lieberman? A. They were turned over to Mr. Lieberman.

Q. On September 14, 1948? A. That's correct.

Q. Did you hand those to Mr. Schwartz to give to Mr. Lieberman or did you give them directly to Mr. Lieberman? A. To the best of my recollections I handed them directly to Mr. Lieberman. He was sitting opposite me at Mr. Schwartz's desk.

Q. Who else was present then? A. Mr. Miller, and I believe Mr. Schwartz was there too.

Q. That was at Mr. Schwartz's office in New York City? A. That's correct.

Q. His law office? A. That's correct.

Q. On September 14, 1948? A. That's correct.

Q. Have you located certificates 14 and 15? I refer to the numbers as they appear on Exhibit P-10 for identification. A. I have not as yet located those.

> Mr. Chazin: Certificates No. 14 and 15 I want to state for the record are certificates issued to Robert Schwartz, No. 14 being in the amount of 32 shares and No. 15 being in the amount of 93 shares.

Q. Have you inquired of your present secretary and your former secretaries as to whether they know where certificates 14 and 15 are? A. I have inquired from my former secretary.

Q. And her name is what? A. Mrs. Maginn, Adelaide Maginn.

Q. What did she tell you? A. She told me that she

called Mr. Schwartz constantly for the stock. And I had told her I had purchased the stock from Mr. Schwartz. And Mr. Schwartz said that he would bring over the stock to her.

Then in the final call she told me that he said, "I am to visit Mr. Marcus at his home tonight and I will bring the stock to him at his home." That is the last conversation she recalls having with Mr. Schwartz.

Q. And she does not know where the stock certificates are, referring to stock certificate Nos. 14 and 15? A. She has no definite recollection whether Mr. Schwartz did deliver them to her or not.

Q. Mr. Schwartz did not give them to you personally, did he? A. He did not.

Q. When were these conversations of your secretary with Mr. Schwartz; was that after that series of payments that you made to Mr. Schwartz? A. That was during the series of payments that I made to Mr. Schwartz, or possibly after. I really don't know when those conversations were other than I notified her I was making this purchase of stock from Mr. Schwartz and to follow through and obtain the stocks.

Q. Have you looked through all your records to ascertain whether you have those certificates, No. 14 and 15? A. I have searched as much as I could and have not been able to locate them at the present time.

Q. Have you looked at the Duane Street warehouse? A. I have. I have been down there.

Q. And you looked through there? A. I have looked through all records as I have been able to locate there.

Q. Well, there aren't any records that you did not look through, records of yours? A. It is possible I may have skipped something, but I feel that I have gone through everything there.

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Excerpts from Deposition of Samuel Marcus

Q. Have you found any more papers or records? A. I have not at the present time.

Q. Have you found any records of account or books of yours which have records of payment for the stock which you sold on September 14, 1948? A. I haven't found any records of that nature at all.

Q. Do you have any such books? A. I don't believe I have.

Q. Well, don't you know whether you have? A. I don't believe I have. I asked my accountant whether he had kept any records and he said no. He said, "I did not bother with your personal matters." So I believe there are no books in particular on this.

Q. You do not know of any books? A. I don't know of any books.

Q. Who is the accountant? A. My certified accountant.

Q. The one you spoke about? A. Well, I have one accountant in my Thirty-third Street store. His name is Henry Overt. And then I have a firm of accountants who do my auditing. That is the Dobkin Company.

Q. Neither of them have any books showing payments to you for the stock you sold on September 14, 1948? A. Neither of them have any records of that transaction.

Q. Do you have any books which have records of any transactions which you had with Milmar Estates, Inc., or Bill Miller's Riviera, Inc., or Bill Miller, or Al Kevelson, or Al Bierman? A. I do not. I do not believe I have.

Q. You have checked with your accountants? A. My accountants have told me they have no personal records of my transactions.

Q. And you do not have any books? A. I do not have any.

Q. Relating to any such transaction? A. I do not have any such books of that nature.

Q. And you do not have any records other than what

you brought in today and previously? A. I believe that is all I could locate at the present time.

Q. Do you think you could locate in the future something else? A. That is doubtful, but I am looking for something else.

Q. But you have made an effort to locate everything? A. I made an effort to find everything I could.

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Q. I show you a photostatic copy of certificate No. 17 of Milmar Estates, Inc., purporting to be made to Samuel Marcus, for 500 shares, dated September 14, 1948, and purporting to bear the signature of Samuel Marcus, President, and Robert J. Schwartz, Secretary-Treasurer, and purporting to have an endorsement in blank of Samuel Marcus. I want to ask you whether the signatures on the front right-hand corner bottom and on the back are your signatures? A. I believe they are.

Mr. Chazin: I would like to have this marked for identification and put in evidence.

[The photostat of certificate No. 17 was marked Exhibit P-146.]

Q. I want to ask you the same question with regard to certificate No. 19 for 125 shares. A. This appears to be my signature.

Q. Mr. Marcus, do you remember signing this certificate No. 17? A. I do not have any recollections of signing them.

Q. And do you remember signing this certificate No. 19? A. I do not have any recollections of signing them.

Q. Do you remember endorsing in blank certificate No. 17? A. I do not.

Q. Do you remember endorsing in blank certificate No. 19? A. I do not.

Excerpts from Deposition of Samuel Marcus

Q. Mr. Marcus, I call your attention that these two certificates bear the date of September 14, 1948. Do you have any recollection at all as to how your signature came to be on these certificates? A. I don't recall signing those certificates.

Q. Do you have any recollection at all as to how your signature came on the back of these certificates? A. At this moment I have no recollection of signing these certificates.

Q. Does seeing these certificates refresh your recollection at all as to how your signature got on them? A. They do not.

Q. So that you have no recollection at all of having signed these certificates? A. I can't recall signing those certificates at all.

Q. Do you recall signing any other papers on September 14, 1948? A. Oh, I signed a raft of papers that day.

Q. Do you recall signing any other certificates of stock of Milmar Estates, Inc. on that date? A. The only thing I recall is endorsing these certificates that I held and turning them over to Mr. Lieberman.

Q. When you say these certificates you held, certificates of what number are you referring to? A. That would represent Nos. 2, 6, 7, 8 and 9.

Q. You do not recall signing any new certificates? A. I do not.

• • •

Q. Do you have any other checks or records of moneys you loaned to Miller? A. I do not have them available. I think I brought you some checks the last time.

Q. I am not referring to what you brought in previously. A. I haven't located any additional checks at the present time.

Q. Well, do you have any? A. There may be.

Q. Well, have you looked through all your records? A.

Excerpts from Deposition of Samuel Marcus

I have looked through all the records I have available and I could find no others.

Q. You looked thoroughly? A. I have looked thoroughly.

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Q. Have you brought with you any other records, papers, relating to this which we have not examined? A. I have not.

Q. Do you have any other records? A. I don't know where to search for any other records at this time.

Q. You have looked every place? A. I have looked every conceivable place I could think of where I might locate records.

Q. Do you have any other records of moneys loaned or advanced by you to Milmar Estates or Bill Miller's Riviera, or Bill Miller, or Al Bierman? A. I have looked for those records, and up to the present time I have not been able to locate any other records than what I produced up to this time.

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Q. You testified during the last hearing that you were not in any way interested in Mocambo except as a creditor, is that right? A. That's right.

Q. And that you were never a stockholder? A. That's correct.

Q. And you never acquired any of its stock? A. I never owned any of its stock outright.

Q. Did you ever own any of the stock not outright? A. I hold stock as collateral for loans.

Q. You hold stock of Mocambo as collateral for loans to whom? A. To Mr. Miller.

Q. Mr. Miller only? A. I held Mr. Miller's stock in Mocambo as collateral for loans.

Q. Anyone else's stock? A. I don't believe I held anybody else's stock.

Excerpts from Deposition of Samuel Marcus

Q. Did you ever hold David Parris stock? A. I may have for a time.

Q. What is your present recollection? A. To the best of my recollections I can't recall at this time whether I did or not.

Q. When you say collateral, you mean the loans that you testified during the last hour that you made? A. I made a number of personal loans to Mr. Miller, other than what I made to Mocambo for which he gave me his stock as collateral.

Q. What about David Parris? A. I don't recall whether I have held his stock as collateral or not.

Q. Who is I. J. Friedland? A. I. J. Friedland, I don't know him at all.

Q. You never heard of the name? A. The name does not bring any recollections to me.

Q. When did you last part with the possession of this Mocambo stock which you held as collateral?

Mr. Tepper: You are speaking of the stock he has testified to?

Mr. Brigadier: Yes.

A. I believe that stock may still be in my possession.

Q. As collateral still for the loans that you made? A. Well, it is of no value. The corporation is defunct. It went in bankruptcy.

Q. Since we had the difficulty of the meaning of words, what did you mean by the word collateral when you employed it here? A. Well, I would make him a loan and he gives me that stock as security for the repayment of that loan.

Q. You saw that that stock at least has an endorsement on it to you? A. Yes.

Q. So that you could use that stock to satisfy the loan? A. That's right.

Q. And you know it is as security for the loan, is that right? A. I felt that was security for the loan, yes.

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Excerpts from Deposition of Al Kevelson

AL KEVELSON, called as a witness in behalf of Samuel Marcus, having been first duly sworn, testified as follows:

Direct Examination by Mr. Grosman:

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Q. Can you tell us, please, why the present interpleader suit was brought?

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A. Yes, sir. We started that suit—when I say "we" I am referring to Mr. Miller and Mr. Bierman—because of the fact that they made a contract with Milmar Estates to pay them, and the money was going direct to Samuel Marcus. And we felt that if at any time Milmar Estates would get into any trouble, and should there be a receiver appointed, Milmar Estates can turn around to Mr. Miller and Mr. Bierman and demand the money of that contract that he made with Milmar Estates.

Mr. Brigadier: Judge Grosman, in view of my interruption, it is very obvious that the witness is giving you actually an opinion furnished by me, and I think that the record may not show you that, that actually that is what happened. I am not trying to testify, I am just trying to tell you that the interruption may mislead you, and that is why I am trying to make it clear to you, that the witness is probably assuming that his answer is now based on my interruption.

Excerpts from Deposition of Al Kevelson

Q. Well, was there any question as to the propriety of having paid Mr. Marcus this money? A. What do you mean? I don't understand the question.

Q. Did the question come up in connection with your decision to file this suit? A. Well, we wanted to cover ourselves from all angles. We saw the dealings that we had with dower rights, and we felt that God knows who we are dealing with, with a man who is unscrupulous in his methods, his words don't mean nothing, it is nothing for him to tell lies, and to do things that are very, very ungentlemanly, and we just figured that God knows what is the next trick he will pull out. We only know to do things in the right way.

Q. Well, was there any doubt in your mind as to the propriety of the corporation carrying out this contract, P-4? A. Oh, we knew we were going to fulfill the contract. No question about it.

Q. There was no doubt in your mind that the Milmar Estates would fulfill the contract, was there? A. Well, we wouldn't—a 100 per cent, we were going to pay it. But we didn't know what would come up, and we just wanted to be careful, because we were dealing with a man who we see is very, very unscrupulous.

Q. Well, now, you, Mr. Bierman and Mr. Miller were in exclusive charge of Milmar Estates, Inc., were you not? A. That's correct.

Q. Why was it necessary to make Milmar Estates, Inc., a party to this suit, in view of the fact that you controlled Milmar? A. Well, I don't know why it was necessary to make it. I imagine that is a legal matter.

Q. As a matter of fact, you could have made Milmar Estates, Inc., do whatever you three gentlemen thought proper; isn't that so? A. We were running the business of Milmar, we certainly can do. But we discussed it with attorneys and that was the way we decided to do it.

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Excerpts from Deposition of William Miller

WILLIAM MILLER, called as a witness in behalf of Samuel Marcus, having been first duly sworn, testified as follows:

Direct Examination by Mr. Grosman:

• • •

Q. I see. Now, you know about this suit, this interpleader suit having been brought in this Court. A. Yes, I do.

Q. And did you give that matter some thought before you brought the action? A. Yes, I did.

Q. Did you discuss the matter with Mr. Bierman? A. Yes, I did.

Q. He was available? A. Yes.

Q. He wasn't on the road. A. Maybe he was on the road, but I discussed it with him by telephone. I don't know whether it was in person, but I discussed it with him.

Q. And did you discuss it with Mr. Kevelson? A. Yes, I did.

Q. And did you discuss it with counsel? I am not asking you to tell what you said to counsel, but did you discuss it? A. Yes, I did.

Q. And you received legal advice before you instituted the present suit, right? A. That's correct.

Q. Now, do you know what the purpose of the present suit in this Court happens to be? A. Yes.

Q. What is it? A. I think I know—which was explained to me by my attorney—

Q. Yes. A. —he said that when you put everything into Milmar—or the way the Judge took care of this thing and arranged these papers, in the event—"I know your intentions are good, but in the event of a bankruptcy, or a receiver was appointed, a receiver could come in and make you pay this $125,000 again by saying the corporation had no right to pay Marcus. And you could be—you and Bier-

man could personally be made to pay that money again."

Q. And is that what you sought to avoid— A. That's correct.

Q. —when you instituted this suit? A. That's right.

Q. You were trying to avoid personal liability. A. That's correct.

Mr. Abraham Chazin: That isn't what the witness said. He said paying again.

Q. Now, counsel said I am not quoting you properly. A. That's correct.

Q. I don't want to misquote you. You sought to avoid liability by filing this suit. A. That's correct.

Q. Liability on whose part? A. On Milmar Estates.

Q. If the Milmar Estates were to go in the hands of a receiver, Milmar Estates might be liable to somebody? A. I am not an attorney.

Q. I know. A. I am just trying to explain to you that I was told—whether it was Milmar, myself, I don't know—he just told me that he is starting a suit so that in case there is a receiver appointed that Milmar Estates—which I imagine it must have been Milmar Estates—that they'd have to pay it twice.

Q. Milmar would have to pay it twice. A. I imagine it would be Milmar. I don't know. I am not an attorney.

Q. Not you, not the directors— A. I don't care who. Milmar was our corporation. I was protecting our corporation.

Q. Well, now, look, there is a difference. Do you know that there is a difference— A. I don't know.

Q. Let me finish, please. Do you know that there is a difference between Milmar Estates, the corporation, and William Miller, and the other stockholders and directors; you know there is a difference? A. Yes.

Q. Now, who was to be protected and against what by

the filing of this suit? A. Milmar Estates was to be protected.

Q. That is what you were told? A. I believe so.

Q. Not you and the remaining stockholders and directors personally? A. I don't know.

Q. You weren't being protected. A. I don't know who was being protected. All I know is when he said that there is a chance of this thing being paid twice—whether it was me, Milmar, or someone, I didn't want to pay it twice. I thought once is enough to pay any debt, not twice.

Mr. Abraham Chazin: I think the witness has explained it, Judge.

Mr. Grosman: If he has, it hasn't penetrated my thick skull.

Q. Now, this suit was filed on December 28, 1950. And was there any danger of Milmar Estates being declared bankrupt at that time? A. Cafe business is a very treacherous business. Nobody gives you a guarantee. And there is always a danger, in a business of this type, of something going wrong. And I thought it would be a good thing to have protection.

Q. Was the Milmar Estates, Inc., on December 28, 1950, solvent? A. Oh, yes.

Q. That was more than two years after the agreement, P-4, had been signed? A. Yes.

Q. Were you afraid that the corporation might be declared bankrupt upon a suit of somebody? A. I have always taken the advice of my attorney, and if my attorney said we ought to protect ourselves, I told him to go ahead.

Q. What was the condition of Bill Miller's Riviera on December 28, 1950, financially; was it in good shape? A. I imagine it was.

Q. You had gotten rid of Marcus and you were running it

yourself. I take it that you made a success of it, right? A. I think so.

Q. On December 28, 1950. A. Yes, we were meeting our obligations.

Q. Were you being threatened with suit by anybody? A. No.

Q. Or with bankruptcy, the filing of a bankruptcy petition against you? A. No.

Q. Now, as a matter of fact, you and Mr. Bierman, and Mr. Kevelson, were actually operating Milmar Estates, Inc., weren't you? A. That's correct.

Q. You did what you saw fit with it, without interference by Mr. Marcus. A. Of course.

Q. And on December 28, 1950, you and Mr. Bierman, and, I take it, Mr. Kevelson, were directors? A. That's correct.

Q. And officers of the corporation? A. Correct.

Q. And you authorized the bringing of this suit, did you,— A. Yes.

Q. —against the corporation which you were controlling— A. That's correct.

Q. —because you thought that in a bankruptcy proceeding somebody might be held liable for the payment of this.

Mr. Brigadier: I object. The witness did not testify because he thought—because he had been advised by counsel.

Q. Well, did you believe what your lawyer had told you with respect to the need for bringing this suit? A. I certainly did.

Q. So you authorized—you and your associates authorized the bringing of this suit. A. That's correct.

Q. Against your own corporation. A. Any way that my lawyer saw fit to handle it.

Q. Well, did your lawyer set this thing up? A. That's correct.

Excerpts from Deposition of William Miller

Q. And you went along. A. That's right.

Q. Now, as a matter of fact, shortly before that you and your associates had had some differences with Mr. Marcus with respect to some dower interest that his wife held in the real estate owned by Milmar Estates. A. That's correct.

Q. And you started a suit against her, or against him?

Mr. Brigadier: I object, unless you identify what the "you" is. You mean that the corporation started this suit, or he, individually? The record actually is the best evidence. And you know the record shows that it was started by Milmar Estates.

Mr. Grosman: I don't know. I never saw that record.

Mr. Brigadier: Your associate, who was counsel for Mrs. Marcus in the case, certainly—

Mr. Grosman: He hasn't told me.

Mr. Brigadier: Well, it would seem to me that the knowledge of an associate in the case, who is attorney of record, ought to be imputed to his colleague.

Mr. Tepper: Off the record.

(Discussion off the record.)

Q. You remember that suit, Mr. Miller. A. Yes.

Q. You and the directors of Milmar Estates, Inc., authorized the bringing of that suit? A. Yes.

Q. Now, you finally paid Mrs. Marcus some money for her signature,— A. Correct.

Q. —wiping out, or conveying her interests, whatever it may be, in the Milmar properties? A. Yes, sir.

Q. Now, you and your associates were quite put out over the fact that you had to pay that money to Mrs. Marcus. A. No, we were quite put out that we were dealing with a man who had no principles.

Excerpts from Deposition of William Miller

Q. And the man you refer to is— A. Is Mr. Samuel Marcus.

(Discussion off the record.)

Q. Now, tell me, Mr. Miller, do you remember when these two suits were brought, one with respect to dower, and one, this interpleader suit? A. Excuse me. Off the record. I just heard the conversation, and I just found out.

Mr. Brigadier: If you don't know, say you don't know.

A. I don't know.

Q. But you do know that you and your associates, acting as directors of Milmar Estates, Inc., did authorize the bringing of both suits? A. Yes.

Mr. Abraham Chazin: The witness did not say that, that acting as directors they authorized the bringing of both suits.

Mr. Grosman: How else could they authorize the bringing of suits?

Mr. Brigadier: The first suit was not brought by the corporation.

Mr. Abraham Chazin: You know that the first suit was brought by Miller and Bierman as individuals. Therefore, it is not authorized by the corporation. And he didn't say it was authorized by the directors of the corporation

Mr. Grosman: He did say it, yes, in response to my question.

Mr. Brigadier: There isn't any doubt about it.

Mr. Abraham Chazin: He has been answering your questions before they are asked.

Mr. Brigadier: That is not the fault of Judge Gros-

man that he does that. You can't put that at his door.

Mr. Grosman: I know you have been annoyed with Mr. Miller, the way he has been answering.

Mr. Abraham Chazin: I wouldn't say that.

Mr. Grosman: I would take it from what you just said that you are annoyed.

Mr. Brigadier: I would suggest that this colloquy come to a stop.

The Witness: I would just suggest that this only proves how little I know about corporation law.

Mr. Brigadier: I think it suggests that you do answer the question before you hear it.

The Witness: Yes. Or of my knowledge--I know what happened. That is all I am interested in.

Mr. Brigadier: Listen to the question the next time.

Q. Now, it is quite evident, Mr. Miller, that the present suit, the interpleader suit, was not brought by Milmar Estates, it was brought by you and Mr. Bierman, individually. A. That's correct.

Q. I didn't want to mislead you. A. Well, I am glad.

Q. But the first suit, with respect to the dower, was brought by the corporation.

Mr. Brigadier: That is not the first suit. It happens to be the second suit. You see, you do that.

Q. The second suit, or the suit with respect to the dower right, was brought by the corporation. A. I believe so. I don't know.

Q. Don't you know that? A. No, I don't.

Q. Now, isn't it a fact that when you and your co-directors of Milmar Estates, Inc., were made aware of the fact that there was an outstanding dower right in Mrs. Marcus, you sought to obtain that from Mrs. Marcus with-

out any payment to her; is that right? A. Let me answer it this way,—

Q. All right. You answer in your own way. A. —that when I was notified in trying—by other attorneys—that Mrs. Marcus didn't sign the dower papers, which are necessary in New Jersey, the State of New Jersey, that I immediately called Mr. Marcus and told him that he didn't live up to his agreement, that he had promised me that he would give me a free and clear title, and he said he would get me a letter from Mrs. Marcus, inasmuch as he was on the original mortgage, and we were taking him off the mortgage, and taking him off the responsibility of $235,000, and he promised to get me the paper. And after a while I found out that he never got me the paper. So I also came to a decision that anything that this man says to you, verbally, can't be trusted. He can't be trusted. And I started to protect myself. And I thought it would be a good idea to go to an attorney. And when the attorney read the papers, and everything that I had, he told me at that time that he should start a suit because in case a receiver—or anything was to happen, I could be made to pay twice for this thing. And I said, "Well, I will leave it to you. You handle it any way you say. You are my attorney. If you think you should start a suit, you go ahead." And that is how the suit started.

Q. Both suits? A. No, one suit. And then they followed up, and did whatever they thought—whatever was necessary, that they thought was necessary for me to do in order for me to have myself clear.

Q. Now, you said that other attorneys told you of this outstanding dower right, and the signature of Mrs. Marcus required to relinquish that right in New Jersey. You mean other attorneys than Chazin & Chazin? A. Yes.

Q. And who were they? A. They were the attorneys who were taking care of the mortgage.

Excerpts from Deposition of William Miller

Q. Who were they? A. I don't remember the name. He is dead now, so it makes no difference.

Q. Then you went to Mr. Abraham Chazin, I take it. A. That's correct.

Q. And authorized him to proceed with it. A. To proceed with any way he thought it was best for my protection.

Q. And— A. And I followed his advice.

Q. But you were primarily concerned with this outstanding dower right. A. I was primarily concerned with the fact that I didn't want to pay a thing twice. I thought once is enough to pay a debt.

Q. Had you been asked by Mr. Marcus to pay it over again? A. No.

Q. Or by anyone else? Your answer is?

The Witness: Off the record, please. You asked me why I get worked up. Now, you know, don't you?

Mr. Abraham Chazin: Just a minute. Off the record.

(Discussion off the record.)

Mr. Grosman: Will you read the last question?

(Question read as follows: "Or by anyone else? Your answer is?")

A. No.

Mr. Brigadier: That's all. That's all it takes.

Q. Is that the only reason why you and Mr. Bierman authorized the bringing of the present suit of interpleader?

Mr. Abraham Chazin: The witness has testified that he authorized the suit on the advice of counsel. He has already answered that three or four times.

Excerpts from Deposition of William Miller

Mr. Brigadier: Now he is asking if that is the only reason, and he can ask it.

A. Yes.

Q. Can you tell us why Mr. Al Kevelson was not a party to this present interpleader suit? A. I saw Mr. Chazin and Mr. Brigadier—

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A. (Continuing.) And I followed the advice of counsel.

Q. When you say "counsel", who do you mean? A. Mr. Chazin.

Q. Now, when did you see Mr. Brigadier, before this suit was brought or after? A. I don't remember.

Q. Who took you to Mr. Brigadier? A. I don't remember.

Q. Are you sure about that? A. Positive.

Q. Did you go there yourself? A. I don't remember.

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Excerpts from Deposition of Al Bierman

AL BIERMAN, called as a witness in behalf of Samuel Marcus, having been first duly sworn, testified as follows:

Direct Examination by Mr. Grosman:

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Q. Now then, let's get down to the present suit. You are a plaintiff—one of the plaintiffs in this case, are you? A. Yes.

Q. And who is your lawyer in this case? A. Chazin & Chazin.

Q. And did you discuss this suit with Mr. William Miller before you brought it, the present suit,— A. Yes.

Q. —in this Court? A. Yes.

Excerpts from Deposition of Al Bierman

Q. And what was the purpose of your bringing this action? A. Protection.

Q. Against what? A. Well, I don't know how to—you fellows, lawyers, talk about terms, but all I know is—

Q. You tell us in your own terms. A. I wanted protection.

Q. Against what? A. Well, in the event that—we were paying money, paying out money—that is Milmar—and supposing Mr. Miller lost his license and—

Q. License to do what? A. To run the Riviera. And the club was closed—we couldn't collect rent—was going bankrupt, they would go in bankruptcy, we wouldn't be able to get any money. We could go bankrupt. Some receiver might come along and want to charge us all that money over again. We wanted protection.

Q. What money? A. That we were paying out.

Q. To whom? A. To Sam Marcus.

Q. You wanted protection against Sam Marcus?

Mr. Abraham Chazin: The witness did not testify to that, Judge. He said if a receiver was appointed. And I object to your question it is based on an assumption contrary to his testimony.

Q. You wanted protection against the money that you had been paying to Mr. Samuel Marcus. A. Yes, sir.

Q. Well, you hadn't paid him any money, had you? A. Well, I certainly have.

Q. Who was paying him the money? A. Mr. Kevelson and I.

Q. How much money had you paid Mr.— A. I don't remember right offhand how much I paid him.

Q. —Mr. Marcus; how much money had you paid him? A. At that particular time?

Q. Yes. A. I don't remember.

Excerpts from Deposition of Al Bierman

Q. The time that you instituted this suit, you authorized the institution of this suit. A. I don't remember right offhand how much money I had paid in. Mr. Kevelson has a record over there.

Q. Well, did you get the money from Mr. Kevelson, or was it your own money? A. Some of it was my own. Some was Mr. Kevelson's.

Q. How much was your own? A. The total amount?

Q. Yes. A. I don't know.

Q. You don't know how much money you paid to Mr. Marcus on account of what you term is the stock that you bought from him? A. Right at this moment, I don't know. I can get it.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 839

MILMAR ESTATE, INC., WILLIAM MILLER, AL BIERMAN and AL KEVELSON,
Petitioners,

vs.

SAMUEL MARCUS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. .

MILMAR ESTATE, INC., WILLIAM MILLER,
AL BIERMAN and AL KEVELSON,
Petitioners,

v.

SAMUEL MARCUS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review an order, entered in the above-entitled cause on December 26, 1957 (R. Pr. Ct. App.;* Appendix B, *infra*, p. 80), by the United States Court of Appeals for the Third Circuit, in which that Court entertained and in terms "de-

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* References herein to the certified Transcript of Record are as follows: (1) The Appendix to Appellant's Brief in the Court of Appeals (five volumes, bound in white covers) is cited as "R....a." etc. (2) The Appendix to Briefs for Appellees in the Court of Appeals (one volume, bound in blue cover) is cited as "R....b," etc. (3) The proceedings in the Court of Appeals (not paginated in the Certified Transcript) are cited as "R. Pr. Ct. App." (4) The "Motion by Appellees for Amendment of Mandate, Etc.," and the Appendix thereto, which are part of the proceedings in the Court of Appeals, and of which nine additional copies are filed herewith, are cited, respectively, as "R. Mot. Ct. App. ....." and "R. Mot. Ct. App., Appendix, ..."

nied" a motion filed December 2, 1957, by the petitioners (R. Mot. Ct. App.) praying the Court to declare the intent of, and to recall and amend, its mandate of July 31, 1957 (R. Pr. Ct. App.; Appendix B, *infra*, pp. 65-66) (issued upon a judgment of July 3, 1957 (R. Pr. Ct. App.; Appendix B, *infra*, p. 64)) in this cause.

Opinions Below.

The Court of Appeals set forth a clarification or construction of the mandate in the order of December 26, 1957 (R. Pr. Ct. App.). A copy of that order is printed in Appendix B hereto, *infra*, p. 80. The opinion of the Court of Appeals filed July 3, 1957 (R. Pr. Ct. App.), and the opinion of the District Court filed March 12, 1956 (R. 111a to R. 139a), rendered, respectively, in connection with the appellate and trial judgments in this cause, are reported, respectively, in 246 F. 2d 200 and 140 F. Supp. 66, and are printed in Appendix B hereto, *infra*, pp. 25, 58.

Jurisdiction.

The date of entry of the order of the Court of Appeals sought to be reviewed is December 26, 1957 (R. Pr. Ct. App.; Appendix B, *nifra*, p. 80). The prior judgment of the Court of Appeals, entered July 3, 1957 (R. Pr. Ct. App.; Appendix B, *infra*, p. 64), may possibly be deemed brought forward for review on the present petition. The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U. S. C. § 1254 (1).

Questions Presented.

1. Whether nearly six years of arduously contested litigation which decided on grounds of credibility all of the substantive issues on the merits, in a complex dispute over ownership of corporate stock of great value, should be wiped out, merely because the interpleader complaint is held to have been jurisdictionally improper, where the adjudication is sustainable on post-complaint independent jurisdictional grounds.

2. Whether the Court of Appeals, in the manner in which it has phrased its successive rulings, has so kept the question of dismissal of the post-interpleader claims in a state of ambiguity and uncertainty, and has consequently so disadvantaged petitioners in their rights, including especially their right to seek timely review in this Court, as to justify the conclusion that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings" that this Court should grant review.

3. Whether the order of December 26, 1957 (on our motion addressed to the mandate) ruling that the District Court's adjudication of all of the issues must fall with the dismissal of the interpleader complaint, worked a jurisdictional ouster of the post-interpleader claims for the first time in the case; or whether such ouster was effected with requisite certainty and reviewable finality by the judgment of July 3, 1957.

4. Whether the post-interpleader claims rest upon federal jurisdiction independent of the interpleader complaint.

5. Whether, if the judgment of the Court of Appeals of July 3, 1957, be deemed properly brought forward for review, it erroneously dismissed the interpleader complaint.

Statutes Involved.

The statutory provisions involved are Sections 1332 (a) (1) (62 Stat. 930; 70 Stat. 658), 1335 (62 Stat. 931), 1391 (62 Stat. 935), 1397 (62 Stat. 936), 1406 (b) (62 Stat. 937; 63 Stat. 101), 1653 (62 Stat. 944). 1655 (*ibid*), and 2201 (62 Stat. 964; 63 Stat. 105; 68 Stat. 890), of Title 28, U. S. C.; they are printed in Appendix A, *infra*, pp. 21-24.

Statement.

This action commenced in the District Court for the District of New Jersey as a suit in strict interpleader by petitioners Miller and Bierman against respondent Marcus and petitioner Milmar Estate, Inc. (R. 10a). The interpleader suit arose out of a contract executed September 14, 1948, for the sale of the stock of the interpleader-defendant Milmar Estate, Inc., which at the time owned the realty premises of "Bill Miller's Riviera," a nightclub at Fort Lee, New Jersey (Appendix B, *infra*, pp. 46, 53). The interpleader plaintiffs, petitioners Bierman and Miller, were the purchasers (*Id.*, p. 46). Their suit alleged that the named "seller" of the stock was interpleader defendant Milmar, but that interpleader defendant Marcus claimed the balance of the purchase moneys still owing (then amounting to $35,000), that Milmar "may claim" such moneys, and that the interpleader plaintiffs were pure stakeholders (R10a-13a). By post-interpleader receivership proceedings, counterclaims and crossclaims, interpleader-defendant

Marcus tried to obtain expanded relief beyond possession of the interpleaded fund; and the interpleader plaintiffs, as well as the other petitioners herein, thereupon responded with post-interpleader claims for affirmative relief against Marcus embracing all of the enlarged issues which he had imported into the case (R. 24a-111a, 114a-116a, 19b-30b, 52b-74b). The post-interpleader issues turned upon the following enlarged claims by Marcus (R. 24a-41a, 19b-30b, 52b-74b): (1) no valid sale occurred and he still owned all of the stock; (2) if a valid sale occurred it involved only approximately one-half of the stock, approximately one-half being still Marcus' property; or (3) the contract was rescissible for fraud; as a final alternative, Marcus prayed to be awarded the interpleaded fund (plus payment on Miller's personal debt (R. 36a, 48a)); Marcus also claimed that Milmar owed him money for alleged loans (R. 39a-40a). The case, tried without a jury (R. 120a), terminated, under the District Court's judgment (R. 2022a; Appendix B, *infra*, p. 54), in a rejection of all of Marcus' expanded claims and an adjudication thereon in favor of the present petitioners, except as to a claim for payment of a personal debt of Miller's which was uncontested (R. 36a, 48a). Thus, all of the post-interpleader enlarged issues which were disputed were decided in petitioners' favor. As to the interpleader issues, the District Court made award to Marcus of the interpleaded fund. The rejection of Marcus' enlarged claims was on the ground that they were utterly spurious; the District Court was confronted throughout with indications that Marcus was unworthy of belief (Appendix B, *infra*, pp. 34-35, 46-52).

The interpleader jurisdiction was based on 28 U. S. C. 1335 (R. 10a). The citizenship alignment was: plaintiff

Bierman—*North Carolina*, plaintiff Miller—*New Jersey*, defendant Marcus—*New York*, defendant Milmar—*New Jersey* (R. 10a). The District Court sustained the jurisdiction in all respects. There was no question as to jurisdictional amount (R. 10a). Diversity of citizenship was not contested in the District Court, but the question was raised *sua sponte* by that Court and was resolved in favor of jurisdiction (Appendix B, *infra*, pp. 30-33, 54; R. 117a-119a, 2022a). There was no question as to jurisdiction over the person of defendant Milmar (a New Jersey corporation, R. 10a), or of defendant Marcus (R. Mot. Ct. App., pp. 26-31). There was no question as to venue in view of 28 U. S. C. § 1397, one claimant (Milmar) being a New Jersey citizen (R. 10a), and no party having objected to the venue (see 28 U. S. C. § 1406 (b)). As to the jurisdictional propriety of the resort to the interpleader remedy, the District Court found (Appendix B, *infra*, pp. 33, 54; R. 119a, 2022a) that even though Marcus, not Milmar, was the actual "seller" in the September 1948 contract, still, since Milmar was the named "seller", the interpleader plaintiffs were in fact actuated by good faith fears that Milmar "may claim" within the meaning of 28 U. S. C. 1335; and that the interpleader suit was brought in "good faith and for good cause".[1]

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[1] The proofs on the "good faith" issue were: During 1949 and 1950, in negotiations to obtain from Marcus' wife a release of dower rights relating to the September 1948 transaction (R. 360a-366a, 555a-557a, 1528a-1534a), the 1948 purchasers sought the advice of new attorneys. This led to a scrutiny of the entire corporate structure of Milmar and the Riviera Nightclub and an examination of the documents relating to the transaction of September 1948. The result was a recommendation that it was advisable to seek an adjudication for the financial security of the 1948 purchasers. The dangers envisaged arose from the possibility that Milmar-Riviera might change hands through action of creditors, receivership or in some other manner, and that the persons who might obtain

The jurisdictional basis and impact of the post-interpleader claims are fully described in our printed motion in the Court of Appeals addressed to the mandate (nine additional copies of which are filed herewith). See R. Mot. Ct. App., pp. 10-12, 16-38. We there show (and it is apparently undisputed) that the entire District Court adjudication of the post-interpleader enlarged issues is sustainable on a perfect jurisdictional footing independent of the interpleader jurisdiction.

Marcus' appeal (R. 2027a) raised all of the substantive issues, and assailed the District Court's jurisdiction on two grounds: (1) the interpleader-plaintiffs' alleged lack of a good-faith fear of claims by both interpleader defendants; and (2) alleged lack of diversity of citizenship in the interpleader suit (Appellant's Br. 24-33). The Court of Appeals rendered its opinion and entered judgment on July 3, 1957 (R. Pr. Ct. App.; Appendix B, *infra*, pp. 58, 64). It made the dispositive (and sole) issue the District Court's juris-

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future control in such manner might demand of Miller and Bierman that they make payment to Milmar of the purchase moneys under the September 1948 contract in accordance with its literal terms, i.e., Milmar having been named therein as the "seller." Riviera's own distressed financial history (Appendix B, *infra*, p 37), dictated that consideration be given to such possibilities. The Septemberr 1948 contract had included escrow and default provisions (id., p. 53, pars. 5, 6, 10), which in the event of distress would have opened up the situation to unpredictably unsettling possibilities. Bierman, Miller's co-purchaser in September 1948, had suffered a heart attack early in the latter month from which he had not fully recovered, thereby importing the additional unknown quantity of what might happen if the Bierman interest were to pass into the hands of an executor or administrator (R. 519a). There was express testimony for the interpleader plaintiffs that considerations along the above lines propounded to them by their new attorneys persuaded them of the necessity of filing the interpleader suit in December 1950 (R. 579a-582a, 332b-345b). During 1954, receivership proceedings were actually instituted in the Superior Court of New Jersey by Riviera creditors against both Riviera and Milmar (R. 125b-126b).

diction of the interpleader suit (*ibid*). It did not reach the diversity issue. It held that the interpleader jurisdiction had been improperly invoked in that the interpleader-plaintiffs did not have a good faith fear of adverse claims by the interpleader-defendants, Milmar and Marcus, because the plaintiffs had stock-control over Milmar (*ibid*). It did not refer to the District Court's express finding that such good faith existed, nor did it adduce any record facts inconsistent with that finding; the only facts in the record pertinent to this question support the District Court's finding (fn. 1, *supra*). The Court of Appeals also concluded that the assertedly improper resort by the interpleader-plaintiffs to the federal interpleader jurisdiction was motivated by their desire to obtain adjudication of controversies between themselves and Marcus which went beyond the issues presented by the case of strict interpleader (R. Pr. Ct. App.; Appendix B, *infra*, pp. 58-63). The Court cited nothing (nor is there anything) in the record to indicate that the interpleader plaintiffs or any of the present petitioners contemplated enlargement of the interpleader issues prior to the time when Marcus first began to seek such enlargement—which occurred in deposition proceedings commencing in 1952 (R. 1909a-1939a, 301b-332b), and was formalized by Marcus in his receivership proceeding (a full year before the joining of issue on the interpleader complaint (R. 19b-30b, 52b-74b)).[2] The Court of Appeals' judgment and opinion decreed dismissal of the interpleader complaint and vacating of the

[2] The proofs of this are overwhelming, and the record is devoid of any shred of proof to the contrary. (R. 223a-231a, 250a-251a, 288a, 302a, 326a, 340a, 358a-359a, 363a, 366a, 421a, 558a, 675a, 762a-764a, 1066a-1067a, 1307a-1308a, 1534a-1535a, 1539a). See also R. 132a-133a, Appendix B, *infra*, pp. 46-47.

District Court's judgment (R. Pr. Ct. App.; Appendix B, *infra*, pp. 58-64), but were wholly silent as to the disposition of the post-interpleader claims.

With the issuance of the mandate of the Court of Appeals (July 31, 1957) (R. Pr. Ct. App.; Appendix B, *infra*, p. 65), the impression became fortified that the Court of Appeals had not intended to effect a jurisdictional ouster of the post-interpleader claims. The opening recital paragraph of the mandate described the District Court's "judgment" (which was to be "vacated") in language referrable only to the purely interpleader issues as such (R. Pr. Ct. App.; Appendix B, *infra*, p. 65).

Upon the issuance of the mandate, petitioners, having promptly made inquiry at the District Court as to a date upon which further proceedings might be had, were advised, during the first week of August, 1957, that the District Judge assigned to the case (Judge Modarelli) was on vacation and that the parties would later be advised of a date for proceedings pursuant to the mandate (R. Mot. Ct. App. p. 9). Shortly thereafter occurred Judge Modarelli's last illness; he died before setting a date for further proceedings (*ibid*). The matter was reassigned, to District Judge William F. Smith, before whom the parties appeared on October 28, 1957 (*ibid*) upon the return of a motion by Marcus for judgment pursuant to the mandate (R. Mot. Ct. App., Appendix pp. A-1 to A-6). The petitioners urged that the post-interpleader claims rested on independent jurisdiction, and that the mandate did not require dismissal of any part of the case which rested on such independent jurisdiction and was severable from the purely interpleader issues as such (*id.*, pp. A-7 to A-19). After hearing, Judge

Smith ordered the proceedings adjourned "without day" (*id.*, p. A-12) on the ground that the petitioners "may" and "ought" to "petition the Court of Appeals for a clarification of the opinion and the mandate" (*id.*, pp. A-10 to A-19) (see also Appendix B, *infra*, pp. 67-69).

On December 2, 1957, petitioners filed their motion to obtain a determination as to whether the Court of Appeals intended to require jurisdictional ouster of the post-interpleader claims (R. Pr. Ct. App.; R. Mot. Ct. App.).

On December 26, 1957, the Court of Appeals entered an "Order denying motion for recalling and amending of mandate" (R. Pr. Ct. App.; Appendix B, *infra*, p. 80). The present petition to this Court followed (and seeks review of) the order of December 26, 1957.

Reasons for Granting the Writ.

I.

If this case be deemed properly presented here in point of finality and timeliness—a question which we defer for the present (see "VI," p. 18, *infra*)—it calls for review by this Court because the Court of Appeals has made a ruling whose effect is to oust jurisdiction of jurisdictionally unexceptionable claims or suits typifying an important instance of federal jurisdiction which has been expressly accepted in principle by five other Courts of Appeals or Circuit Courts of Appeals, by several District Courts and by leading scholarly authorities; and which has never been disapproved or repudiated, so far as we know, by any court or other authority. The principle of federal jurisdiction to which we refer is that the dismissal of a suit

for lack of federal jurisdiction does not carry with it the dismissal of counterclaims or crossclaims, if an independent basis of federal jurisdiction for such claims exists. Directly in point are: *Haberman* v. *Equitable Life Assurance Society of U. S.*, 224 F. 2d 401, 409 (C. A. 5, 1955), reh. den. 225 F. 2d 837, cert. den. 350 U. S. 948; *Isenberg* v. *Biddle*, 125 F. 2d 741, 743-744 (App. D. C. 1941); *Lion Mfg. Corporation* v. *Chicago Flexible Shaft Co.*, 106 F. 2d 930, 933 (C. C. A. 7, 1939); *Vidal* v. *South American Securities Co.*, 276 Fed. 855, 874-875 (C. C. A. 2, 1921, 1922); *Pierce* v. *Perlite Aggregates*, 110 F. Supp. 684, 687-688 (N. D. Calif. 1952), aff'd 226 F. 2d 204 (C. A. 9, 1955); *U. S. Industrial Chemicals* v. *Carbide & Carbon C. Corp.*, 52 F. Supp. 164, 166-167 (S. D. N. Y. 1943); 3 *Moore's Fed. Prac.* (Second Ed.), § 13.36, p. 98, at n. 4a; *Shulman and Jaegerman*, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L. J. 393, 413-414 (1936).

In order "to confine inferior courts to the exercise of their prescribed jurisdiction or *to compel them to exercise their authority when it is their duty to do so*" (*U. S. Alkali Ass'n* v. *United States*, 325 U. S. 196, 202) (emphasis supplied), this Court has traditionally exercised its power of review, even to the extent of issuing the extraordinary common law writs authorized by 28 U. S. C. § 1651. E. g., *De Beers Mines* v. *United States*, 325 U. S. 212; *House* v. *Mayo*, 324 U. S. 42; *In re 620 Church St. Corp.*, 299 U. S. 24; *McClellan* v. *Carland*, 217 U. S. 268; *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277.

II.

A further reason why this Court should grant review to correct the jurisdictional effect of the ruling below is that by that ruling the Court of Appeals has decided, at least impliedly so far as principle is concerned, and unequivocally so far as decisional impact is concerned, an important question of federal law which has not been, but should be, settled by this Court. The rule applied in the *Haberman, Isenberg* and other cases cited at p. 11, *supra*, to the effect that juirsdictional dismissal of a suit does not work dismissal of counterclaims or crossclaims resting on independent federal jurisdiction, has not been passed upon by this Court except insofar as it may have received attention *in camera* upon the denial of certiorari in the *Haberman* case, p. 11, *supra* (see 350 U. S. 948).

III.

The Court of Appeals' rejection of the unassailable post-interpleader jurisdiction herein touches, in further ways, interests of general and major importance beyond this case. The record does not suggest that the jurisdictional ouster of the post-interpleader claims resulted from the kind of judicial scrutiny required by decisions like *Wetmore* v. *Rymer*, 169 U. S. 115, 128 ("* * * a suit cannot be properly dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion * * *."). The record here suggests rather that down to the time of its July 3,

1957 opinion and judgment (R. Pr. Ct. App.; Appendix B, *infra*, pp. 58, 64) and its July 31, 1957 mandate (R. Pr. Ct. App.; Appendix B, *infra*, p. 65), the Court of Appeals had not yet so maturely or articulately concluded to oust the post-interpleader claims as to manifest in any way in any of its rulings that it deemed "the facts * * * on the record [to] create a legal certainty of that conclusion" (*Wetmore* v. *Rymer, supra*); in fact, there is no indication of any kind that this jurisdictional question had been discerned by the Court of Appeals at all down to that juncture. Nor, even in its order of December 26, 1957 (R. Pr. Ct. App.; Appendix B, *infra*, p. 80), purporting to "deny" our motion addressed to the mandate, did the Court of Appeals address itself to the question of the post-interpleader jurisdiction on the merits of that question as such, stating rather merely that the latter jurisdiction in effect fell with the interpleader jurisdiction. Our motion (R. Mot. Ct. App., pp. 5-6, 40) had expressly, but unavailingly, urged the Court of Appeals to conduct, or to direct the District Court to conduct[3] a proper factual inquiry as to the jurisdictional adequacy of the post-interpleader claims and as to their severability, for judgment-preservation purposes, from the interpleader suit. The District Court never had to reach those problems before rendering judgment because, as seen, it upheld the original interpleader jurisdiction (R. 117a-119a; Appendix B, *infra*, pp. 30-33). The Court of Appeals has apparently preferred to leave those problems unreached.

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[3] Cf. *Gibbs* v. *Buck*, 307 U. S. 66, 71-72 ("As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court.").

Indisputably, the original opinion and judgment of the Court of Appeals herein (July 3, 1957—R. Pr. Ct. App.; Appendix B, *infra*, pp. 58, 64), and its mandate (July 31, 1957—R. Pr. Ct. App.; Appendix B, *infra*, p. 65), were wholly silent as to dismissal of the post-interpleader claims. Even the order below entered December 26, 1957 (R. Pr. Ct. App.; Appendix B, *infra*, p. 80) "denying" our motion addressed to the mandate (R. Mot. Ct. App.) still fails to decree dismissal of the post-interpleader claims, but instead calls for a wiping out of the entire District Court adjudication. The consequences of these continuingly uncertain rulings of the Court of Appeals are extraordinarily aggrieving. A judgment (that of July 3, 1957) of which the only "certain"[4] thing that can be said, in relation to the post-interpleader claims, is that it was *uncertain*, and which became even more uncertain in that respect when it was embodied in a formal mandate (July 31, 1957; App. p. 65, *infra*), could scarcely have served as a realistic basis for a petition for certiorari in this Court by these petitioners on the issue which has come to constitute, through no design or fault of the petitioners, the real meat of this litigation, namely, the issue of preservation of the District Court's adjudication of Marcus' enlarged demands under the post-interpleader claims. By reason of the uncertainty in the respects mentioned, and the consequent unripeness-for-review, of the July 3, 1957 judgment, petitioners were placed in the dilemma of (1) never-

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[4] "A decree, to be operative, must contain sufficient certainty in itself; it cannot be aided by presumption." *Watts* v. *Waddle*, 6 Pet. 389, 399. See also *Peirsoll* v. *Elliott*, 6 Pet. 95, 100; *Waialua Agr. Co.* v. *Maneja*, 178 F. 2d 603, 606 (C. A. 9, 1949); *Whitaker* v. *Bramson*, 29 Fed. Cas. 947, 953 (No. 17,526) (C. C. S. D., N. Y., undated); Freeman on Judgments (5th Ed., 1925), Vol. 1, § 72, pp. 126-127.

theless forging ahead with an immediate petition for certiorari which would present with "certainty" and with "certain" reviewable finality only an issue of interpleader jurisdiction (the "good-faith" issue—pp. 6-7, *supra*) that is basically factual rather than legal and would therefore in itself have had less prospect of winning this Court's interested attention than would the then still-unripe issue of ouster of the post-interpleader claims; or (2) of awaiting a clarification either in the remand proceedings in the District Court or on motion in the Court of Appeals, i. e., a clarification resulting in a requisitely certain and reviewably final adjudication as to the far more significant issue of the jurisdictional ouster of the post-interpleader claims. We tried to resolve our dilemma by choosing the second of the above two courses; and it is not yet wholly clear even now that the Court of Appeals has given us the requisitely certain and reviewably final order that we need in order to seek in this Court a review of the jurisdictional vitiation of the post-interpleader claims. The Court of Appeals' apparent unwillingness to assist us in bringing the case to a surer haven of reviewable finality and decretal certainty is not only occurring in the face of the fact that the Court itself imported the uncertainty element into the situation. The Court of Appeals' unwillingness to alleviate the situation is occurring also in the face of the fact that we are blamelessly under disadvantage arising from the lapse of time brought about by the fortuitous time sequence of the July 3, 1957 judgment, Judge Modarelli's vacation, illness and death, and the 90 day requirement of 28 U. S. C. § 2101 (c). In our motion addressed to the mandate we expressly entreated the Court of Appeals to relieve us from the danger of being untimely

before this Court (R. Mot. Ct. App., pp. 5-6, 40); the reply to our entreaty was the order of December 26, 1957 (R. Pr. Ct. App.; Appendix B, *infra*, p. 80), which could hardly have been more effective in keeping our dilemma unresolved.

IV.

Another interest of major and general importance which this case affects is the policy interest in preserving jurisdiction wherever possible after a case has proceeded to final decree. E.g., *Evers* v. *Watson*, 156 U. S. 527, 533; *Gaines* v. *Rugg*, 148 U. S. 228, 241. Cf. *Washington Bridge Co.* v. *Stewart*, 3 Howard 413, 423-426; *Skillern* v. *May*, 6 Cranch 267; *Kerrigan's Estate* v. *Joseph E. Seagram & Sons*, 199 F. 2d 694, 696-7 (C. A. 3, 1952).

If a jurisdictionally proper way can be found to avoid a retrial of this protean litigation, the interests of sound judicial administration and general public policy (not to say sheer humaneness) would be well served. Cf. *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 93.

V.

The foregoing four reasons for granting the writ condense, additionally, into a fifth reason, namely, that the Court of Appeals has so kept the question of dismissal of the post-interpleader claims in a state of ambiguity and uncertainty, and has so disadvantaged petitioners in regard to their exercise of the right to seek timely review in this Court, as to justify the conclusion that the Court of Appeals has so far departed from the accepted and usual

course of judicial proceedings that this Court should grant review. This Court is free to interpret and to apply, in the interests of justice, the mandate of the Court of Appeals in such manner as may eliminate its stymying effects. Cf. *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, 141; *Briggs* v. *Pennsylvania R. Co.*, 334 U. S. 304, 310 (dissenting op.). Specifically, we urge the Court to interpret the mandate (and the opinion and judgment of July 3, 1957) as having failed to settle with certainty the question of dismissal of the post-interpleader claims; to interpret the order of December 26, 1957, as having settled that question, for the first time in the case, with reviewable finality; to decline to accept the implication apparently intended by the Court of Appeals in its latter order to the effect that it was doing nothing that had not already been done by its former judgment of July 3, 1957; and to entertain and grant this petition as a timely petition addressed to the order of December 26, 1957. The interpretation which we ask this Court to make as to the July 3, 1957, opinion and judgment and as to the July 31, 1957 mandate would be a justifiable application of the rule that an appellate judgment of reversal is not necessarily an adjudication of any questions other than those in terms discussed and decided. *Mutual Life Insurance Co.* v. *Hill*, 193 U. S. 551, 553-554; *United States* v. *Gutzler*, 105 F. 2d 188, 191-192 (C. C. A. 9, 1939). The interpretation we ask as to the order of December 26, 1957, is justified by the facts and would render it reviewable as having "modified" or "amended" the judgment of July 3, 1957 in "a matter of substance." 21 A. L. R. 2d 285, et seq.

VI.

What of the timeliness of this petition? To put the question of the timeliness of the present petition (in seeking review of the order of December 26, 1957), is but another way of putting the question of the certainty *versus* the uncertainty of the judgment of July 3, 1957. Fundamentally, then, the answer to the question of timeliness is given in all that we have said heretofore concerning the uncertainty of the July 3 judgment. In addition:

(1) No difficulty is presented by the timing of our motion in the Court of Appeals addressed to the mandate (R. Mot. Ct. App.). While the motion was filed after expiration of the time for rehearing in that Court, the Court did entertain the motion (cf. *Bowman* v. *Loperana*, 311 U. S. 262, 266; Stern and Gressman, *Supreme Court Practice* (2nd Ed.), p. 164).

(2) This Court granted certiorari in *National Biscuit Co.* v. *Kellogg Co.*, 96 F. 2d 873 (C. C. A. 3, 1938), cert. granted 304 U. S. 586, reversed on the merits 305 U. S. 111 (earlier op. 91 F. 2d 150, cert. and reh. den. 302 U. S. 654, 733, 777), in circumstances closely suggestive of those here presented, i. e., the writ was granted to review an opinion and order of the Circuit Court of Appeals which stated that clarification of the mandate was unnecessary but would be given; and while the latter Court in terms amended its judgment, it is perfectly clear from the two opinions of that Court, *supra*, and from the Transcript of Record in this Court (Oct. Term 1938 No's. 20, 56, R. III-A, pp. 2244-2303), that, unlike the situation in the instant case (which indeed stands *a fortiori* in this respect), the amendment

made no actual change in the judgment as it had been originally intended to operate. Cf. also the granting of certiorari, despite failure to move for timely amendment of the mandate, in *Briggs* v. *Pennsylvania R. Co.*, 334 U. S. 304, cert. granted 333 U. S. 836. Cf. also the entertaining of mandamus in *Ex Parte Morgan*, 114 U. S. 174.

(3) It is not uncommon for courts to say that they are denying a motion addressed to a mandate and nevertheless to go on and construe or clarify the mandate; or, indeed, to grant such a motion while at the same time stating that it is unnecessary because the mandate is clear. E. g., *F. A. R. Liquidating Corp.* v. *Brownell*, 223 F. 2d 128 (C. A. 3, 1955); *S. S. Kresge Co.* v. *Winget Kickernick Co.*, 102 F. 2d 740 (C. C. A. 8, 1939), cert. den. 308 U. S. 557; *National Biscuit Co.* v. *Kellogg Co.*, 96 F. 2d 873 (C. C. A. 3, 1938), rev'd on the merits 305 U. S. 111. What the Court of Appeals has done in the instant case is to say that it is "denying" the motion while at the same time taking affirmative action thereon by clarifying the mandate in vital respects as to which it was not previously clear or certain. The right of a party to seek review in this Court should not be frustrated by technicalities evolved from the niceties of the motion procedure in this branch of appellate practice. If the fair substance of the matter is looked to, the present case will be seen plainly to involve a reviewable order upon the motion addressed to the mandate.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari should be granted. If the writ is denied and the reason for denial should be that the Court deems the

petition premature by reason of continuing uncertainty with respect to the ouster of the post-interpleader jurisdiction under the orders and judgments below, we pray that the Court shall make its order of denial without prejudice to our right to renew the petition upon the completion of further proceedings below. If the writ is denied and the reason for denial is that the Court deems the petition filed too late, we pray that the order of denial shall be without prejudice to our right to petition for leave to file common law writs of certiorari or mandamus or both pursuant to 28 U. S. C. 1651.

Respectfully submitted,

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APPENDICES.

Appendix A—Statutes Involved.

U. S. C. Title 28, Section 1332.

1332. Diversity of Citizenship; amount in controversy

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3000.00 exclusive of interest and costs, and is between:

(1) Citizens of different States:

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico. As amended July 26, 1956, c. 740, 70 Stat. 658.

U. S. C. Title 28, Section 1335.

1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instruments, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. June 25, 1958, c. 646, 62 Stat. 931.

U. S. C. Title 28, Section 1391.

1391. Venue generally.

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district. June 25, 1948, c. 646, 62 Stat. 935.

Appendix A—Statutes Involved.

U. S. C. Title 28, Section 1397.

1397. Interpleader

Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside. June 25, 1948, c. 646, 62 Stat. 936.

U. S. C. Title 28, Section 1406.

1406. Cure or waiver of defects

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue. June 25, 1948, c. 646, § 1, 62 Stat. 937; May 24, 1949, c. 139, § 81, 63 Stat. 101.

U. S. C. Title 28, Section 1653.

1653. Amendment of pleadings to show jurisdiction

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts. June 25, 1948, c. 646, 62 Stat. 944.

U. S. C. Title 28, Section 1655.

1655. Lien enforcement; absent defendants

In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.

Such order shall be served on the absent defendant personally if practicable, wherever found, and also upon the person or persons in possession or charge of such property, if any. Where personal service is not practicable, the order shall be published as the court may direct, not less than once a week for six consecutive weeks.

If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the State, but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action. When a part of the property is within another district, but within the same state, such action may be brought in either district.

Any defendant not so personally notified may, at any time within one year after final judgment, enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just. June 25, 1948, c. 646, 62 Stat. 944.

U. S. C. Title 28, Section 2201.

2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States and the District Court for the Territory of Alaska, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended Aug. 28, 1954, c. 1033, 68 Stat. 890.

Appendix B—Opinions, Judgments, Mandate and Orders Below.

1. Opinion of District Court (March 12, 1956) (140 F. Supp. 66) (R. 111a-139a).

Appearances:

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Attorneys for Defendant Samuel Marcus

GEORGE KESSELHAUT, ESQ.
Attorney for Al Kevelson

MODARELLI, District Judge.

This is an interpleader action filed on December 28, 1950, by Al Bierman and William Miller against Samuel Marcus and Milmar Estate, Inc.[1] In order to understand the full significance of the matters in dispute in this case, I feel it necessary to make a synopsis of the pleadings in narrative form.

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[1] The action is based on 28 U. S. C. A. § 1335, which provides for interpleader if "Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim * * *" to be entitled to the money in the possession of the plaintiff. Section 1332 confers original jurisdiction upon the federal district courts in all civil actions "* * * between: (1) Citizens of different States:" Plaintiffs allege that Bierman is a citizen and resident of North Carolina; Miller of New Jersey; Marcus of New York; and Milmar of New Jersey. The jurisdiction of this court will be discussed.

Appendix B—Opinion of District Court.

THE COMPLAINT.

The complaint alleges that on September 14, 1948,[2] Milmar contracted to sell to Bierman and Miller all of its authorized and issued stock, consisting of 1,250 shares of common stock.[3] The purchase price was $125,000.00, payable $30,000.00 cash on September 14, 1948, and $95,000.00 in deferred payments: $3,000.00 each month certain premises at Fort Lee, New Jersey, were open for business, and $1,500.00 each month the premises were closed. On the date of the complaint, the unpaid balance of the purchase price was $35,000.00 and a payment of $1,500.00, plus interest, would be due on January 1, 1951; additional payments of $1,500.00 or $3,000.00, plus interest, would be due on the first day of each succeeding month. Marcus "* * * claims that he is entitled to the said $1,500.00 installment and interest, and to all the installments constituting the balance of the purchase price, to wit: $35,000.00, and interest, and demands payment of same. Defendant, Milmar Estate, Inc., may claim that it is entitled to the said $1,500.00 installment and interest, and to all the installments constituting the balance of the purchase price, to wit: $35,000.00 and interest." If plaintiffs pay any installment to the defendant not entitled to it, the other defendant might declare an acceleration of the entire balance of the purchase price.[4] Plaintiffs require the protection of this court in

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[2] See Schedule A attached to this opinion.

[3] Exhibit DM-22, a copy of DME-5, the contract, does not contain "up to 50%" in the 5th paragraph, and "at least 50%" in the 10th paragraph. Lieberman testified he called Schwartz and told him of the insertions and Schwartz approved of the same and said he would insert the same in his copy of the contract. Apparently Schwartz failed to do so.

[4] The alleged contract contains an acceleration clause providing that if the buyer defaults in any payments, the unpaid balance shall become due and certain stock held in escrow shall be returned to the seller.

order that they will not be compelled to pay the balance of the purchase price twice and to restrain defendants from calling a default and invoking the acceleration clause. Plaintiffs have deposited the $1,500.00 installment and interest into the registry of the court and have alleged their willingness to deposit the amount of each installment as it becomes due.[5] They demand that the defendants interplead to determine their rights to collect the obligation described in the complaint; plaintiffs also demand a discharge from all liabilities to the defendants.

On December 28, 1950, on plaintiffs' motion the court (1) enjoined the defendants from commencing or prosecuting any legal proceeding affecting the obligation involved in the interpleader action, (2) ordered the defendants (a) to interplead and determine their rights, (b) not to invoke the acceleration clause of the alleged contract, (c) to show cause on January 15, 1951, why plaintiffs should not be discharged from their alleged liability under the alleged contract and why the injunctions in the order should not be made permanent.[6]

The Ancillary Claims

Milmar cross-claims against Marcus, demanding judgment that as a result of the September 14, 1948 transaction, Marcus has no right, title, or interest in any Milmar stock certificates issued prior to September 14, 1948; any

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[5] The total original deposit was $1,700.00. Subsequent to the filing of the complaint, on various dates plaintiffs deposited a total of $34,400.00 into the registry of the court. Thus, the total fund is $36,100.00.

[6] The return date of the order to show cause was adjourned by consent. Finally, the parties agreed that the issues arising under the order should be determined by the court as part of its final opinion and judgment. Those issues relating to whether certain requirements of the Interpleader Act have been met will be discussed.

Milmar stock certificates possessed by Marcus be delivered to Milmar for cancellation; the balance of the proceeds of the condemnation award[7] is the sole property of Milmar and should be delivered and paid to Milmar; an unlawful filing by Marcus of a lis pendens was a malicious use of process for which Milmar demands punitive damages of $100,000.00, and it was also a malicious abuse of process and a malicious prosecution for which it demands $100,000.00, and it was also a slander of title for which it demands $100,000.00, and it was also a malicious interference with a prospective economic advantage for which it demands $100,000.00.

Marcus filed his responsive pleading on October 25, 1954, in which he cross-claims against Milmar and Al Kevelson,[8] and counterclaims against the plaintiffs. His claims are in the alternative: The September 14, 1948, document is null and void, and there is no contract relating to the sale of any Milmar stock; Lieberman must deliver to him all the

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[7] On February 18, 1954, Marcus applied to the court for the appointment of a receiver to take into possession the proceeds of a condemnation award of approximately $757,410.00 by the State of New Jersey for the condemnation of lands of Milmar. On that same day the court ordered the money paid to the Peoples Trust Company of Bergen County, Hackensack, New Jersey, and placed on deposit in an account designated "Walter G. Winne, Master of the United States District Court," District of New Jersey, not to be disbursed except by the express order of this court. In the same order, the court ordered $77,500.00, plus interest, paid to the holder of record of the first mortgage on the condemned lands of Milmar.

[8] His role in this controversy will be described *infra*. On January 14, 1955, the court granted Marcus' motion to join Kevelson as a defendant to Marcus' counterclaim. The order was based on findings that the counterclaim was a compulsory one over which the court had ancillary jurisdiction and that the joinder did not deprive the court of jurisdiction. The same order denied Marcus' similar motion to join Abraham Lieberman, whose role also will be described.

stock and all other documents deposited by him pursuant to the September 14, 1948, document;[9] he is the owner and presently entitled to possession of 1,230 shares of Milmar; Bierman, Miller and Kevelson are not the duly elected officers and directors of Milmar, have no right to act as such and must be restrained from so acting; in the alternative, if the September 14, 1948, document is a contract, $35,000.00, plus $15,000.00 must be paid to him; he is the owner and entitled to possession of 630 shares of Milmar stock; Miller, Bierman, Milmar, and Kevelson have defaulted in paying money due him under the September 14, 1948, contract, so that he has the right to the possession of the Milmar stock held by Lieberman as escrowee, who should deliver to him all documents held by him pursuant to that contract. He also cross-claims against Milmar for $46,801.23 allegedly loaned to it.

Bierman and Miller counterclaim against Marcus: The transaction of September 14, 1948, is a valid contract; Marcus has no right, title, or interest in any of Milmar's stock; Marcus is not an officer or director of Milmar; the $50,000.00 note executed by Miller to Marcus must be cancelled; Bierman, Miller, Milmar, and Bill Miller's Riviera, Inc., must be released from all liability to Marcus, excepting the liability of Miller on the balance of the $15,000.00 note to Marcus; Marcus is not entitled to the return of any documents held by the escrowee, Lieberman; all documents held by Lieberman pursuant to the September 14, 1948, transaction must be delivered to Bierman and Miller; all of the stock of Milmar is owned as follows: Miller, 40%; Kevelson, 40%; Bierman, 20%; Marcus must deliver to Miller all certificates of stock which he holds.

Kevelson cross-claims against Marcus, alleging essentially the same things as do the plaintiffs against Marcus.

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[9] Lieberman holds documents in escrow.

ISSUES

As I see them, the legal and factual issues raised by the pleadings and the evidence are: (1) Has the court jurisdiction under 28 U. S. C. A. § 1335?[10] (2) Are Marcus and Milmar "adverse claimants" who "are claiming or may claim to be entitled" to the unpaid balance of the purchase price of the Milmar stock?[11] (3) What substantive law governs the contract claim? (4) Did Bierman, Miller, Milmar, and Marcus on September 14, 1948, contract for the purchase and sale of any amount of Milmar stock owned by Marcus?[12] (5) If there is a contract, was Marcus fraudulently induced to enter into it? (6) Does Milmar owe Marcus any money which he loaned to it? (7) Was Marcus' filing of a lis pendens (a) malicious use or (b) abuse of process, (c) slander of title, or (d) malicious interference with a prospective economic advantage.[13]

(1) JURISDICTION

The citizenship of the parties is: Plaintiff Bierman, North Carolina; plaintiff Miller, New Jersey; defendant Marcus, New York; and defendant Milmar, New Jersey. There is diversity of citizenship between the two defendants who allegedly are adverse claimants. But does the co-citizenship of Miller and Milmar jurisdictionally affect the requirement of diversity set forth in 28 U.S.C.A. §1335? The question is discussed in 3 Moore, Federal Practice,

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[10] See footnote 1, supra.

[11] See footnote 6, supra.

[12] Is there a contract? If there is, how much stock did Marcus sell?

[13] This issue was raised by Milmar's cross-claim against Marcus. Milmar now asks this court to reserve its decision concerning the issue. Accordingly, the decision will be reserved and if Milmar wishes to pursue that cross-claim, evidence must be submitted.

paragraph 22.09, page 3029 (2nd ed. 1948), where Professor Moore notes that *Treixies* v. *Sunshine Mining Co.*, 308 U. S. 66 (1939) does not settle the doubt "* * * whether, under the Interpleader Act, there must be diversity between the complainant and all the claimants, if the complainant has an interest and is not a mere stakeholder * * *." This court agrees with Professor Moore who believes that interpleader relief is proper despite the co-citizenship of a plaintiff with an interest and a defendant who is an alleged claimant. *Ibid.* The dicta in *Boice* v. *Boice*, 135 F. 2d 919 (CA 3, 1943) is not contra. That case also involved a bill in the nature of interpleader. The appellate court affirmed the trial court's order dismissing the complaint which sought interpleader between the defendants. But the court also thought that "* * * the dismissal was right because of an absence of diversity of citizenship between the plaintiff and one of the defendants * * *." Confining that case to its facts, the dicta expresses the court's view that in a case involving a bill in the nature of interpleader where one plaintiff has an active controversy with respect to the subject matter of the suit with one of the defendants whose citizenship is the same as his, the court is without jurisdiction. Although this is also a case involving a bill in the nature of interpleader,[14] that dicta does not apply. Here there is co-citizenship of plaintiff Miller and defendant Milmar. But not only are there two plaintiffs, one of whose citizenship differs from the two defendants, but further analysis demonstrates the inapplicability of that dicta.

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[14] Bierman and Miller are not merely disinterested stakeholders. Clearly they are vitally concerned with the outcome of this action. Although they have never asserted a claim to the unpaid balance of the purchase price of the Milmar stock (see footnote 5, supra) which they have deposited into the registry of the court, their rights concerning the extent of their ownership in Milmar depend upon the court's decision pertaining to the issues raised by their complaint.

Miller's theory pertaining to Milmar is that he and Bierman purchased all of Milmar's stock. Milmar's theory is the same as Miller's. Thus, there is no "active controversy" between Miller and Milmar. This is so even though the interpleader action was commenced on the ground that since the named seller is Milmar, it "may claim" the unpaid balance of the purchase price of the Milmar stock. But, Miller (and Bierman) never have claimed a right to that money. In this case, it is important to distinguish between the phase of the case involving the fund and the controversy concerning the nature of the September 14, 1948, transaction. A similar distinction was made in the *Boice* case, where the Court of Appeals carefully referred to the plaintiff's "* * * active controversy with respect to the subject matter of the suit with one of the defendants * * *." This general language becomes meaningful by referring to the facts of the case described in the lower court's opinion. 48 F. Supp. 183 (D. C. N. J. 1943). In that case, the fund in court resulted from dividends paid to the plaintiff who was formerly a trustee of stock under a declaration of trust. The trust had been terminated, but the stock was still registered in his name. At the time plaintiff commenced the interpleader action, there was a controversy between him and the settlor's wife concerning the right to the stock. Clearly, that plaintiff did not claim any right to the dividends he deposited in court. Thus, the Court of Appeals decided the district court was without jurisdiction because of the plaintiff's active controversy with one of the defendants and both of them were citizens of the same state. But in the case at bar, the two co-citizens (Miller and Milmar) do not have an active controversy with each other, even though one (Milmar) may have had a claim to the unpaid balance of the purchase price of the Milmar stock at the time the action was commenced because it was the named seller.

On the basis of the foregoing, the court concludes that it has jurisdiction under 28 U. S. C. A. §1335.

(2) The Interpleader Act.

Previously, the court decided in an order dated March 24, 1953, that Marcus and Milmar are adverse parties. The question arose on a motion by Milmar to strike interrogatories propounded to it by Marcus. The court's order denying the motion was based on its finding that they were adverse parties. And clearly, on the date of the complaint Marcus was claiming to be entitled to the unpaid balance of the purchase price of the Milmar stock, and Milmar as the named seller in the basic document involved in the transaction "may claim" that money. Thus, they are adverse claimants within the meaning of the interpleader Act.

(3) Governing Law.

Before discussing the remaining issues, what substantive law governs this action?[15] *Kerrigan's Estate* v. *Joseph E. Seagram & Sons*, 199 F. 2d 694 (CA 3 1952) was an interpleader action. The court held that the substantive law governing the action was the state law in which the federal court sat as that state's court had declared it, citing *Klaxon Co.* v. *Stentor Mfg. Co.*, 313 U. S. 487 (1941). In the case at bar commenced in this New Jersey federal court, there is a dispute concerning the interpretation of certain documents, which were executed not in New Jersey but in New York. The New Jersey conflict of laws rule is the general rule, viz., the reference regarding question of validity and interpretation of the obligations of the parties is

[15] In the sixteen briefs which have been submitted, there is no discussion of the conflict of laws phase of the case.

to the place of contracting.[16] *Colozzi* v. *Bevko, Inc.*, 17 N. J. 194, 202 (1955); *James H. Rhodes & Co.* v. *Chausovsky*, 137 N. J. L. 459, 462; *Hinkly* v. *Freick*, 86 N. J. L. 281, 283. That place is New York. Thus the substantive law governing this action is New York law as the New York courts have declared it.[17]

Before I recite my findings of facts in this case, I should like to make some observations. The case was tried intermittently without a jury over a period of approximately four months, consuming nineteen full trial days beginning January 29, 1955. The transcript is 2,471 pages, in six volumes, and hundreds of documents are in evidence, with no attempt made to abbreviate them so that I should only consider the parts which were pertinent to the disposition of this case. The record is a very long one and its analysis was a tedious and rather unwelcome task because of truths evaded, half truths, half lies, some perjury, faulty recollection of events, of incidents, and conversations which took place some seven years before the trial. Thousands of pages of depositions were taken and were used often to confront witnesses with statements made at the taking of depositions which were irreconcilable with the testimony given at the trial. Many of the characters involved in this litigation might be well characterized as Damon Runyon types, some of whom had a wholesome disregard for the spirituality of the truth and were actuated in testifying to facts which they thought more helpful to their cause than to establishing the truth of what happened. The record is replete with circumlocutions of the truth and the best that could be said for some of the witnesses is that they had no

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[16] Of course, the threshold question is whether there is a contract. But the documents, whatever may be the legal consequences arising therefrom, were executed in New York.

[17] As a result of counsels' disregard of the conflict of laws problem, their briefs contain mainly New Jersey cases.

recollection of what actually happened, and so they said whatever came to their minds while on the stand. These factors made it rather difficult to find the facts, and I have done the best I can to establish the operative facts under the circumstances.

The bringing of this case to trial was characterized by much unnecessary delay. It appears to me from the activity of some of the litigants that it was deliberately planned to delay the trial of the issues. Countless motions were made before the trial and during the trial; many postponements of arguments on the motions were had for one reason or another. I do not find it necessary to specify who the delayers were. Motions were made during the trial for discovery of documents and books in an effort by one of the litigants to bolster up his case. Great inconvenience was caused in searching for documents which had long since been put away. It meant rummaging through countless files and thousands of papers in an effort to find something to bolster up the case, but all in vain. I found it necessary to force the trial on because several of the litigants were thoroughly disgusted with the delay and appealed to me personally over the heads of their counsel. Their appeals were justified. It became necessary during the course of the trial for the production of typewriter experts, which, in my opinion, were absolutely unnecessary. These facts are recited to show the antagonism which prevailed between the litigants and some of which flowed over and affected counsel, who at times became very antagonistic. In such an atmosphere, the court found it difficult at times to get at the true facts.

Appendix B—Opinion of District Court.

THE FACTS[18]

Bill Miller and Sam Marcus met for the first time in January, 1946. Miller was a well known night-club owner and operator. Marcus was an active enterpreneur in many enterprises and business man principally engaged in the photographic supply business. In April, 1946, they purchased from Michael Realty Co., property located at Fort Lee, New Jersey. The closing statement, dated April 5, 1946, shows that the purchasers were Miller and Marcus. The financing, however, apart from a $300,000.00 purchase money mortgage, was that Marcus contributed $93,750.00, Bierman $20,000.00, and Robert Schwartz $11,250.00.[19] Miller executed and delivered a $50,000.00 demand note, dated April 1, 1946, to Marcus.[20] Additionally, Miller later gave Marcus collateral security consisting of all stock issued to Miller in Milmar Estate, Inc., Bill Miller's Riviera, Inc., and Mocambo, Inc.[21] Shortly after the purchase of the property, Milmar Estate, Inc., was incorporated in New Jersey, and Miller and Marcus conveyed title to it. The Milmar stock-book stubs show that prior to September 14, 1948, certificates were issued: On April 15, 1946, 9 shares to Miller, 9 to Marcus, 2 to Marguerite K. Kane; on June 7, 1946, 982 to Miller, 1,107 to Marcus, 125 to Schwartz;[22] on June 7, 1947, 20 shares to Bierman, Milmar's corporate business was that of a landlord; its ten-

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[18] Since the issues principally involve an interpretation of documents allegedly comprising a contract, the court has been guided in finding the facts by the principles of law set forth *infra* under Issue (4).

[19] Schwartz also was Marcus' attorney.

[20] The note was renewed on June 1, 1947, payable $500 weekly, commencing June 1, 1948.

[21] Exhibit DME-40.

[22] Since the parties included Schwartz' shares as part of Marcus' holdings, in this opinion the court will not separately refer to Schwartz's shares. Schwartz is not a party in this action.

ant was Bill Miller's Riviera, Inc., a New Jersey corporation,[23] whose business was the operation of a fashionable night-club known as "Bill Miller's Riviera."

Both Miller and Marcus were active, on-the-scene, continual participants in the affairs and operation of the Riviera night club enterprise, as evidenced by a letter dated April, 1946, written to Mr. William Miller, signed by Mr. William Miller and accepted by Samuel Marcus. On December 19, 1946, Bill Miller's Riviera, Inc., filed a petition in bankruptcy in the United States District Court for this District. Miller on behalf of the corporation stated in the petition that the corporation was insolvent or unable to pay its debts as they matured; he proposed an arrangement with the corporation's unsecured creditors under Chapter XI of the Bankruptcy Act. In the statement of executory contracts, Miller referred to the corporation's lease with Milmar at a yearly rental of $60,000.00. At the time, the petitioner-corporation owed to Milmar the rent for October, November, and December, 1946. The summary of the corporation's debts showed $183,982.21, as compared with assets of $27,500.00. On April 2, 1947, the Referee in Bankruptcy ordered the proposed arrangement confirmed.

When the Riviera failed to pay rent to Milmar, in July, 1947, Milmar commenced dispossess proceedings. The controversy was settled and a new lease was executed.

The Riviera corporation's financial plight adversely affected the income of Milmar.[24] Marcus unsuccessfully at-

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[23] Miller was a principal beneficial owner of its stock and actively in control of the corporate operations.

[24] Milmar's only income was from Riviera rent. Moreover, Milmar, Miller, and Marcus needed money for their mortgage payments to Michael Realty Co. Despite two helpful modifications of the original mortgage, beginning August 1, 1948, and continuing until July, 1951, their obligation was to pay $5,000.00 each month.

tempted several times to sell his stock interest in Milmar. Finally, on July 27, 1948, he sent an option letter to Miller.[25] Although Miller never exercised his option, on August 18, 1948, Marcus gave a document to Miller.[26] Previously, Miller had asked Marcus for a written assurance of his participation in a proposed transaction. Miller wanted such a document to reassure Kevelson, with whom Miller anticipated financing the ultimate transaction; in fact, Miller already had received $5,000.00 from Kevelson. The contents of the document are set forth in the footnote.[27]

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[25] "This is to substantiate our verbal understanding that you are hereby given a ten-day option in which to purchase *my holdings* of the Milmar Estates Inc., owners of the Riviera property for the sum of $125,000.00 payable $30,000.00 cash and the balance at $4,000.00 per month.

"Inasmuch as I am dickering with other interested parties, I cannot make any more than a ten-day option at this price and this option expires midnight the 6th day of August, 1948." (Emphasis supplied.)

[26] Although the disputed transaction did not occur until September 14, 1948, the prior negotiations are relevant evidence in interpreting the legal consequences of the transaction. This is so because Marcus contends that this court should construe the documents involved in the transaction to mean something else than their words indicate. Under New York law, the parol evidence rule is not thereby violated. *O'Neil Supply Co.* v. *Petroleum H. & P. Co.*, 280 N. Y. 50, 55, 56 (1939); 1 *Corbin on Contracts*, § 22, p. 53 et seq. (1950).

[27] "Agreement made this day between William (Bill) Miller hereinafter called party of the first part also known as the buyer and Sam Marcus hereinafter called party of the second part also known as the seller. The party of the first part agrees to purchase *all right, title and interest including all outstanding stocks,* notes, I.O.U.'s options, agreements and any other transactions that the party of the second part has participated in with the party of the first part including the agreements in the following companies and corporations.

1. William (Bill) Miller
2. *Milmar Realty Corp.*
3. Bill Miller's Riviera, Inc.

(Continued on following page)

On or about August 26, 1948, Marcus gave another document to Miller.[28] It was a letter in which Bierman offered to buy all of Marcus' shares in Milmar "* * * consisting of approximately 62½% of the outstanding shares (described as all those shares not held by Bill Miller or Al Bierman) for the sum of $125,000. payable as follows: $19,000. on execution of this agreement, receipt whereof is hereby acknowledged. $11,000. upon execution of the necessary papers called for in this agreement. $3,000. each month on the first day of each and every month that the Riviera (or successor)[29] $1,500. each month of the first day of each and every month that the Riviera is closed; * * *."

(Continued from preceding page)

The party of the second part herewith agrees to sell all of the above mentioned assets which he now claims he is the sole owner and agrees to the following terms of payment for all of the above mentioned items.

"The purchase price for all of the items herein mentioned is One Hundred and Twenty five Thousand Dollars ($125,000.00) to be paid as follows:

"The party of the first part agrees to pay $5,000.00 to the party of the second part upon the signing of this agreement.

" Dollars to be paid by the party of the first part to the party of the second part upon final signing of all papers releases and whatever other documents that will be necessary to be signed to release Bill Miller and all of the other companies and corporations herein mentioned.

"The balance of Dollars to be paid as follows:

"First payment of Three Thousand Dollars shall be paid one Month from date the final documents shall be signed and delivered. Thereafter a payment of Three Thousand Dollars shall be made each month that Bill Miller's Riviera shall be open for business. In the period that Bill Miller's Riviera shall be closed and not open for business a payment shall be made each month of One Thousand Five Hundred Dollars.

"Upon the signing of this agreement it shall be a legal and irrevocable contract." (Emphasis supplied.)

[28] Exhibit DME-2.

[29] The sentence is incomplete.

On August 27, 1948, Marcus received two $5,000.00 checks from Bierman. Marcus signed a receipt for the checks[30] which were a "* * * deposit pending negotiations for the purchase of my [Marcus'] stock of the Milmar Estates, Inc., which includes all outstanding stock excepting that stock owned by William Miller and Al Bierman." The receipt as typewritten contained the figure "$19,000"; "$10,000.00" was inserted in ink and the insertion was initialed by Marcus and Bierman.[31] This receipt was typed or dictated by Marcus on Riviera stationery.

On or about August 28, 1948, there was a meeting in Marcus' New York City office. The participants were Miller and his attorney Lieberman, Marcus and his attorney Schwartz. There was a discussion regarding the sale to Miller and Bierman of all the interests held by Marcus in Milmar. At the end of the conference Miller and Marcus instructed the attorneys, Lieberman and Schwartz, to prepare an agreement to provide for the sale by Marcus of all his interest in Milmar to Miller and Bierman for $125,000.00. The attorneys knew the proposed terms of the contract because the three above-described documents were shown to them during the conference.

On September 14, 1948, the same four men met in Schwartz's New York City law office. The purpose of their meeting was to conclude the pending transaction between Miller and Marcus regarding the sale of Milmar stock to Miller and Bierman.[32]

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[30] Exhibit DME-1.

[31] Bierman's deposit was reduced $9,000.00 because when he produced two $5,000.00 checks and $9,000.00 cash, Marcus refused to accept the cash.

[32] Miller was authorized by Bierman, who was in North Carolina to "* * * sign my name to all papers legalizing sale of Milmar Corporation to me."

In the basic document the parties are identified as Milmar Estate, Inc., seller, and Al Bierman and William Miller, buyers. The document recites that Milmar has an authorized and issued stock consisting of 1,250 shares of common stock; "the buyer" (Bierman and Miller) desires to purchase from Milmar all of that stock; Milmar sells to the buyer "* * * all of the issued and outstanding shares of the Corporation."; the price is $125,000.00, payable $30,000.00 cash upon execution of the agreement, $95,000.00 "* * * by the Purchaser executing a Purchase Money Mortgage on the real estate and chattels, with interest at four (4%) per cent, and containing the following terms: * * *." $3,000.00 every month that the Fort Lee premises are open for business, $1,500.00 every month that the premises are closed. Further, it is provided that "The stock up to 50%[33] herein purchased by the Buyer and endorsed in blank shall be deposited in escrow with ABE LIEBERMAN, ESQ. * * * immediately upon the execution of this Agreement with instructions to the said ABE LIEBERMAN to deliver the sale of the said stock to the Buyer upon payment of the full amount due hereunder." The document also contains a default clause, a promise by the buyer to assume a first mortgage, taxes, and insurance debts of Milmar. It is signed on behalf of Milmar by Sam Marcus, President, and on behalf of Bierman by Miller, who also signed his own name.

Other pertinent documents executed by the parties on September 14, 1948, were:[34] (1) A letter addressed to Milmar signed by Miller confirms "our" understanding that

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[33] "Up to", of course, is imprecise language. Miller, Marcus, and their lawyers, however, in fact did deposit exactly 50% of the stock in escrow.

[34] The parties intended all of the documents to constitute their transaction.

Miller will deposit with Lieberman at least 50%[35] "of all of the stock of Milmar Estate, Inc., and 50% of Bill Miller's Riviera, Inc., which shall consist of my own and Al Bierman's." (2) An escrow receipt signed by Lieberman acknowledges that he held certain documents in escrow including "625 shares of Milmar Estates, Inc."[36] (3) A letter signed by Marcus as president of Milmar addressed to Bierman confirms their understanding that Milmar represents that it will pay all of the present outstanding obligations of Milmar "* * * consisting of the corporation's obligations for legal fees or other obligations and loans *to* Samuel Marcus personally." (Emphasis supplied)[37] (4) A real estate mortgage by Bierman and Miller as mortgagors, and Milmar as mortgagee, to secure the payment of the $95,000.00 debt resulting from the basic sale of Milmar stock. The subject matter of the mortgage was land, furniture, fixtures, and equipment then located on the premises as set forth in (5) A chattel mortgage with Bierman and Miller as mortgagors, and Milmar as mortgagee, to secure the payment of the $95,000.00 debt. It is recited that the goods covered by the mortgage are "* * * mentioned in the schedule hereunto annexed * * *." However, the schedule page is blank.[38] (6) Marcus, acting as president of Milmar, confirmed with Miller their understanding arrived at

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[35] "At least" also is imprecise language.

[36] As will appear *infra*, 625 shares was 50% of the *then* issued and outstanding shares of Milmar stock.

[37] This is another example of the sloppy drafting of the documents in this case. Obviously, the intention was by Samuel Marcus personally.

[38] The two mortgages are of doubtful legality for at the time they were executed the named mortgagors did not own the land or the chattels. Milmar was the owner of the real estate and Bill Miller's Riviera, Inc., of the personal property. When queried as to why these futile documents were drawn, both attorneys replied that Marcus demanded the same.

September 2, 1948, which included "in the event that the contract of purchase, dated September 14th, 1948, is fulfilled, the said note of Fifty thousand ($50,000.00) Dollars is to be returned to you and we agree to exchange mutual releases."[39] (7) Statement signed by Miller to the effect that he promised to pay to Marcus $15,000.00, plus 4% interest, subject to certain conditions.[40] (8) Letter by Miller to Marcus confirming their understanding that all of Marcus' tabs and checks signed by him at the Riviera were cancelled. (9) Two identical letters by Marcus and Schwartz to Milmar: "The undersigned hereby resigns as an officer and director of the corporation, effective immediately." (10) Milmar Estate, Inc., stock certificate Nos. 17, 18, 19, and 20, totaling 1,250 shares. Marcus is named as the owner of the shares; on the rear of each share at the bottom of the printed form of assignment and transfer, Marcus signed his name, although no other handwriting appears thereon. Miller and Marcus agreed that the form of the transaction would be a sale of stock. Neither Miller nor Marcus produced their stock certificates for assignment to the purchasers. Thus, the mechanics of the transaction were that the certificate stubs of the then issued and outstanding shares were marked cancelled, and the parties agreed that the absent certificates would be deemed to have been surrendered back to Milmar. Then the four new certificates totaling 1,250 shares were issued in Marcus' name; he endorsed in blank and delivered the certificates to Lieberman; two certificates representing 625 shares were given to Lieberman to be held by him in escrow, and two certificates representing 625 shares were left

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[39] See footnote 20, supra.

[40] Miller obligated himself to pay the $15,000.00 in addition to his obligation under the basic document "in order to sweeten up the deal."

with Lieberman apparently in his capacity as Miller's lawyer.[41]

This court has found the above-narrated facts as they are evidenced by the many negotiation documents, those executed during the September 14, 1948, meeting and the believable testimony. What legal conclusions must be based thereon?

(4) Is There a Contract? If There Is, What Was Sold?

Marcus has made many arguments relating both to the existence of a contract and the interpretation of any contract held to exist. Thus, based upon research of New York law, the court will set forth the principles of contract law which a New York court would apply to the facts.

This court will not make a contract. If the parties intended to enter into a contract, however, the court will attempt to give effect to a transaction that was not only serious, but which is solemnly recorded by many documents signed by the two men who now are the principal disputants.[42] There is no doubt that the parties intended to make a contract. This court is clearly convinced that on September 14, 1948, the parties believed themselves to be making a contract, to be affecting their legal relations with each other. Thus "* * * sound practical policy requires that their mutual expressions should be given an interpretation that will effectuate their belief and intention * * *." *Ibid.* The court's research of New York law did not disclose any cases contrary to such sound principles.

What was sold under the contract? "It is well settled that in construing the provisions of a contract we should

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[41] Undoubtedly, the documents drafted for the transaction lacked legal craftsmanship. Nevertheless, as will be discussed below, there is no doubt regarding the intentions of the parties.

[42] See 1 *Corbin on Contracts,* § 149, pp. 483, 486 (1950).

give due consideration to the circumstances surrounding its execution, to the purpose of the parties in making the contract, and, if possible, we should give to the agreement a fair and reasonable interpretation * * *." *Aron* v. *Gillman*, 309 N. Y. 157, 163 (1955). The ascertainment of the substantial intent of the parties is the fundamental rule in the construction of all contracts. *Madawick Contracting Co., Inc.* v. *Travelers Ins. Co.*, 307 N. Y. 111, 119 (1954). The court ascertains that intent not by a literal reading of the words of the contract, nor by a strict grammatical reading of the words, but by reading them in the light of the circumstances existing at the making of a contract. *O'Neil Supply Co.* v. *Petroleum H. & P. Co.*, 280 N. Y. 50, 55, 56 (1939); *Wirth & Hamid Fair Booking, Inc.* v. *Wirth*, 265 N. Y. 214, 219 (1934); *Becker* v. *Frasse & Co.*, 255 N. Y. 10, 14 (1930). The liberal New York law relating to the interpretation of a contract is shown by *Empire Properties Corp.* v. *Manufacturers Trust Co.*, 288 N. Y. 242, 248, 249 (1942), "We have said, 'The intention of the parties must be sought for in the language used. To understand the language we may put ourselves in their place and discern if possible the objects they had in view and the motives which dictated their choice of words. A wider meaning may thereby be disclosed.' (*Halsted* v. *Globe Indemnity Co.*, 258 N. Y. 176, 180.) The object which the parties had in view is, in this case, clear, and so are the motives which dictated their choice of words. The construction which has been placed upon the words the parties have chosen might defeat the object of the parties. The parties have chosen words which leave room for construction. Even literal construction would leave the meaning of the words open to doubt. The courts should then choose that construction which will carry out the plain purpose and object of the indenture."

Applying these principles of interpretation the court as is suggested by its previous finding of fact concludes that Bierman and Miller purchased *all* of Milmar's stock, consisting of 1,250 shares. The price was $125,000.00 payable to Marcus: $30,000.00 cash upon execution of the contract and $95,000.00 pursuant to the aforementioned installment payment formula. Miller contracted to pay Marcus an additional $15,000.00, plus 4% interest. Fifty per cent of the 1,250 shares being sold were deposited in escrow with Lieberman, who was to deliver them to Bierman and Miller when they made their final installment payment. Marcus contracted to release Miller from his $50,000.00 debt evidenced by his aforementioned June 1, 1947, note. Marcus and Schwartz resigned as officers and directors of Milmar.

Confronted with such evidence concerning the nature and extent of the sale of all Milmar stock, plus his complete withdrawal from active participation in the affairs of Milmar,[43] plus payment to him of $66,004.96 pursuant to the installment payment formula set forth in the contract,[44] litigant-Marcus—compared with seller-Marcus—now asks this court to conclude either that no affirmative legal effect resulted from the documents executed on September 14, 1948, or that he sold only one-half of the total issued and outstanding shares of Milmar. In support thereof, Marcus

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[43] After September 14, 1948, although Miller was continually present at the Riviera night-club, he did not see Marcus again until 1951 when he testified by deposition in this case.

[44] Twenty-seven checks are dated from October 1, 1948, to December 1, 1950, to Marcus as payee, signed by either Miller or Kevelson (as president of Milmar) as payor, endorsed (strangely, two are not, although they appear to have been cashed) by Marcus and in amounts identical to the installment payment formula. With but two exceptions, on the face of every check is a computation of the interest and principal, which clearly evidences payments pursuant to the September 14, 1948, contract. And, also pursuant to that contract, the spring-summer-fall checks include $3,000.00 payments.

cites cases which are authority for general and basic principles of contract law, e. g., the terms of the purported contract must be such that their meaning can be ascertained to a reasonable degree of certainty; there must be a meeting of the minds or there is no contract. But they are merely conclusions of law applied to the facts of a particular case. As has been discussed, the evidence clearly supports two main conclusions, viz., the parties intended to contract and to sell and buy all of Milmar's stock. Indeed, it was not until after the commencement of this action that Marcus' intent was otherwise, for his conduct prior to that date was that of a man whose legal rights in Milmar had changed.[45]

(5) Fraud

Marcus seeks rescission of the contract on the ground that there was "* * * a scheme of fraud on the part of Miller, starting in March 1946, and continuing up to and including the 14th day of September, 1948, designed to give an unconscionable advantage over Marcus." Disregarding Marcus' irrelevant and frivolous arguments, his theory of fraud is based upon his uncorroborated testimony that about August, 1948, Miller falsely represented to him that the Riviera night-club enterprise was losing money and that he was in danger of losing his entire investment. Under New York law, since Marcus does not seek damages he does not have to prove an intentional misrepresentation. His burden is, however, to prove a (1) misrepresentation, and that (2) it materially influenced the bargain. *Bloomquist* v. *Farson*, 222 N. Y. 375, 380 (1918). It is Hornbook law that in all rescission action the victim must establish (1) that the defendant was guilty of fraud or misrepresentation, and (2) plaintiff was deceived thereby.

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[45] See footnotes 43 and 44, supra.

There is no proof either that Miller made the statement or that it was false. Even assuming that there was such proof, there is a complete absence of any proof that Marcus was materially influenced or deceived by the misrepresentation. Indeed, the proof is otherwise, for during the trial this court noted that Marcus had used the opportunity granted to Milmar in its lease with Bill Miller's Riviera, Inc., to examine the books.[46] The court said: "I am convinced that Mr. Marcus knew more about the books prior to September 14, '48, than Mr. Miller will ever know. I can infer that from what I have heard already." The court's opinion has not changed, but, in fact, has been fortified. Marcus tried to create the impression that the Riviera was doing marvelous business. This despite the fact that the evidence discloses that it never paid its rent on time to Milmar, went through bankruptcy, and was constantly in arrears on the payments of interest and installments on the purchase money mortgage. As a matter of fact, the purchase money mortgage mortgagee sold the mortgage at a 15% discount. The evidence further discloses that Marcus had complete access to the books of both the Riviera and Milmar which were kept by Jacob Hoffman, who was Marcus' accountant, not Miller's. Hoffman testified that he reported weekly to both Miller and Marcus as to the business of the Riviera.

Marcus further attempted to prove by mathematical computations purportedly based on an examination of the Riviera's books that the Riviera was earning a profit during the time that Miller allegedly told him it was losing money. The evidence is incomplete, inconclusive, and does not support Marcus' conclusions. Moreover, on July 27, 1948, Marcus sent the aforementioned option letter to

[46] "The Landlord shall have an absolute right to check any and all receipts, computations, cash registers, guest checks, billings for each and every book of account maintained by the Tenant."

Miller.[47] Thus, prior to the time when the alleged misrepresentations were made to him he had already decided not only to sell his interest in Milmar but at a price less than he ultimately received.[48] From these facts it is reasonable to infer that Marcus' decision to sell his Milmar stock was not based upon Miller's alleged misrepresentation but was a business decision made with full knowledge of the Riviera's financial status.

(6) The Alleged Loans

While the parties have raised many issues of fact in this case, none has been more bitterly contested than the issue relating to the money allegedly loaned by Marcus to Milmar. Marcus' cross-claim against Milmar for $46,801.23 is based on his allegation that beginning on July 16, 1946, through September 15, 1948, he loaned $67,997.23 to Milmar and Milmar has repaid him only $21,196.00. He also alleges that the repayments "* * * became due and payable five years from the 23rd day of July, 1947, and are now due and owing", evidently having in mind the statute of limitations. While there are numerous examples of Marcus' failure to prove the alleged loans, one will suffice for my purpose because it is typical. As evidence of a $5,100.00 loan on December 28, 1946, he relies upon a page from Milmar's general ledger, journal, and cashbook. The page is entitled "Loans Payable S. Marcus." For the year 1946 it does not contain any $5,100.00 entry.[49] Not only has Marcus failed in his attempted documentary proof of loans, but his unconvincing testimony relating thereto does

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[47] See footnote 25, supra.

[48] The option gave Miller the right to purchase Marcus' stock for $125,000.00. The final contract also called for $125,000.00, but Marcus and Miller agreed that he would pay an additional $15,000.00.

[49] Exhibit DM 14, page 10.

not support his contentions. Moreover, during his deposition on December 19, 1951, Marcus repeatedly was asked whether he had any claims against Milmar for money. At that time he didn't know whether he had such claims.[50] The claims were not made until he filed his cross-claim on October 25, 1954. Surely his memory was better in 1951 than in 1954.

The parties were instructed at the conclusion of the trial to submit to the court proposed findings of ultimate facts

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[50] "Q. I am not asking you about other people. I am asking you specifically whether you have any claims for money against Milmar Estates, Inc.? A. I do not know to whom I have to look for money for claims.

* * * *

"Q. What is your answer? A. My answer is I do not know to whom I have claims for money.

"Q. Mr. Marcus, you are an intelligent man. You understand the question. I am asking you specifically: Do you have any claims for money against Milmar Estates, Inc.? A. And I am answering just as specifically: I don't know to whom I have to look for redress on money.

"Q. Then you do not know whether you have any money claim against Milmar Estates, Inc.? A. That's right, I don't know definitely to whom I have to look for money.

"Q. Do you have any other claims against Milmar Estates, Inc.? A. I don't know at this time.

* * * *

"Q. Do you have any money claims against Jacob Hoffman? A. Yes, I do.

"Q. Are they in any way related to Milmar Estates, Inc., * * * ? A. No, they are not.

"Q. Do you have any other claims against Jacob Hoffman relating to Milmar Estates, Inc., * * * ? A. I don't know at this time.

* * * *

"Q. * * * Do you know of any facts which may give you any claims against Milmar Estates, Inc., * * * ? A. I have been advised by my attorneys that the situation is so muddled up that they could give me no advice of any definite character as

(Continued on following page)

"with specific reference to where these facts are found in the transcript"[51] because the court realized in a lengthy case of this character where there was so much irreconcilable contradiction in testimony that "fact finding would be a difficult art," as has been stated many times by learned judges. Marcus' proposed findings of fact concerning the loans failed to cite a single reference to the transcript to support his statements. His failure to do so made it necessary for me to read many pages of testimony and to examine countless documents in order to establish the ultimate facts. With the state of the record, it was humanly impossible to find the truth in relation to the loans because there was nothing but hopeless confusion in testimony regarding the alleged loans. Marcus has failed to satisfy me by a fair preponderance of the evidence that Milmar owes him anything.

On the issue of credibility, I should mention that Marcus admitted that he often signed affidavits without reading them. I called his attention to the fact that affidavits were sworn statements, he still said he signed them often without reading them.

It became necessary for Milmar to institute a dower action in the Superior Court of New Jersey against Sarah Marcus, the wife of Samuel Marcus. This action was settled for $7,500.00. This action was necessitated because the lawyers who handled the transaction did not realize

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(Continued from preceding page)

to what our claims are, against whom the claims are to be instituted.

* * * *." Deposition upon oral examination of Samuel Marcus, dated December 19, 1951, pp. 95-100.

The excerpts from the deposition of Samuel Marcus were put into the record pursuant to a stipulation made in court. (T. 2468.)

[51] T. 2467.

that a wife's right of dower had not been abolished in New Jersey. This was in connection with the transfer of title from Marcus and Miller to Milmar Estate, Inc. Marcus claimed he knew nothing about this action and had nothing to do with it, despite the fact that he and his wife were living together in their matrimonial abode. This is an incredible situation, particularly since Mrs. Marcus was represented by Mr. Roth of the New York Bar who also represented Marcus. As a matter of fact, Mr. Roth sat in during the trial of this case as associate counsel for Marcus and appeared as a witness for him.

An order may be submitted in conformity with the findings of fact and conclusions of law expressed in this opinion.

Exhibit D-ME 5, Annexed to Opinion of

Modarelli, *D. J.*

(See Opposite ☞)

AGREEMENT made this 14th day of September, 194., in the City and State of New York between MILLER ESTATES, INC., a New Jersey corporation (hereinafter referred to as the "Seller", party of the first part, and AL. BIRNBAUM and William Miller both residing at Fort Lee, New Jersey (hereinafter referred to as the "Buyer"), party of the second part.

W I T N E S S E T H :

WHEREAS, the corporation is duly organized in the State of New Jersey and has an authorized and issued stock consisting of 1250 shares of Common Stock; and

WHEREAS, the Buyer is desirous of purchasing from the Seller all of the issued and outstanding capital stock of the Corporation;

NOW, THEREFORE, it is mutually agreed as follows:

1. The Seller hereby sells to the Buyer,

and

WHEREAS, the Buyer is desirous of purchasing from the Seller all of the issued and outstanding capital stock of the Corporation;

NOW, THEREFORE, it is mutually agreed as follows:

1. The Seller hereby sells to the Buyer, and the Buyer hereby purchases from the Seller all of the issued and outstanding shares of the Corporation.

2. The price for such shares of stock which the Buyer hereby agrees to pay shall be in the sum of One Hundred Twenty-Five Thousand ($125,000.00) Dollars, payable as follows:

-Thirty Thousand ($30,000.00) Dollars in cash upon execution of this agreement, receipt whereof is hereby acknowledged;

-Ninety-five Thousand ($95,000.00) Dollars by the Purchaser executing a Purchase Money Mortgage on the real estate and chattels, with interest at four (4%) per cent, and containing the following terms:

D-ME 5

Three Thousand ($3,000.00) Dollars each month on the first day

SCHEDULE A

of each and every month that the premises in question located at Fort Lee, New Jersey, are open for business. Fifteen Hundred ($1500.00) Dollars each month on the first day of each and every month that premises are closed; and for the purpose of this clause, the question of whether or not the Riviera is open or closed during any given month shall be the state of affairs that prevails on the first day of each month. The said Purchase Money Mortgage shall be prepared upon the usual forms of any regular title company doing business in the State of New Jersey.

The mortgage shall contain a clause providing for a 50% release after every $25,000. shall have been paid.

~~3. The Seller is authorized to pay all of its outstanding obligations of whatsoever kind and description may be contained upon the corporate books, and to pay over at the closing the surplus remaining, if any.~~

4. The Seller and the Buyer agree that the liquor license will be continued until such time as may be required to transfer and turn over the said liquor license to the Buyer, but without any cost or expense to the Seller.

45 50%

5. The stock herein purchased by the Buyer and endorsed in blank shall be deposited in escrow with ABR

3. ~~The Seller is authorized to pay all of its outstanding obligations of whatsoever kind and description may be contained upon the corporate books, and to pay over at the closing the surplus remaining, if any.~~

4. The Seller and the Buyer agree that the liquor license will be continued until such time as may be required to transfer and turn over the said liquor license to the Buyer, but without any cost or expense to the Seller.

5. The stock of to 50% herein purchased by the Buyer and endorsed in blank shall be deposited in escrow with ABE LIEBERMAN, ESQ., of 4000 Bergenline Ave., Union City, New Jersey, immediately upon the execution of this Agreement with instructions to the said ABE LIEBERMAN to deliver the sale of the said stock to the Buyer upon payment of the full amount due hereunder.

6. In the event of the Buyer failing to pay the amount due hereunder, or in the event that the Buyer shall default in making any one of the payments due hereunder, then the balance remaining unpaid shall immediately

become due and payable, and in such event the shares of stock remaining in escrow shall be returned by the said ABE LIEBERMAN to the Seller.

7. The Buyer agrees to assume and perform all of the outstanding contracts and obligations consisting of first mortgage, taxes and insurance ~~of whatsoever and the nature of~~ MILMAR ESTATES, INC. and covenants and agrees to indemnify and hold the Seller and the stockholders of the said Corporation, its officers and directors harmless from and against ~~all~~ said claims, ~~demands, liabilities now existing and arising or that may hereafter arise, in connection with any such debts, liabilities, contracts and obligations whatsoever.~~

8. ~~[illegible]~~ The Buyer agrees not to encumber the property of the Corporation with any mortgages, including chattel mortgages, conditional Bills of Sale, liens or encumbrances of any kind or nature, without the written consent of the Seller first obtained, except as provided in a chattel mortgage

9. It is understood that no representations

now existing and arising or that may hereafter arise, in connection with any such [illegible], liabilities, contracts and obligations whatsoever.

9. [illegible] The Buyer agrees not to encumber the property of the Corporation with any mortgages, including chattel mortgages, conditional Bills of Sale, liens or encumbrances of any kind or nature, without the written consent of the Seller first obtained, except as provided in a chattel mortgage

10. It is understood that no representations have been made by the Seller to the Buyer, as to the value of or the condition of the property of the Corporation, nor as to any other item or thing, except as set forth in this agreement.

10. The Buyer shall have the right to assign this agreement to a New Jersey corporation, without the consent of the Seller, provided, however, that William Miller and Al Bierman shall be the principal stockholders of the

said corporation. In the event such new corporation is formed, MILMAR ESTATES, INC. shall not be dissolved but shall be continued in existence. The parties further agree that at least 51% of the shares of stock in the new corporation shall immediately be placed in escrow with ABE LIEBERMAN, ESQ., pending the fulfillment of each and every term of this agreement.

11. All of the terms and conditions contained in this agreement shall survive the transfer of title to the stock called for in this agreement.

12. In the event of condemnation of the property owned by MILMAR STATES, INC. all moneys due on ~~received by the Purchaser, or his executors, heirs and assigns~~ the second mortgage, will be paid over promptly to the Seller and the Seller agrees to apply all such amounts received on account of this contract. In the event this contract is assigned, it is a condition of this agreement that the new corporation shall be bound by the terms of this clause. (AL, RS)

IN WITNESS WHEREOF, the parties have hereunto set their corporate seals the day and year first above written.

MILMAR ESTATES, INC.

By: [signature] Pres.

[signature]

By: [signature]

Attest:

[signature]
Secretary

2. Final Judgment of District Court (October 19, 1956) (R. 2022a-2025a).

This cause coming before the court at a hearing on motion for entry of final judgment, to dismiss part of cross claim of Milmar Estate, Inc., against Samuel Marcus, and application for counsel fees; and the court having heard the evidence, and having considered the motions of the parties, and the legal arguments, and having read and considered the briefs of the parties, and the court having stated the issues, the findings of fact and conclusions of law in its opinion filed March 12, 1956, which findings and conclusions are incorporated her in;

IT IS on this 19th day of October, 1956, ORDERED, ADJUDGED, DECREED, FOUND, AND DECLARED THAT:

1. The court has jurisdiction over all the parties and claims; the plaintiff's complaint was filed in good faith and for good cause and the plaintiffs, Al Bierman and William Miller, are discharged from any and all liability to Milmar Estate, Inc., and Samuel Marcus in the making of any payments on account of the purchase price or on account of any balance arising out of or with respect to a transaction which culminated in the contract entered into on the 14th day of September, 1948, among the parties to this action relating to the sale of stock of Milmar Estate, Inc.

2. Judgment is entered in favor of Al Bierman, William Miller, Milmar Estate, Inc., and Al Kevelson against Samuel Marcus on each and every claim asserted by the respective parties against Samuel Marcus, except as otherwise provided in paragraphs, 10, 11, and 13 herein.

3. Each and every claim of Samuel Marcus asserted by way of or in any answer, cross claim, counterclaim, or third party claim, is in all things denied, and as to each of such claims of Samuel Marcus judgment is entered in favor of Al Bierman, William Miller, Milmar Estate, Inc., and Al

Kevelson, except as otherwise provided in paragraphs 10, 11, and 12 herein.

4. All stock or stock certificates in or of Milmar Estate, Inc., in the possession, custody, or control of Samuel Marcus, and all stock of Milmar Estate, Inc., bearing date prior to September 14, 1948, be and hereby are declared cancelled, null, and void; Samuel Marcus has no right, title, or interest in or to any stock or stock certificates of Milmar Estate, Inc., all stock certificates of Milmar Estate, Inc., in the possession, custody, or control of Samuel Marcus shall be forthwith delivered to Milmar Estate, Inc., to be physically cancelled.

5. The transaction entered into among the parties on September 14, 1948, was a purchase of all of the stock of Milmar Estate, Inc., consisting of 1250 shares by the plaintiffs, Al Bierman and William Miller. Milmar Estate, Inc., is not in any manner or on any claim or for any reason indebted to Samuel Marcus for any alleged loans or advances.

6. The balance of the proceeds of the condemnation award made in favor of Milmar Estate, Inc., by the commissioners in condemnation in the matter of the petition of the State Highway Commissioners of the lands of Milmar Estate, Inc., which money was ordered deposited in the Peoples Trust Company of Bergen County in the account designated "Walter G. Winne, Master United States District Court," which balance now totals $569,674.70 was and always has been the sole property of the defendant, Milmar Estate, Inc., and that balance now on deposit shall be delivered and paid within ten (10) days after this date to Milmar Estate, Inc., through Maurice C. Brigadier, its attorney, and the said account of Walter G. Winne, Master United States District Court, be closed. Walter G. Winne, Master, shall receive a fee of $3,500.00 for his services as the Master of this court, to be paid him herewith from the monies in his hands.

7. The agreement of September 14, 1948, is a valid agreement.

8. Samuel Marcus is not an officer nor a director of Milmar Estate, Inc.

9. The note bearing date of June 1, 1947, in the amount of $50,000.00 executed by William Miller to Samuel Marcus is cancelled.

10. Al Bierman, William Miller, and Milmar Estate, Inc., are each and all released from all liability to Samuel Marcus, except as to the liability of William Miller on the balance of a $15,000.00 note executed to Samuel Marcus as provided in paragraph 11.

11. Judgment is entered in favor of Samuel Marcus and against William Miller in the sum of $5,800.00 and interest at 4% running to the date of payment on the unpaid balance of $15,000.00.

12. Samuel Marcus is not entitled to the return of any stock, papers, agreements, or documents deposited with Abraham Lieberman, Esq., as escrowee; each and all of which shall be forthwith delivered to Al Bierman and William Miller.

13. It is ORDERED that there be awarded $500.00 as counsel fees to Chazin & Chazin, attorneys for plaintiffs, which amount the Clerk of the Court is directed to pay forthwith to them out of the interpleaded fund deposited in this court. On his claim to the interpleaded fund, judgment is entered in favor of Samuel Marcus in the amount of $35,600.00 which is the total interpleaded fund less the award of counsel fees to Chazin & Chazin, and the Clerk of the Court is ordered to pay forthwith that amount to Samuel Marcus out of the interpleaded fund deposited in this court. All other applications for counsel fees are disallowed.

14. It is Ordered that costs be awarded against Samuel Marcus in favor of the plaintiffs, Al Bierman and William Miller, the defendant, Milmar Estate, Inc., and the added third-party defendant, Al Kevelson, in the sum of $659.52, which are their expenses paid to the Court reporter to obtain for this court a transcript of the trial of this action. The court hereby finds good cause for the granting of the aforementioned costs against Samuel Marcus all in compliance with the applicable rules, statutes, and practice of the court. The Clerk of this Court is directed to enter the within judgment and to tax all costs as are provided by law.

15. Further proceedings, decision, and judgment are reserved on the claims asserted against Samuel Marcus on the 4th, 5th, 6th and 7th counts of the cross claim of defendant, Milmar Estate, Inc., which counts allege causes of action against Samuel Marcus for the filing of a lis pendens as a malicious use of process and malicious abuse of process, slander of title and a malicious interference with a prospective economic advantage. The court expressly determines that there is no just reason for a delay in the entry of a final judgment as to all matters except said 4th, 5th, 6th, and 7th counts of the cross claim of defendant, Milmar Estate, Inc.

s/ Alfred E. Modarelli.
Alfred E. Modarelli,
United States District Judge.

3. Opinion of Court of Appeals (July 3, 1957) (246 F. 2d 200) (R. Pr. Ct. App.).

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,073

AL BIERMAN AND WILLIAM MILLER

v.

SAMUEL MARCUS AND MILMAR ESTATE, INC.,
A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF NEW JERSEY

SAMUEL MARCUS,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued May 7, 1957

Before McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed July 3, 1957.)

HASTIE, *Circuit Judge.*

As instituted in the district court this proceeding appeared to be an unexceptional strict interpleader with Miller, a citizen of New Jersey, and Bierman, a citizen of

North Carolina, asking the court to decide whether Marcus, a citizen of New York, or Milmar, Inc., a New Jersey corporation, was entitled to certain money which plaintiffs admittedly owed to someone. The plaintiffs pictured their dilemma as arising out of a contract under which they purchased stock of Milmar, Inc. and agreed to pay for it in installments. The complaint asserts that Marcus is claiming and that Milmar, Inc., "may claim" the unpaid installments of purchase money. The plaintiffs cast themselves in the role of disinterested stakeholders. Accordingly, beginning when the complaint was filed and continuing periodically thereafter for about two years, the plaintiffs deposited with the court the entire balance of the purchase money, in all about $35,000.

It was not until October 1954, four years after the complaint was filed and two years after the last installment of purchase money had been paid into court, that any pleading was filed by either defendant. At that time answers were filed by the defendants together with cross claims raising a variety of other contentions among the parties. It is noteworthy that the answer of Milmar, Inc., admitted that the money was owed to Marcus while Marcus claimed, among other things, not that he should receive the impleaded fund, but rather that he had been defrauded in the original transaction. This four year delay and the failure of either defendant, even then, to claim the fund as paid into court strongly indicate that something very different from what had been alleged in the interpleader complaint was actually in controversy. Indeed, the pleadings subsequent to the complaint and the evidence introduced by the parties disclosed that the matters in controversy were the amount of stock Marcus had agreed to sell to Miller and Bierman and whether, for reasons we need not consider, Marcus was entitled to have the transaction set aside as fraudulent. In addition, the hearing disclosed a number of very involved disputes among the

parties with the reference to a night club venture which had been incorporated as Milmar, Inc., but no dispute between the original defendants over the interpleaded fund.

At the conclusion of the case the court found against Marcus on almost all of his contentions and ordered that he be paid the impleaded fund and one other item which is of no significance for present purposes. Aggrieved at getting the fund, which the original complaint said he was claiming, rather than the different and antithetical relief he actually sought, Marcus has appealed, raising at the outset the question whether this is such a suit as should have been entertained under the Interpleader Act of 1936, as amended. 28 U. S. C. § 1335.

The Interpleader Act authorizes interpleader by an obligor where "two or more adverse claimants, of diverse citizenship . . . are claiming or may claim . . ." the impleaded fund or obligation. The district court viewed Marcus of New York and Milmar, Inc., of New Jersey to be actual or potential adverse claimants within the meaning of the statute. However, appellant Marcus urges that the plaintiff "did not in good faith fear claims of both defendants" and for that reason had no standing to invoke the equitable jurisdiction of interpleader.

It is well established that without real fear of the vexation and hazard of conflicting claims, an obligor cannot maintain interpleader. This remedy was developed by equity so that a stakeholder could avoid being subjected to such hazard and vexation. Thus, in the very nature of the problem it seeks to solve, the federal Interpleader Act requires "adverse claimants" who are claiming or may claim the same fund. Of course, only one claim will ultimately be sustained. Thus, jurisdiction in interpleader is not dependent upon the merits of the claims of the parties interpleaded, and a plaintiff can maintain the action even though he believes that one of the claims is valid and the other,

or others, without merit. See *John Hancock Mut. Life Ins. Co.* v. *Kraft*, 2d Cir. 1953, 200 F. 2d 952; *Hunter* v. *Federal Life Ins. Co.*, 8th Cir. 1940, 111 F. 2d 551; *Metropolitan Life Ins. Co.* v. *Segaritis*, E. D. Pa. 1937, 20 F. Supp. 739.

On the other hand, that which is advanced as an adverse claim "may be so wanting in substance that interpleader under the statute may not be justified". *New York Life Ins. Co.* v. *Lee*, 9th Cir. 1956, 232 F. 2d 811, 813. See also *John Hancock Mut. Life Ins. Co.* v. *Beardslee*, S. D. N. Y. 1920, 263 Fed. 909, 915. While the stakeholder is not obliged at his peril to determine which claimant has the better claim, he must have some real and reasonable fear of exposure to double liability or the vexation of conflicting claims to justify interpleader. See *John Hancock Mut. Life Ins. Co.* v. *Kraft*, 2d Cir. 1953, 220 F. 2d 952, 953-954. His bona fide purpose must be to rid himself of this vexation and the expense of resisting conflicting claims. See *Lockridge* v. *Brockman*, N. D. Ind. 1956, 137 F. Supp. 383. As Professor Chafee has put it, there must be in every interpleader a real fight over the res. Chafee, *Broadening the Second Stage of Federal Interpleader*, 56 Harv. L. Rev. 929, 985 (1943). Several of the cases that plaintiffs have cited to us in their brief to show that claims need not be of prima facie validity point out this requirement of good faith. *Hunter* v. *Federal Life Ins. Co.*, 8th Cir. 1940, 111 F. 2d 551, 556; *First National Bank* v. *Fleming*, D. N. J. 1950, 10 F. R. D. 159, 160; *Massachusetts Mut. Life Ins. Co.* v. *Weinress*, N. D. Ill. 1942, 47 F. Supp. 627, 631. It follows that, where the plaintiff knows that he can safely pay one party without substantial risk of vexatious demand by a rival claimant interpleader will not lie.

In this case it is clear that the plaintiffs did not believe or assert in good faith that there was any danger of Milmar, Inc., claiming the unpaid purchase money. We say this because of a fact not heretofore mentioned in this opinion.

At the time Miller and Bierman filed their complaint expressing fear that Milmar, Inc. might claim the purchase price of the shares, they were the sole stockholders of Milmar, Inc., and in complete control of that corporation. Moreover, they knew as principals in the sale transaction that a procedure of canceling outstanding Milmar stock owned by Marcus and others and having Milmar, Inc. issue new stock to Miller and Bierman had been no more than the agreed mechanics of the transfer of stock from Marcus to them, which gave rise to the purchase money obligation they have sought to implead. Thus, when they impleaded Milmar, Inc. they knew that corporation had no claim on them for the purchase price and could not even assert a fictitious claim without their consent.

Unable to dispute these facts, appellees have sought to avoid them by an argument that is ingenious but not persuasive. In their brief they say: "The dangers envisaged arose from the possibility that [control of Milmar, Inc.] • • • might change hands through action of creditors, receivership • • •, and that the persons who might obtain future control in such manner might demand of Miller and Bierman that they make payment to *Milmar* of the purchase moneys under the September 1948 contract in accordance with its literal terms, i. e., Milmar having been named therein as the 'seller'."

We are unable to see how the plaintiffs could possibly have been apprehensive on this score. Of course they well knew that any such claim would be completely baseless. And being in control of Milmar, Inc. when this alleged danger occurred to them they could at anytime have Milmar, Inc. execute a formal document disavowing any interest in the payments and stating that Marcus was the sole party in interest on the selling side. Such a document would put any receiver on notice as to the true situation in regard to the stock transaction. Any investigation he might make would confirm this information, since one of the few points

of agreement by all who participated in this transaction was that Marcus was the seller, not Milmar, Inc. It is not to be presumed that a receiver, thus informed, would proceed in bad faith to harass Miller and Bierman demanding payment to Milmar, Inc. Moreover, as this court has recently pointed out, receivers "are officers of a responsible court which can be relied upon to see that * * * obviously proper action is taken," so that fear of groundless and improper conduct by receivers cannot amount to an "adverse claim" within the conception of the Interpleader Act. *B. J. Van Ingen and Co.* v. *Connolly*, 1955, 225 F. 2d 740, 742.

Actually, what has been done in this suit has been to misuse interpleader, based on mere pretense of adverse claims to a fund, to obtain adjudication of controversies other than entitlement to that fund. While "the normal duty of a district court [is] to permit interpleader liberally to relieve parties of the hazards and vexations of conflicting claims against them," *B. J. Van Ingen & Co.* v. *Connolly, supra,* at 744, the asserted hazards and vexations here were as unreal as the asserted depredations of the casual ejector in the classic common law action to try land titles.

The interpleader action should have been dismissed once its true character was disclosed, as presenting no bona fide issue of the type essential to this form of equitable relief, and therefore, constituting an imposition upon the jurisdiction of the court.

Accordingly, the judgment will be vacated and the cause remanded with instructions to dismiss the complaint as not being predicated upon any bona fide fear of vexatious conflicting claims.

A true Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

4. Judgment of Court of Appeals (July 3, 1957) (R. Pr. Ct. App.).

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,073

AL BIERMAN and WILLIAM MILLER

vs.

SAMUEL MARCUS and MILMAR ESTATE, INC., a corporation organized under the laws of New Jersey
SAMUEL MARCUS,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: McLAUGHLIN, KALODNER and HASTIE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby vacated, with costs, and the cause remanded with instructions to dismiss the complaint.

Attest:

IDA O. CRESKOFF,
Clerk.

July 3, 1957.

Appendix B—Mandate of Court of Appeals.

5. Mandate of Court of Appeals (July 31, 1957) (R. Pr. Ct. App.).

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the District of New Jersey

—GREETING

WHEREAS, lately in the United States District Court for the District of New Jersey, before you or some of you, in a cause between Al Bierman and William Miller, Plaintiffs and Samuel Marcus and Milmar Estate, Inc., a corporation organized under the laws of the State of New Jersey, Defendants (District Court No. 1026-50 Civil Action) a judgment was entered on October 19, 1956 in favor of Plaintiffs and against Defendants,

as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by Samuel Marcus agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

AND WHEREAS, the said cause came onto be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby vacated, with costs, and the cause remanded with instructions to dismiss the complaint.

July 3, 1957.

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 31st day of July in the year of our Lord one thousand nine hundred and fifty-seven.

IDA O. CRESKOFF,
Clerk, United States Court of
Appeals for the Third Circuit.

COSTS (to be recovered by Samuel Marcus, Appellant)

Clerk's Fee	$ 25.00
Printing Briefs and Appendices	8,062.25
Total	$8,087.25

Appendix B—Colloquy and Rulings, District Court Proceedings on Execution of Mandate.

6. Colloquy and Rulings, District Court proceedings on execution of Mandate (October 28, 1957) (R. Mot. Ct. App., Appendix, pp. A-7 to A-19).

IN THE

United States District Court

FOR THE DISTRICT OF NEW JERSEY.

AL BIERMAN, *et al.*,

vs.

SAMUEL MARCUS, *et al.*

Newark, N. J., October 28, 1957.

Civil 1026-50.

Motion.

Before:

HON. WILLIAM F. SMITH, *U. S. D. J.*

Mr. Shapira: Your Honor, I am appearing on behalf of Sam Marcus, who obtained a reversal of judgment entered by Judge Modarelli, and as I see the proceeding before your Honor it is as simple as merely filing——

The Court: You say he obtained it, that I have my doubts about. The circuit decided on the question which they raised themselves, jurisdiction, and they decided the court had no jurisdiction because it was not in truth and in fact an interpleader action. That put the thing right out of court lock, stock and barrel.

Mr. Shapira: That is all I am asking this court to do by submitting an order, putting it out of this court lock, stock and barrel.

There seems to be just one question, and that is the money which is now in the hands of a master under the order of this court.

Appendix B—Colloquy and Rulings, District Court Proceedings on Execution of Mandate.

If your Honor pleases, I think my order, which I have submitted to your Honor, indicates that the money had originally been taken from the registry of the Superior Court of New Jersey in order to put all parties back in status quo. It seems to me that the only logical thing to do would be to send it back.

The Court: Was this case removed from the Superior Court originally to this court?

Mr. Shapira: No, sir; the money was a result of a condemnation award, and that award was given during the pendency of this suit in the federal court and the commissioner, instead of paying over monies to the owner, or the record owner of the property, followed the statutory requirements and paid it into the Superior Court of New Jersey. Then this court, the federal court, ordered that the fund which was in the Superior Court be returned, or turned over to Mr. Winne as a master of this court. I say that in all justice and fairness it would seem to me that that money should now be turned to the Superior Court, or disposed of in such a manner as a court of competent jurisdiction would decree because, if your Honor pleases, the merits of the case have not been decided by the appeals court and there is no question that we will seek a decision on our claim.

The Court: Well, of course you see the state law, as does the federal law, provides that in a condemnation proceeding the court shall pay to the persons entitled thereto. In fact, I think that is even the language that is used; I had forgotten, it is so long.

Mr. Shapira: I have the statute here.

The Court: But I think contemplates that the money held in a condemnation proceeding, the value of the land taken having been fixed, shall remain in the court until the various persons prove their right to the fund.

Mr. Shapira: Anyone making a claim may petition.

Appendix B—Colloquy and Rulings, District Court Proceedings on Execution of Mandate.

The Court: There is no reason under the circumstances, in fact, I didn't handle this originally and if I had I would never have permitted it to be removed from the Superior Court because it should remain there. Now that we have no jurisdiction it should go back there.

Mr. Shapira: That is exactly my point, your Honor.

The Court: Until somebody decides who is entitled to it, because our circuit has said that we have no jurisdiction to decide it.

Mr. Shapira: Now, there is one other point that has been raised by Mr. Brigadier, who represents Milmar, and that is that he wishes to charge the fund with the tax costs. The tax costs that have been awarded to Mr. Marcus against not only Milmar but against other defendants, which would be tantamount to saying that we would pay ourselves if we eventually proved our case in the Superior Court, and I, if your Honor please, object to having Mr. Brigadier tell us where or against whom we should collect our costs.

Mr. Brigadier: If your Honor please, it is obvious that I am not going to stand up here this morning and say to Your Honor that you should not enter a judgment in accordance with the mandate.

The Court: I should not?

Mr. Brigadier: It is obvious that I would not suggest to your Honor anything like that even remotely.

The Court: That is the only judgment I can enter.

Mr. Brigadier: But I submit that the judgment you are being asked to enter is not in accordance with the mandate at all, or the opinion. Both the opinion and the mandate distinctly state that your Honor shall do the following:

"It is ordered and adjudged by the court that the judgment of the district court in this case be and the same is hereby vacated with costs, and the cause remanded with instructions to dismiss the complaint."

Appendix B—Colloquy and Rulings, District Court Proceedings on Execution of Mandate.

The proposed judgment that is being submitted to you today asks you to do a great deal more; it asks you not only to vacate the judgment and dismiss the complaint but also asks you to dismiss the cross claim of the defendant Milmar Estate, Inc., the cross claim of the defendant Samuel Marcus, the counter-claim of the defendant Samuel Marcus, the counter-claims of the plaintiffs Al Bierman and William Miller and the cross claim of the defendant Al Kevelson. All of which, incidentally, were adjudged and determined by the final judgment of Judge Modarelli, and which you are directed by the court of appeals to vacate.

But nowhere in the opinion or in the judgment are you told to dismiss these for a very good reason. The reason is that independent jurisdiction exists with respect to all of these claims, and that is why the court of appeals was very careful that it has employed.

When the appellate court intends that everything shall be dismissed, it says so.

The Court: All right. If that is the position you take, then there is only one thing to do: you may petition the court of appeals for a clarification of the opinion and the mandate, and you will do that at my direction because——

Mr. Brigadier: I cannot do that, sir, because I am troubled about one thing.

The Court: I am troubled about it because I know nothing about the litigation and I think when it says vacate it means vacate everything. Now, if there is any argument about it, then they ought to clarify the situation and the thing should remain in status quo until you have applied for such a clarification.

Mr. Brigadier: May I point out what I think my problem is, and you may be of even greater value.

We ran across authority in this very circuit in which the court of appeals made this very statement, "but in the opinion said it should be done before the term has expired," I think is the language the court used.

We were unable, unfortunately, to do anything, all of us in this case, because of the intervening death of Judge Modarelli. And this is actually the first time we are able to come before you and tell you what the problem is. We wondered whether under those circumstances, even though that language appears in this case, and we apparently are past that term in which this has happened, whether or not in view of the special circumstances, perhaps the court of appeals would consider it.

The Court: Well, don't you think under the circumstances since there is a disagreement as to what that means that you ought to go to the court that wrote it? Because I am a third party in it.

Mr. Brigadier: I would very much like to go, sir; the only problem is whether or not we have to go that way or whether we must do it the other way.

The Court: If they won't take you then I will have to take you and work it out. But I would like to know what they meant. You say there is this difference. After all, you gentlemen went through this litigation, I wasn't through it; Judge Modarelli was through it and the circuit has been through it.

Now, if there is some dispute as to what this mandate really means because it is "open and vacate," I don't think anything remains here. I don't think you retain a cross claim when the claim itself fails.

Mr. Brigadier: We found ample authority to the contrary and we are ready to brief it. That is another problem that confronts me. You see we got this motion accompanied with a letter to appear, that he is submitting no

brief because he is doing nothing but asking the court to implement the mandate. Well, actually when I read this proposed decree for judgment, that he is going way beyond the terms of the mandate, it seems to me that this is something that should have been supported by a brief. We found a great deal of authority, sir, on this question.

The Court: I am a stranger and I have no briefs on this at all, which puts me in a very strange position because I have no knowledge of what took place at all, and I understand that this took some weeks before Judge Modarelli.

Mr. Brigadier: Nineteen days of actual trial.

The Court: In fact, his secretary brought over to me the record and it stands that high (indicating).

Now, with all the competent counsel in here and that have been with this for all these weeks, it occurs to me that you ought to work out a proper judgment, yourselves, or if there is some dispute as to what the circuit contemplated when it says "open and vacate," now you said it didn't contemplate the cross claims.

Mr. Brigadier: Or the counter-claim.

The Court: Or the counter-claim.

Mr. Brigadier: And it distinctly says "vacate the judgment and dismiss the complaint."

The Court: All right.

Mr. Brigadier: When we checked the reported cases we found——

The Court: All right, if they have reserved any portion of this litigation in a jurisdictional status in this court, then somebody ought to say it and you ought to go back there.

Mr. Brigadier: All right, I will be very glad to do so.

The Court: All right. Now, what I will do, I will adjourn your motion without day, the present three applications without day and give you an opportunity to go there. And I think that is where you all ought to go.

Of course, if they don't hear you, why then you will have to come back and we will have to work it out the best way we can.

Mr. Shapira: If I may be heard on that.

The Court: Yes.

Mr. Shapira: It seems to me that if Mr. Brigadier objects to that one clause I would be willing to eliminate it from the order.

The Court: He makes another point, though, he makes another point important to the court: that there remains for determination in this court——

Mr. Shapira: Yes, I understand that, sir. Except this: that we shall go as far as we know we ought to in any event. In other words, the judgment should be vacated because we want to proceed in the state court. This delay which will be occasioned by reason of your Honor's suggestion may work to our hardship. It seems to me that an order should be entered now in accordance with the mandate, vacating this judgment.

As far as anything else is concerned, if we just stick to the four corners of the judgment and the mandate, I will be very happy because we can proceed in the state court, where we can't do it now because under the order of this court we have been enjoined from instituting any action. And this is the thing that I want to avoid, is further delay.

Now, if Mr. Brigadier is unhappy or dissatisfied with the way the opinion is written and he can't understand it, then he certainly should take proceedings, but it should not prevent us from proceeding elsewhere.

The Court: Well, then, you are going to be in a very anomalous position because you will have the counterclaims and cross-claims in this court and the original litigation in another court, won't you?

Mr. Shapira: Is it your Honor's opinion that there is any question about the fact that the court refused to litigate these various claims and cross-claims and ordered the vacation of those cross-claims and counter-claims because they didn't decide a single thing other than the fact that the suit should be dismissed?

The Court: No, Counselor, I entertain no thought about it one way or the other.

Mr. Shapira: Yes. As a matter of fact, in the opinion—

The Court: Your adversary raises a question and I said if there is a question—I don't know whether or not there is——

Mr. Shapira: Well, the opinion says—may I interrupt your Honor?

The Court: Go ahead.

Mr. Shapira: The opinion distinctly says—I haven't been able to just hit it, but I will, with your Honor's indulgence.

Mr. Brigadier: The last paragraph.

Mr. Shapira: No, it is not the last paragraph. That there was no necessity for determining any of the other claims because the suit falls due to the bad faith in the filing of the interpleader. Which merely means that the court has stated that since the complaint is to be dismissed nothing else is before the court to decide. And this is the tenor of the opinion.

The Court: All right.

Mr. Shapira: Now, it doesn't seem fair to again litigate this before the court of appeals with the statement——

The Court: Yes, but, Counselor——

Mr. Shapira: Yes.

The Court: A question is raised and I say if there is a question it should be decided by the circuit, no by me. He raises a question, and if he wants it clarified I am perfectly

willing to give him an opportunity to do it. Now, how long are you going to be delayed?

Mr. Shapira: The fact of the matter is, if your Honor please, there is a mandate to this court to do something. It would seem to me that you should do that, and if he has any other remedy he should pursue it in another direction. But I don't think we should be delayed in the entry of the order in accordance with the mandate. It is as simple as that.

Mr. Brigadier: If your Honor please, so that Mr. Shapira will have no misapprehension about what I am doing, I am doing much more than he even imagines, apparently, I am saying that the court of appeals has merely directed that the judgment as it was rendered by Judge Modarelli be vacated; that the complaint be dismissed, and then under the language of the mandate, as it appears in all mandates, that such proceedings be had in such cause in conformity with the opinion and the judgment of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

The Court: Yes.

Mr. Brigadier: And my contention is this: That thereupon I am going to ask you, after you vacate this judgment and enter an order dismissing the complaint, that you then find as a matter of law that the cross-claims and counter-claims stand by reason of independent jurisdiction; that they have already been adjudicated and that therefore you enter a new judgment only on the portion of the cases as to which this court has jurisdiction, the counter-claims and the cross-claims, and that the only question you will be called upon to decide with respect to that judgment is whether the dismissal of the interpleader in any way affects or changes the adjudication as it was made by Judge Modarelli on those counter-claims.

The Court: All right. Now, you may have another situation, now you present even another question of law. Maybe a petition for rehearing is the appropriate thing before the circuit because the circuit hasn't ruled on these other claims, apparently.

Mr. Brigadier: Has not.

The Court: It has neither reversed nor sustained them.

Mr. Brigadier: Let me show you what they did. They raised seven points on the appeal with subdivisions of many of the seven points. The court of appeals didn't get beyond point 1-A, didn't even reach point B on the question of jurisdiction. So that is my contention.

Now, I think there are two ways to handle it. I would rather handle it the way your Honor suggested, that is first go back to the court of appeals.

The Court: I will be guessing at it, I will be guessing at it.

Mr. Brigadier: That is right. That is why I think that is better to do.

The Court: They will be deciding. I don't want to guess it because here is the situation, gentlemen: You have already gone through sixteen weeks or so of litigation, this suit is already complicated. Now, if we are going to start complicating it further, just as soon as Mr. Shapira starts his new suit if the funds are sent back to the Superior Court, we are going to be down here with the counter-claims. I don't know what you are going to do with them here—or the cross-claims—because, as you say, you argue that way, that they remain undisturbed by the opinion of the circuit.

I want to know from the circuit whether or not they meant to disturb the adjudication on the counter-claims and cross-claims because I don't know. As I said, it comes to me because Judge Modarelli is dead.

Now, I don't see what great delay you have or how anybody is going to be prejudiced because the fund is apparently still intact somewhere, and I don't know why somebody didn't think of this sooner.

Mr. Brigadier: Sir, we did think of it but we had other problems, procedural problems we didn't know what to do with. As soon as we read the opinion, before the mandate came down, we saw this point.

The Court: I read the opinion but I couldn't appreciate until you brought it to my attention, the problem about the cross-claims and the counter-claims, and there is a problem, I agree with you. If possible I am going to give the circuit the opportunity to say more completely what they meant. Maybe they would care to amend the mandate consistent with Mr. Shapira's contention. Maybe they would want to amend it consistent with the position you take, I don't know.

Mr. Shapira: I just want to add this, sir: if they would do that, do what he wants them to do, we would have been able to do what we wanted to do in the first place, we would have been able to petition the United States Supreme Court for certiorari; we didn't because we couldn't tell from the mandate that they had done this, you see, and we know that the Supreme Court in granting certiorari is not going out of its way.

The Court: You wanted to hold on to your adjudication on the counter-claim and cross-claims as a valid judgment of the court.

Mr. Brigadier: That is exactly what our intention is.

The Court: All right. That is the reason why you ought to go there and find out, and not from me because I don't know. I have read the opinion and until you bring this to my attention this morning, I don't know what the situation is.

* * * * * *

Appendix B—Colloquy and Rulings, District Court Proceedings on Execution of Mandate.

Mr. Shapira: Your Honor, this is not at your direction.

The Court: No, all I am doing is adjourning it to afford him an opportunity to take such action as he deems advisable. Now, as soon as the circuit acts on it one way or the other if you will inform me we will fix it for immediate hearing.

Mr. Shapira: I certainly want it to appear that your Honor directed either one of us to take the appeal to the circuit.

The Court: I am not directing it, I am just saying that Mr. Brigadier raises a question and I am suggesting to you that maybe the circuit should clarify it because if it does leave the status of the claims and the counter-claims undisposed of, then I don't know what action this court is to take with reference to them.

Now, otherwise, in view of Mr. Brigadier's argument, he wants to hold on to the judgment and in addition to the mandate I suppose he submits an order for judgment which will preserve the status of those claims and counter-claims which will affect your litigation in the state court immediately.

Mr. Shapira: If your Honor pleases, all of that has been argued before the circuit court, they heard all of the issues involved and this happened to be——

The Court: That is the reason.

Mr. Shapira: —happened to be an order dismissing everything. It seems to me they disposed of every part of the case.

The Court: It seems to me they may have, Counselor.

Mr. Brigadier: That is what we are going to find out.

The Court: And that is what you are going to find out. Now, I have read the opinion and I must say I did not know anything about these counter-claims or cross-claims. I don't know. Frankly I don't know.

Now, they do say that the thing is to be dismissed. My view of it would be that the whole litigation is dismissed. Mr. Brigadier's view is otherwise, and I will let him go there, I will give him a chance to do it.

Mr. Shapira: You are giving him an opportunity without direction.

The Court: An opportunity to do it.

Mr. Shapira: In other words, I don't want him to appear before the circuit and say that, "the court below directed me to do this."

The Court: No, I am adjourning it to give him an opportunity to do what he wants me to do here. Now, I don't know.

Mr. Shapira: Very good.

The Court: That is all, and I suggest if any action is to be taken it be taken forthwith so there won't be any undue delay.

Mr. Brigadier: If your Honor please, I have enough confidence in my argument here not to have to lean on you, so let him not be worried that I am going down there to say you sent me; I am going there for the reasons I stated to you this morning.

The Court: Well, you said you had the idea earlier but because of——

Mr. Brigadier: Unfortunately this situation arose and we didn't know what to do about it.

The Court: You didn't know what to do about it. Well, all right, go ahead.

7. Order of Court of Appeals (December 26, 1957) (R. Pr. Ct. App.).

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,073.

AL BIERMAN AND WILLIAM MILLER

v.

SAMUEL MARCUS AND MILMAR ESTATE, INC., A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF NEW JERSEY

SAMUEL MARCUS,

Appellant.

Present: McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

ORDER DENYING MOTION FOR RECALLING AND AMENDING OF MANDATE.

Upon consideration of the motion of appellees herein for an order amending and recalling this court's mandate of July 31, 1957; and

It still appearing to the satisfaction of this court that an interpleader complaint, the essential averments of which constituted an imposition upon the jurisdiction of the District Court, was the basis upon which that court took cognizance of and adjudicated the several matters covered by its final judgment from which appeal was taken to this court; it is hereby

Appendix B—Order of Court of Appeals.

ORDERED that the said motion be and it is hereby denied.

By the Court:

(Sgd.) WILLIAM H. HASTIE,
Circuit Judge.

Dated: December 26, 1957.

RECEIVED & FILED,
Dec. 26, 1957.

IDA O. CRESKOFF,
Clerk.

SUPREME COURT. U. S.

Office - Supreme Court, U.S.
FILED
APR 2 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM—1957

No. 839

MILMAR ESTATE, INC., WILLIAM MILLER, AL BIERMAN and AL KEVELSON,

Petitioners,

vs.

SAMUEL MARCUS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of Questions Involved

1. Should a writ of certiorari be granted to review the denial by the Court of Appeals of the petitioner's motion to amend the mandate when the mandate is clear and certain?

2. Should the Court in the exercise of its sound judicial discretion issue a writ of certiorari to review the judgment of the Court of Appeals when the petitioners failed to file their application for such writ within the time allowed by law?

3. Even if the application for the writ of certiorari was timely filed are there presented under the rules and applicable law special and important reasons for this Court to exercise its sound judicial discretion to grant the writ?

Counter-Statement of the Case

This action was commenced in the District Court for the District of New Jersey. After trial the court filed an opinion (140 F. Supp. 66; Petition for Certiorari pp. 25-53) and entered final judgment on October 19, 1956 (R2022a to R2025a; Petition for Certiorari pp. 54-57). Samuel Marcus the respondent here appealed from that judgment to the United States Court of Appeals for the Third Circuit. After hearing argument on all issues on May 7, 1957 the Court, on July 3, 1957, filed an opinion (246 F. 2d 200; Petition for Certiorari pp. 58-63) which read in part as follows:

> "Actually, what has been done in this suit has been to misuse interpleader, based on mere pretense of adverse claims to a fund, to obtain adjudication of controversies other than entitlement to that fund. While the normal duty of a district court [is] to permit interpleader liberally to relieve parties of the hazards and vexations of conflicting claims against them, *B. J. Van Ingen & Co.* v. *Connolly, Supra*, at 744, the asserted hazards and vexations here were as unreal as the asserted depredations of the casual ejector in the classic common law action to try land titles.
>
> "The interpleader action should have been dismissed once its true character was disclosed, as presenting no bona fide issue of the type essential to this form of equitable relief, and therefore, constituting an imposition upon the jurisdiction of the court.
>
> "Accordingly, the judgment will be vacated and the cause remanded with instructions to dismiss the complaint as not being predicated upon any bona fide fear of vexatious conflicting claims."

That court's judgment, which was filed the same day, ordered that the judgment of the District Court be and the same was thereby vacated, and remanded the cause with instructions to dismiss the complaint (Petition for Certiorari p. 64). The court's mandate issued on July 31, 1957. This read, in part:

> "ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby vacated, with costs, and the cause remanded with instructions to dismiss the complaint." (Petition for Certiorari, p. 65).

Thereafter, nothing was done by the petitioners to seek further review. They did not seek a rehearing in the Court of Appeals. They did not file an appeal to this court. They did not petition this court for a writ of certiorari. They did not move to extend the time within which such a writ could be applied for. Nothing was done by the petitioners until the matter came before the District Court on October 28, 1957 for proceedings on the mandate. This appearance before the District Court was pursuant to a motion of the respondent Marcus, seeking the entry of "a final decree upon the law as laid down in the opinion of the United States Court of Appeals for the Third Circuit and in conformity with the * * *" mandate of that court (R. Mot. Ct. App. Appendix p. A-2.)

At the hearing of said motion the Court observed:

> "* * * they decided the court had no jurisdiction because it was not in truth and in fact an interpleader action. That put the thing right out of court lock, stock and barrel." (Petition for Certiorari, p. 67).
>
> "Now they do say that the thing is to be dismissed. My view of it would be that the whole litigation is dismissed." (Petition for Certiorari, p. 79).

For the first time the petitioners urged that the mandate issued by the Court of Appeals on July 31, 1957 was ambiguous. Although the District Court considered the mandate clear, nevertheless it permitted the petitioners an opportunity to urge their contention before the Court of Appeals.

Petitioners did not take advantage of this opportunity until December 2, 1957 when they filed a Notice of Motion in the Court of Appeals seeking an amendment of the mandate (R. Pr. Ct. App.; R. Mot. Ct. App.). The court disposed of the motion on briefs, without oral argument, by entering an order on December 26, 1957 denying the motion. (Petition for Certiorari, pp. 80-81). This order contained the following introductory paragraphs:

> "Upon consideration of the motion of appellees herein for an order amending and recalling this court's mandate of July 31, 1957; and
>
> "It still appearing to the satisfaction of this court that an interpleader complaint, the essential averments of which constituted an imposition upon the jurisdiction of the District Court, was the basis upon which that court took cognizance of and adjudicated the several matters covered by its final judgment from which appeal was taken to this court."

The present petition was not filed until March 5, 1958.

ARGUMENT IN OPPOSITION TO THE PETITION

POINT I

The petition should be dismissed as being an untimely attempt to seek review of the judgment of July 3, 1957, which vacated the judgment of the District Court and dismissed the interpleader complaint.

The entire petition of the petitioners deals with a single point: The Court of Appeals was in error when it "dismissed" the post-interpleader claims. If such a decision was reached by the Court of Appeals, and respondent states that it was, it was reached on July 3, 1957, and incorporated in the mandate issued on July 31, 1957. The applicable statute of the United States reads as follows:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A Justice of the Supreme Court for good cause shown, may extend the time for applying for a Writ of Certiorari, for a period not exceeding sixty days". (28 U.S.C. Sec. 2101(c)).

The writ must be denied if applied for too late. *Sabin* v. *Levorsen*, 320 U. S. 792 (1943); *Cullotta* v. *Ragen*, 321 U. S. 794 (1944). The statute is to be construed strictly and under its terms petitioners' time for taking the present action expired October 3, 1957. In an attempt to circumvent this statutory provision the petitioners state that they are seeking review of the denial of their motion for amendment of the mandate. They do so by averring that the order of the Court of Appeals of December 26, 1957 denying their motion seeking an amendment of the mandate is in effect an amendment of the mandate, and that as a con-

sequence thereof the statutory time commences to run from the date of the aforesaid order and not from July 3, 1957, the date of judgment. This is an erroneous contention.

The Order of December 26, 1957 was practically a word-for-word repetition of the key paragraph in the opinion of the Court of Appeals filed in this matter. It did no more than reiterate what had been said before and it did not amend anything.

Chief Justice Vinson, speaking for this court in *F.T.C.* v. *Minneapolis-Honeywell Co.*, 344 U. S. 206 (1952), said:

> "* * * The time within which a losing party must seek review cannot be enlarged just because the lower court in its discretion thinks it should be enlarged. Thus, the mere fact that a judgment previously entered has been re-entered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court in its second order has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." (344 U. S. at 211-212).

Applying the standards above to the case *sub judice* shows the petitioners' contention to be unsound, for the order of December 26, 1957 did not change any matter of substance, nor did it resolve any genuine ambiguity. In fact it did not change even an immaterial matter, nor did it disturb or revise any legal rights, but maintained the *status quo*. It must be concluded that the petitioners are out of time.

The petitioners on Pages 18 and 19 of the Petition assert that the case of *National Biscuit Company* v. *Kellogg Co.*, 96 F. 2d 873 (D. C. A. 3, 1938), *Cert. Granted* 304 U. S. 586, *rev'd.* 305 U. S. 111 (1938), is a case similar to the one at bar and that under that case this court may grant certiorari here. An examination of the various opinions filed in the *National Biscuit* matter and related papers reveals the following to be the true state of facts. On January 5, 1938 the District Court entered its final judgment using the exact words of the mandate of the Court of Appeals. Subsequently the National Biscuit Company petitioned the Court of Appeals for a clarification of the mandate. The Circuit Court said that although it was perfectly clear what the mandate meant, they would recall the mandate, since its language was poor. They did so and reworded the mandate, being careful to indicate that they were not amending the previous mandate. A petition for certiorari was filed and certiorari was granted. This Court in its opinion (305 U. S. 111) indicated the certiorari was granted because subsequent to the date of the first denial of certiorari (302 U. S. 654) the British Privy Council had decided a case between the same two litigants covering the same points of law and involving the same facts in a manner contrary to the existing decision of the Court of Appeals. There was presented an important problem of comity between the United States and Canada, and this court asserted its prerogative in an effort to harmonize the law of Canada and that of the United States. Certiorari was granted to settle this important problem and not to review the rewording of the mandate. The case at bar does not present a problem of special significance which would justify granting certiorari.

Petitioners cite *Briggs* v. *Pennsylvania R. Co.*, 334 U. S. 304 (1948) for the proposition that certiorari will be granted even though the petitioning party has failed to

move for timely amendment of the mandate. That this is not correct is shown by the following from Justice JACKSON's opinion therein:

> "The plaintiff has at no time moved to amend the mandate which is the basis of the judgment. * * * Plaintiff accepted its advantages and brings her case to this Court, *not on the proposition that amendment of the mandate has been improperly refused*, but on the ground that the mandate should be disregarded. Such a position cannot be sustained." (304 U. S. at pp. 306-307, emphasis added.)

The present matter is being brought to this Court on the proposition that amendment of the mandate was improperly refused and that question was never discussed by this Court in the cited case.

Ex Parte Morgan, 114 U. S. 174 (1885) also cited by the petitioners deals with mandamus. It contains nothing of importance to the question presented here.

POINT II

Even if the petition for certiorari was timely filed, there is not presented any special and important reason which calls for the granting of a writ of certiorari by this Court.

Rule 19 of the rules of this Court states that "A review on writ of certiorari is not a matter of right, but of sound, judicial discretion, and will be granted only when there are special and important reasons therefor * * *." The respondent asserts that there is no special and important reason which justifies certiorari under the rule. All of the points raised in the petition are in reality facets of one central theme: *i.e.* the assertion that the Court of Appeals erred when it ordered the entire judgment vacated and

when it refused to allow judgment to be entered in favor of the petitioners on various crossclaims and counterclaims filed in this action. The petitioners assert that this action of the Court of Appeals is a deviation from previous rulings of other courts of appeal, that this action violates the rule established by this Court in *Wetmore* v. *Rymer*, 169 U. S. 115; and finally that this action is so improper and constitutes such a deviation from the accepted and usual course of judicial proceedings that it calls for the intervention of this Court. The respondent avers that to accept these claims as valid would negate the true keystone of the opinion of the Court of Appeals. That court clearly indicated by its opinion that the petitioners had imposed upon the District Court, that their suit was a misuse of the interpleader statute based on pretense and sham. For that reason the Court of Appeals determined that it would not consider the other matters in issue raised by the various crossclaims and counterclaims and accordingly vacated the judgment of the District Court which had decided these issues.

None of the cases cited by the petitioners on this point contain the type of castigation of the motives of plaintiffs that the present matter does. In none of them does the court indicate that the complaint is being dismissed because the suit was instituted in bad faith, as here.

In *Haberman* v. *Equitable Life Assurance Society of U. S.*, 224 F. 2d 401, 409 (C. A. 5, 1955) the court stated by way of dicta that even if a complaint be dismissed (and in the case it was not so dismissed), a compulsory counterclaim can stand if it is supported by a proper ground of federal jurisdiction. There is no mention or hint that the case is one involving bad faith or an imposition on the court. In *Isenberg* v. *Biddle*, 125 F. 2d 741 (App., D. C., 1941) the plaintiff's complaint was dismissed for lack of jurisdiction and summary judgment was granted on a

counterclaim interposed by the defendant. On appeal the judgment on the counterclaim was allowed to stand. Again there was no hint that the victorious party had been guilty of bad faith or fraud. In fact, it appears that the plaintiff had attempted to defraud the federal government and the decision of the court allowed the innocent party recovery while dismissing the complaint of the wrongdoer. In *Lion Mfg. Corporation* v. *Chicago Flexible Shaft Co.*, 106 F. 2d 930 (C. A. 7, 1939), the plaintiff's complaint was dismissed because it failed to state a cause of action arising under the patent laws. The defendant's counterclaim was allowed to stand, since it did state a cause of action arising under the patent laws. Again we find no mention of fraud, bad faith, or imposition. In *Vidal* v. *South American Securities Co.*, 276 Fed. 855, 874-875 (C. C. A. 2, 1922) a similar situation exists, the complaint was dismissed on jurisdictional grounds, but the court held that the counterclaim would stand. Likewise in the other cases cited. Again it must be stated that in none of these cases were the facts similar to the matter at bar. No one in these cases was accused of sham and pretense and no one was accused of imposing on the federal courts. The cases are therefore clearly distinguishable and not authority in this matter.

The petitioners' reliance on *Wetmore* v. *Rymer*, *supra*, is not well founded. In the present matter the Court of Appeals clearly indicated it realized that the decisions on the counterclaims and crossclaims were in existence and they clearly indicated to the respondent and the District Court below that they had vacated the entire judgment of the District Court. The Court said in its opinion, in commenting on these claims:

> "* * * This four year delay and the failure of either defendant, even then, to claim the fund as paid into court strongly indicate that something very different from what had been alleged in the interpleader com-

> plaint was actually in controversy. Indeed the pleadings subsequent to the complaint and the evidence introduced by the parties disclosed that the matters in controversy were the amount of stock Marcus had agreed to sell to Miller and Bierman and whether, *for reasons we need not consider*, Marcus was entitled to have the transactions set aside as fraudulent * * *." (Opinion of HASTIE, *C. J.*, Petition for Certiorari, p. 59; emphasis added.)

The words "for reasons we need not consider" were placed in the opinion by the court below to indicate that these other claims had been reviewed and were found to be tainted by the basic bad faith of the petitioners, and therefore the judgments thereon were vacated with the dismissal of the complaint. This is the articulate conclusion to oust the post-interpleader claims which the petitioners assert has never been made. (See Petition for Certiorari, p. 13.)

The mandate of the Court of Appeals was clear, precise and unambiguous. The Court of Appeals thought so, as witnessed by its denial of petitioners' motion of December 2, 1957. The District Court thought so, as witnessed by the statements of that court set out previously in this brief.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be deemed as being untimely filed and for the further reason that no special or important reason exists for the exercise of this Court's sound judicial discretion.

Respectfully submitted,

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